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KANAWHA COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

KANAWHA COAL COMPANY,
CONTESTANT

Contest of Order

v.

Docket No. WEVA 82-58-R
Order No. 906148 10/19/81

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Madison No. 1-A Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

v.

Docket No. WEVA 82-177
A.C. No. 46-04945-03029V

Madison No. 1-A Mine

KANAWHA COAL COMPANY,
RESPONDENT

DECISION

Appearances: Harold S. Albertson, Jr., Esq., Hall, Albertson &
Jones, Charleston, West Virginia, appeared for
Kanawha Coal Company
Agnes M. Johnson-Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
appeared for the Secretary of Labor

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

An order of withdrawal was issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 on October 19, 1981. The order alleges a violation of 30 C.F.R. 75.200 in that the roof control plan was not being followed at the No. 1 Pillar, 003 section of the subject mine. The order was modified on October 28, 1981, to a 104(d)(1) citation after a review of MSHA records disclosed that a clean inspection had taken place since the last unwarrantable failure citation had been issued to the subject mine. MSHA thereafter filed a petition for a civil penalty for the violation alleged in the citation. The two cases were consolidated for the purposes of hearing and decision.

Pursuant to notice, the case was heard on the merits on November 16, 1982, in Charleston, West Virginia. Henry James Keith and Billy R. Browning, Federal coal mine inspectors, testified on behalf of the Secretary. Richard J. Smith and Mark Allen Workman testified on behalf of the operator. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

1. At all times pertinent to this decision, Kanawha Coal Company (the operator) was the owner and operator of the Madison No. 1-A Mine in Boone County, West Virginia.

2. The subject mine produces goods which enter interstate commerce and its operation affects interstate commerce.

3. There is no evidence in the record concerning the size of the business of the operator nor as to its history of prior violations.

4. The imposition of penalties in this case will not affect the operator's ability to continue in business.

5. On October 19, 1981, Federal Mine Inspector Henry Keith issued a withdrawal order in which he charged that

"The roof control plan was not being complied with at the No. 1 Pillar 003 Section in that adequate roof supports had not been installed to narrow the roadway to the required 16 feet width and additional turn post had not been installed into the pillar that had to be extracted."

6. On October 19, 1981, when Inspector Keith entered the subject mine, the 003 Section was engaged in retreat mining, extracting pillars with a continuous miner.

7. The roof control plan in effect at the subject mine on October 19, 1981, provided (Drawing No. 4, page 20) that two pillars were to be mined together in the following sequence: cuts 1, 3 and 5 to be taken from the center of Pillar No. 1; cuts 2 and 4 from the center of Pillar No. 2; cuts 6 thru 11 from the left side of Pillar No. 1; cuts 12 through 17 from the right side of Pillar No. 1, cut 18 from the center of Pillar No. 2; cuts 19 through 24 from the left side of Pillar No. 2 and cuts 25 through 30 from the right side of Pillar No. 2. The cuts from the center were 20 feet wide and from the sides 10 feet wide. Two "fenders" (4' x 4' triangles) were to be left in each pillar.

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8. The plan required that 2 rows of breaker posts be installed between Pillar 1 and 2 at the inby end of the pillars; that 2 rows of breaker posts be installed outby the left side of Pillar No. 1; that turn posts and roadway posts be installed to the right of the breaker posts, limiting the roadway between the pillar being mined and the next pillar outby and extending one full pillar outby the pillar being mined. These posts must be set before the first cut. Before the second cut (from pillar No. 2), breaker, turn, and roadway posts must be set outby pillar No.2.

9. In its retreat mining on section 003 in the subject mine, the operator always cuts in sequence from left to right.

DISCUSSION

On this issue, the testimony of Inspector Keith differs from that of the operator's witnesses, Smith and Workman. Since the latter were more familiar with the mining sequence followed in the subject mine, I am accepting their testimony on the question.

10. At the time Inspector Keith arrived at the area of No. 1 pillar, it had been entirely mined except for the last two cuts (numbers 16 & 17 on the roof control plan). Two cuts (Numbers 2 & 4) had been removed from pillar No. 2. Pillars 3 and 4 (to the right of pillar 2) had not been mined.

DISCUSSION

In making these findings, I am again accepting the testimony of Mr. Smith and Mr. Workman which differed from that of Inspector Keith. This follows from and is consistent with findings of fact No. 9.

11. Breaker posts, turn posts and roadway posts had been set outby Pillar No. 1 prior to the first cut being taken. The roadway posts limited the roadway between Pillar No. 1 and the next pillar outby to 16 feet. These posts were standing at the time Inspector Keith arrived at the face area.

DISCUSSION

On this critical issue the testimony is in conflict. I accept the testimony of the witnesses for Respondent because it is consistent with their prior testimony which I accept above. I believe the inspector was possibly confused, as Respondent suggests, because he travelled to the face between pillars 2 and 3, and apparently thought pillar 2 was pillar 1, and that the operator had begun mining pillar 3 on a right to left sequence without setting the required turn and roadway posts.

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12. While Inspector Keith and Mr. Smith were sitting outby Pillar No. 2, they heard a noise from behind the line curtain outby the pillar. They proceeded through the curtain and found that the section foreman Burton had been struck by a roof fall while setting wing posts between Pillar 1 and Pillar 2. The inspector and Mr. Smith assisted in getting Mr. Burton to the outside and did not return to the section that shift. The injury to the foreman was not related to any alleged violation of the roof control plan. The order was issued after the inspector left the section. Mr. Smith mistakenly believed that it referred to pillar No. 3 and did not discuss it with the inspector.

13. If the condition cited by the inspector had existed (I have found it did not) it would be of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

REGULATORY PROVISION

30 C.F.R. 75.200 provides:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

1. Did the operator violate the provisions of its approved roof control plan on October 19, 1981, by failing to provide adequate roof supports at the No. 1 pillar, 003 Section to narrow the roadway to 16 feet and by failing to install turn posts into the pillar being extracted?

2. If the answer to issue 1 is affirmative, was the violations significant and substantial?

3. If the answer to issue 1 is affirmative, was the violation due to the operator's unwarrantable failure to comply with the standard?

4. If the answer to issue 1 is affirmative, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Kanawha Coal Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of its Madison No. 1A Mine at all times pertinent herto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. MSHA failed to establish that a violation of 30 C.F.R. 75.200 took place on October 19, 1981. Specifically, the evidence does not establish that the approved roof control plan was not being complied with at the No. 1 pillar, 003 section of the subject mine, in that adequate roof supports were not installed to narrow the roadway to 16 feet and turn posts were not installed into the pillar that was being mined.

DISCUSSION

As both posthearing briefs point out, the issue in this case is largely one of credibility. In general, I am accepting the testimony of Respondent over the sharply contradictory testimony of MSHA for the following reasons: The testimony of Respondent's safety director is supported by a union miner who has no direct interest in the outcome of this litigation. The inspector was clearly in error with respect to the procedure followed by Respondent in recovering pillars (it always proceeded from left to right). Respondent's witnesses were clearly more knowledgeable

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concerning the conditions on the section. Finally, I believe the inspector may have been distracted because of the roof fall and injury (which were not related to the alleged violation) and did not accurately recall the conditions on the section when he wrote the order.

3. Since no mandatory safety standard was violated, the citation must be vacated and no penalty imposed.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that the contest of the order/citation is GRANTED; the order/citation is VACATED; the petition for the assessment of a civil penalty is DISMISSED.

James A. Broderick
Administrative Law Judge