CCASE:
EMERY MINING V. SOL (MSHA)
DDATE:
19860610
TTEXT:

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

EMERY MINING CORPORATION, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEST 86-35-R
v.	Citation No. 2503818; 10/22/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 86-36-R Order No. 2503819; 10/22/85 Deer Creek Mine

DECISION

Appearances: Timothy Biddle, Esq., and Peter K. Levine, Esq., Crowell & Moring, Washington, D.C., for Contestant; James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

These consolidated cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act), arose from a regular inspection of contestant's Deer Creek coal mine on October 22, 1985. On that date a federal mine inspector issued citations under section 104(d)(1) of the Act.

Emery contests the citations and denies that a violation occurred; further, Emery asserts that if a violation occurred it was not caused by Emery's unwarrantable failure to comply with the regulation.

The cases were expedited and heard in Salt Lake City, Utah on March 5, 1986. Emery submitted two Commission decisions in support of its position. The Secretary did not submit any post-hearing submissions.

General Background

The parties stipulated that Emery is subject to the Act and the administrative law judge has jurisdiction over the dispute. The citation and order attached to the notices of contest are authentic copies of the ones served on Emery. Further, the inspector was a duly authorized representative of the Secretary of Labor when the citation and order were issued. Finally, the citation and order at issue were properly served on Emery (Tr. 5, 6).

WEST 86Ä35ÄR

In this case Emery contests Citation No. 2503818. MSHA's citation alleges Emery violated 30 C.F.R. 75.200. The citation reads as follows:

> Bad top is present along the First South track haulage for approximately 55 feet between the #65 and #66 crosscuts, through this area the roof is broken up and and [sic] sagging between the roofbolts, several steel roof matts have buckled and several roofbolts have pulled through the bearing plates, the chain link has loaded up with broken top between the matts causing it to sage [sic] on to the trolley gard [sic] compressing it against the energized trolley, loaded trips of material have rubed [sic] against the top tearing the chain link at two locations.

The cited regulation provides as follows:

> 75.200 Roof control programs and plans.
>
> [STATUTORY PROVISIONS]
>
> 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.

Summary of the Evidence
MSHA's Evidence

MSHA inspector Dick Courtney Jones, a person experienced in mining, issued a citation and order in the First South switch area of the Emery Deer Creek Mine on October 22, 1985 (Tr. 14Ä24).

At the time the inspector had been traveling through the area with Gary Christensen, the company safety engineer (Tr. 24Ä26). They were traveling in a Scout vehicle operating on a rail. This particular entry was used daily by over 200 miners, including shift foremen and supervisors (Tr. 25Ä29).

The coal seam underneath the entry was also being developed. As a result there was a lot of caving and settling in the area (Tr. 26). A portion of the roof was also secured with chain link fencing (Tr. 35).

The inspector indicated (referring to an area shown on exhibit P1) that some of the roof bolts had failed and in turn fractured coal was causing the chain link to sag. Four of the roof bolts had failed. Also pressure on the bolts had forced the six by six metal plates over the head of the bolts (Tr. 33Ä38). Such bolts are no longer effective when the roof pressure pushes the plates over the end of the bolts (Tr. 34, 35). This is not an uncommon occurrence and it indicates "real pressure" in the area (Tr. 39).

During an inspection the roof and rib areas are always checked. In a location where the top had been secured with chain link fencing the coal had sagged down to a point where the chain link was pressing across the trolley (Tr. 35). One of the two trolley guards had already worn through. The clearance of a trolley wire should be six to eight inches (Tr. 35, 36, 46). The trolley wire carries 250 to 300 volts of DC power. If contact occurs between the energized trolley and the chain link the resulting sparking and heat could cause a serious and hazardous fire in a short time (Tr. 37, 38, 44). In the inspector's opinion about 65 feet of roof in this area had deteriorated (Tr. 43).

The inspector considered this to be an S & S violation. The company should have known of the condition because supervisors travel through the area (Tr. 50, 51). They could have seen the condition of the trolley wire as well as the failed bolts (Tr. 51, 52}. The loss of bearing plates indicated the bolts were no longer sustaining their weight. The leaning timbers in the area also confirmed this view. It would take at least a week, possibly months before a bearing plate becomes separated from the bolt. There are always physical signs before a plate falls off. In the area there was no indication of the plates that had been forced over bolts (Tr. 40Ä42, 56). This particular area was also subject to a preshift examination (Tr. 52). The preshift examiner should have checked for any such problems (Tr. 53). The inspector found that no entry had been made concerning this condition in the preshift and onshift examinations book (Tr. 53).

