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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDINGS

Docket N. VA 85-12
A.C. NO. 44-05210-03512

v.

No. 44 Mine

LAMBERT COAL COMPANY,
RESPONDENT

DECISION

Appearance: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington,
Virginia, for Petitioner;
Mr. Dennis Sutherland, Office Manager,
Lambert Coal Company, Nora, Virginia, for
Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act", in which the Secretary charges the Lambert Coal Company with one violation of the mandatory standard at 30 C.F.R. 75.200. The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on June 13, 1985 at Big Stone Gap, Virginia. Documentary exhibits and oral testimony were received from both parties.

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. 75.200 provides as follows:

75.200 Roof control programs and plans.

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 the 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.

The Cited Condition or Practice

Citation No. 2153689 as modified cites a violation of 30 C.F.R. 75.200 for the following condition:

The approved roof control plan was not being complied with near the face of the No. 3 entry of the 002 active working section in that an area of roof measuring 9 feet in length and up to 3 feet in width and was cracked all the way around it (oval shaped) was present and additional supports such as crossbars were not installed to supplement the resin roof bolts that had been used. The plan stipulates that when abnormal conditions exist that additional roof support will be installed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5):

1. Lambert Coal Company is the owner and operator of the No. 44 mine.

~1168

2. The operator and the No. 44 mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. The Lambert Coal Company's size is 379,766 production tons per year and the No. 44 mine's size is 103,877 production tons per year.

Discussion and Analysis

The inspector who issued the subject citation testified that he inspected the Lambert Coal Company's No. 44 mine on November 6, 1984. As he entered the Number 3 entry in the 002 working section of the mine he observed an oval-shaped crack in the mine roof approximately nine (9) feet in length and up to three (3) feet in width. He also testified that there was a mud seam present in the crack and according to the inspector this would indicate that there is a separation in the roof that most likely goes all the way to the surface and the roof is also more likely to fall out. The entry at that point was approximately sixty (60) feet from the surface. Based upon what he saw, the inspector believed that there was a reasonable likelihood of a nine (9) foot by three (3) foot rock of unknown thickness, and therefore unknown weight, falling out of the roof, which could result in a death or injury.

The operator's roof bolter who had bolted this area testified that he drilled through the rock in three places to install roof bolts and it was eighteen (18) inches thick. He stated he was able to tell that because the pinner head will jump when it hits the crack and he was using a two (2) foot starter barrel that was not all the way in when it jumped.

The citation alleges a violation of 30 C.F.R. 75.200 contending that the operator failed to comply with its approved roof control plan. More particularly, the inspector testified that the specific portion of the plan that was not complied with is contained in the second sentence of the first paragraph on page 5 (Tr. 13, Government Exhibit No. 4). That sentence reads: "In areas where subnormal roof conditions are encountered, indicated, or anticipated, the operator shall provide additional support where necessary."

~1169

There is no dispute that a subnormal roof condition was present because of the 9x3 foot oval-shaped crack in the mine roof. There is a substantial dispute, however, both as to what corrective action, if any, was taken prior to the citation being issued and what quantum of additional support was necessary in the first instance.

A substantial question of fact exists as to what additional support, if any, the operator provided to meet the subnormal roof condition he encountered. The answer to this question turns on the credibility of the two witnesses.

The inspector testified on direct and cross-examination that they had complied with their normal roof control plan in the area of the crack, meaning they had installed resin roof bolts on four (4) foot centers in that entry. However, a diagram of the No. 3 entry made by the inspector in his field notes, and admitted into evidence as Government Exhibit No. 5, indicates that two (2) bolts that would have fallen within the oval-shaped crack were not installed. Another diagram, later admitted into evidence as Respondent's Exhibit No. 1 and purporting to show eight (8) additional roof bolts and bearing plates inside and around the outside circumference of the crack was shown to the inspector on cross-examination. He stated that to the best of his recollection the area was not bolted in this manner, but rather as it is depicted in his field notes. On his re-direct examination, however, he didn't seem too sure. The following exchange took place at Tr. 35:

Q. Mr. Phillips, I'd just like to bring you back to what you observed as far as the roof bolting pattern was in that entry on that roof on that day. You said that the normal roof bolting pattern had been observed, did you observe any type of additional support when you made your inspection?

A. They may have been installing some extra roof bolts.

In contrast to the rather uncertain recollection of the MSHA inspector, Mr. Counts, the operator's roof bolter, who actually did the work in this entry testified with absolute certainty that the roof was bolted as depicted in Respondent's Exhibit No. 1, which is reproduced below.

Respondent's Exhibit No. 1

Mr. Counts testified that he drilled the roof and installed five (5) foot resin roof bolts and 6" x16" x1/4" bearing plates in the order shown above. Further, he is absolutely sure this is the way it was before the inspector saw it on the morning of November 6, 1984.

I accept the operator's description of the roof at that time and find that it was substantially as depicted in Respondent's Exhibit No. 1 which indicates that the normal roof bolting pattern had been supplemented with additional bolts and oversized bearing plates.

Having found the existence of the additional support as alleged by the Respondent, the second issue presented is whether that support was adequate. I conclude that it was.

Petitioner's argument is that even if the roof was bolted as depicted in Respondent's Exhibit No. 1, it was insufficient because given the proximity of the mud seam and the nature of the crack, crossbars were necessary to provide

~1171

adequate support of this particular area. It should be noted that the approved roof control plan for this mine does not specifically require crossbars to support abnormal or subnormal roof, but rather contains a general requirement that "the operator shall provide additional support where necessary." In this particular case, it was and is the considered expert opinion of the inspector that horizontal support in the nature of crossbeams or crossbars was required. However, in arriving at this conclusion, the inspector did not know how far up into the rock the crack went. Therefore, he did not know how thick the rock was or whether the supplemental roof bolts were anchored in solid roof.

The testimony of the operator's witness, who actually did the roof bolting, and whom I find to be credible, is crucial on this point. Mr. Counts testified that he drilled three (3) holes up through the middle of the rock and found it to be more or less uniformly eighteen (18) inches thick from one end to the other. He further stated that he drilled six (6) foot test holes, a foot above the bolts, and installed the eight (8) resin roof bolts in the order shown in Respondent's Exhibit No. 1 into solid roof. Additionally, Mr. Counts offered the opinion that based on eight years of roof bolting experience and the fact that he is the "first one under there," he felt the supplemental roof bolts and bearing plates were adequate to make it a safe working place.

I find the operator's arguments and evidence regarding the condition and adequacy of the supplemental roof support persuasive and I accept it. Based upon this evidence I conclude the additional bolting was sufficient to support the roof.

ORDER

Citation No. 2153689, as modified, is hereby vacated and this case is dismissed.

Roy J. Maurer
Administrative Law Judge