In abating the violation extensive work was required to support the roof. This also indicated to the inspector that it took a month for the condition to develop (Tr. 44).

Inspector Jones (in rebuttal) testified that the four popped roof bolts were the last ones installed. He concluded this because the bolts had been sucked [sic] up against the chain link fence. You could also see the plate imprint of the 6 x 6 plate on the chain link (Tr. 223, 224). The inspector called this condition to the attention of Tucker and Christensen (Tr. 224). In addition, there was no evidence of any plates laying between the chain link fence and the roof (Tr. 224).

Witness Tucker confirmed inspector Jones' testimony about his statement to Christensen (Tr. 226).

If the trolley wears through the guarding and comes in contact with the chain link fence, a fire could result. Also there was a possibility of chain link fence striking the miner as he was riding through the area. Fire and roof fall hazards existed in this area of bad top (Tr. 90, 91). The fracturing of the roof and its settlement onto the chain link took one or two weeks to occur (Tr. 92Ä93).

In Tucker's opinion this condition was apparent and should have been known to management on the day of the inspection. In addition, in Tucker's view, the condition existed for a week or more before the inspection (Tr. 101). But he had no scientific background to support his opinion (Tr. 111).

Emery's Evidence

Kenneth D. Calihan, Emery's shift foreman, oversees the production of coal and is responsible for safety at the Deer Creek coal mine (Tr. 140Ä142).

The First South track haulage runs from No. 1 crosscut to approximately No. 120 crosscut. The area of roof discussed by the inspector was approximately from 58 crosscut to 80 crosscut (Tr. 143). At the time of the inspection, between crosscut 62 and 78, there was a row of cribs installed on five-foot centers the full length of the area. The mining activities created a roof condition known as a squeeze or a roll (Tr. 143, 144). The cribs on one side and timber on the other in the 65Ä66 crosscut area provided additional roof support (Tr. 144Ä146). It was not feasible to place timber and cribs any closer (Tr. 147). The area cited by the inspector, between crosscuts 65 and 66, was developed with 6 foot conventional roof bolts. At various times the bottom and top were cut and the area was matted (Tr. 145). The mats had some bulges in it from catching the fractured top between the gaps in the mats (Tr. 150).

Calihan returned to the area with Inspector Jones and Max Tucker (Tr. 151). The bulging in the chain link did not indicate any serious long term problem (Tr. 152). Calihan described how

the mats were placed parallel to the track and pinned with a second set of 6 foot resin roof bolts (Tr. 145, 146). The chain link meshing was installed with a trolley drill. Three sets of roof bolts were in place. At the time of the inspection the roofbolts were spotted on 5 foot centers and they were as close as one or two feet (Tr. 146).

The Emery safety department, as well as its safety committee, monitors this area. Calihan had not had any reports about problems in the area in the year before the issuance of the citation (Tr. 147). Three fire bosses, who are certified mine inspectors and part of the union work force, walk the area once each shift (Tr. 148, 149). Calihan could not recall any reports of problems in this area (Tr. 149).

When Calihan was called to 65Ä66 crosscut he saw that the trolley wire was close to chain link mesh in spots (Tr. 152, 153). The condition was not obvious (Tr. 153). The wear on the trolley wire might have been caused by clearance in the area (Tr. 154).

In this area some roof bolts had been bent and some were missing plates (Tr. 156). Calihan agreed that it takes awhile for bearing plates to pop off (Tr. 181, 186). The ones with the missing plates were above the wire mesh. They looked old. Conventional roof bolts can be distinguished by their style and material (Tr. 156). In Calihan's opinion the roof was adequately supported (Tr. 156, 157) however, he would change his opinion (that the roof was adequately supported) if it was the last group of bolts that were losing its bearing plates (Tr. 187). The inspector and Calihan only discussed the wire mesh, the trolley guard and the roof bolts (Tr. 157). They shook some coal out of the wire mesh. There was still a good layer of trolley guard and there were ample roof bolts in place (Tr. 157).

Gary W. Christensen, Emery's safety engineer, testified that he had traveled through the 20Äfoot wide entry for over six years (Tr. 188, 189). The entry had been mined to a width of about 10 feet (Tr. 190).

Emery has been aware of the movement in the area and has matted the roof and installed additional roof bolts. On October 22 Christensen was instructed to check the area for material pushing against the chain link (Tr. 192). Christensen clipped the chain, dumped out the coal and rewired the chain link (Tr. 194, 212, 220). As he dumped out the coal the inspector looked at the surrounding top. Jones pointed out to the witness that the bolts had pulled through some of the bearing plates. The plate was still on the top side of the chain link. Christensen could not see any newer bolts that had been popped off (Tr. 196). Christensen felt that the new bolts that had been installed provided adequate support in the area (Tr. 215). The men also discussed that the chain link was down against the trolley guard (Tr. 196). Jones indicated he wanted immediate action in abating the condition (Tr. 197).

It took 24 hours to abate the condition; further, additional bolts were required. In Christensen's view, this additional activity wasn't necessary to make the area safe (Tr. 221).

Discussion

I credit MSHA's evidence in resolving the credibility conflicts in this case.

During the inspecting of this entry Inspector Jones observed that four roof bolts had "popped" their plates. This indicated extreme pressure in the area. In addition, there is persuasive evidence that the condition existed for at least a week, probably longer. This evidence arises from the inspector's opinion. It is further supported by the absence of any of the popped plates laying in the area, as well as from the imprint on the chain link fencing caused by the plates. In short, the most recently installed roof bolt plates were the ones that failed.

Emery's evidence counters the inspector's view: the operator's witness felt the bulging in the chain link fencing presented no long term problem. I agree, the bulging in the chain link was not pivitol to the violative condition. It merely served to focus attention on this portion of the entry.

Emery's witnesses further claim the roof, although a problem area, was adequately supported by the three different sets of roof bolts installed with mats on different occasions. Some plates were on the top side of the chain link.

I credit Inspector Jones' contrary evidence and expertise in this case. Jones has been a coal mine inspector for eleven years. Prior to becoming an inspector he had fifteen years' experience as an underground miner including section foreman in the Deer Creek mine. He also served as a fire boss (Tr. 15Ä18). At the time of the inspection he was particularly checking the roof and rib areas. Witness Tucker further supports the testimony of inspector Jones.

While Emery's witnesses were experienced in underground mining I do not consider their expertise to be as persuasive.

In support of its position, Emery relies on the Commission decision in Westmoreland Coal Company, 7 FMSHRC 1338 (1985) and United States Steel Corporation, 6 FMSHRC 1423 (1984). These cases are offered in support of Emery's argument that there was no violation and, in any event, no unwarrantable failure. Emery argues (Tr. 229Ä230) that it had taken substantial steps to control the roof in this area. Further, the problem of the loose

coal on the chain link was a recent development. I agree that this was a problem area. Three sets of roof bolts are not installed without a purpose. But it is apparent that the most recently installed bolts had "popped" their plates. Witness Jones indicated this condition existed for at least a week. Witness Calihan agrees that the bearing plates took awhile to "pop" off (Tr. 181, 186). Finally, the evidence fails to indicate the presence of any of the popped plates in the area.

The cases relied on by Emery are not factually controlling. Here, the roof bolts had shed their plates at least a week before the citation. Emery's inspectors should have detected this condition. No action was taken. In Westmoreland the Commission held there was no "unwarrantable failure" because "each and every miner who observed the formation before it fell, including the foreman, attempted to bar it down . . . " 7 FMSHRC at 1342. In the case at bar an unstable roof was permitted to exist in a travelway for at least a week, probably longer. Emery should have known of this condition.

The Commission decision in United States Steel Corporation does not support Emery. To restate the holding in the case at bar: Emery's failure to correct this defective roof for a week constituted an unwarrantable failure on its part as that term is defined by the Commission.

For the reasons herein stated the contest of Citation 2503818 should be dismissed.

WEST 86Ä36ÄR

In this case Emery contests Order No. 2503819. MSHA's order alleges Emery violated 30 C.F.R. 75.200, the same regulation allegedly violated in the companion case.

The order reads as follows:

> A large loose rib is present along the First South track at the 3rd West switch. This rib is approximately six feet high and 25 feet long and has seperated [sic] from the top and main coal seam. The rib is being supported by steel rib bolts and steel matts however the weight of the rib has caused several bolts to break or pull through the bearing plates and matts. Haulage equipment regularly park along this area while switching out with equipment traveling to the 3rd West area of the mine.

Summary of the Evidence
MSHA's Evidence

After issuing the prior citation Inspector Jones continued on in the same entry to the Third West switch area. At this

area a telephone may be used to obtain clearance to proceed (Tr. 57, 58; Exhibit P2). The rib adjacent to the switching track was clearly fractured the length of its middle; it was undercut; and it was separated from the top. Some of the fractures were three inches wide. The rib had been bolted with 3 pins in an attempt to secure it (Tr. 59, 60, 66). Only two pins were still affecting it (Tr. 60). The area was also experiencing some subtle settling (Tr. 60).

The inspector was concerned that the rib would come off and anyone adjacent to it would be crushed (Tr. 60). He has the authority to close an area but he did not do so (Tr. 76). After the rib was taken down, Emery installed seven cribs, side to side (Tr. 61).

Most of the working section, 200 to 300 men, would use this route (Tr. 62, 63). Between 10 and 15 locomotive man trips per shift would stop approximately four feet from the rib (Tr. 63Ä65). Frequently men stand near the rib stretching their legs or sitting in the man trips (Tr. 65).

The rib would have come off if this condition had not been corrected. A fatality could have occurred (Tr. 69). This obvious condition had been deteriorating over a period of months (Tr. 69).

This rib should have been examined by a preshift examiner (Tr. 70).

MSHA's witness Tucker also stated that the bolted 4 to 5Äton rib was fractured at the top (Tr. 94). One bolt was hanging loose; this left one bolt to hold most of it (Tr. 95). The rib was undercut about three feet (Tr. 95). On the side of the pillar, where the telephone was located, there were two to three-inch wide cracks running the length of the rib (Tr. 95, 96). The fracture had existed for some time (Tr. 97).

Management should have known about the rib because it was obvious and it should have been known to Emery. In addition, the miners would also comment about it (Tr. 97Ä98, 101, 103).

About a year before the MSHA inspection a union inspection team recommended to the mine foreman that the rib be checked (Tr. 98Ä101). In the close out conference following the union inspection Emery said some additional support had been placed on the rib (Tr. 100).

Emery's Evidence

Emery's witness Kenneth Calihan indicated he travels the Third West Switch area where this order was issued (Tr. 157).

In this area only miners between starting and quitting time stop to request clearance at the "Y" in the track (Tr. 158, 159).

The rib that was the subject of the MSHA order was 6 foot high and 25 feet long. It had four horizontal and one vertical mat. Conventional roof bolts done about two years before the order hold the mats in place (Tr. 159, 161). The vertical mats go from the top to the bottom and they are crossmatted across the roof (Tr. 159). The purpose of the pinning and matting is to hold the rib in place (Tr. 160). If you take it down and widen the area you would have to add cribs or timber later (Tr. 160). It was observed by almost anyone passing by the area (Tr. 161). Fire bosses also walk by this area (Tr. 161). But the mine foreman had not received any reports of problems with this area (Tr. 161, 162).

Calihan didn't think it was necessary to take the rib down nor was it evident to him that the back was fracturing (Tr. 164). The rib was taken down, but Calihan felt this was more dangerous than to leave it up because the worker pulling it down would be in danger (Tr. 165).

Calihan considers that undercutting was deliberately done by digging but he agreed there were several one to two foot voids without foundation under the rib (Tr. 165Ä167). Calihan could see a crack in the rib at the roof but he did not know its depth (Tr. 168). He further observed one loose roof bolt (Tr. 170).

Emery's witness, Gary Christensen, indicated that the Third West Switch area is about 1500 feet from the 65Ä66 crosscut (Tr. 188, 197). Christensen called his supervisor, Calihan, from this area (Tr. 197). Inspector Jones, who was present, brought the condition of the rib to Christensen's attention (Tr. 198). Jones said it wasn't adequately supported and Christensen could see that it had pulled away from the rib at the top. The rib was batted, pinned and cross matted (Tr. 199). The mat had pulled away from the top pin (Tr. 200). He didn't see any cracks in the rib (Tr. 201Ä206).

The rib is approximately 15 feet from the switch intersection and about the same distance to the telephone booth (Tr. 202).

There was no indication of any recent movement of the rib (Tr. 203).

Discussion

I credit MSHA's evidence in resolving the credibility conflicts in this case.

Inspector Jones described the conditions related in the summary of the evidence. Emery's evidence takes a lesser view of the seriousness of the problem. But Emery's witnesses basically confirmed certain physical conditions that establish the vio-

lative condition. Witness Calihan confirms that the rib was undercut and there was a one to two foot "void" under the rib. There was also a loose roof bolt.

Witness Christensen could see that the rib had pulled away from the top.

Discussion

The obvious physical condition of the rib was essentially agreed to by all witnesses. These conditions cause me to conclude that the rib at this switch area was unstable and not adequately supported. For these reasons I concur in MSHA's position that a violation occurred.

Emery argues that it had taken substantial measures to secure the rib with bolts and mats. Further, it had been stable and solid for over a two-year period (Tr. 229Ä230). I disagree. The unstable condition described by the inspector and witness Tucker had clearly existed for a long period of time. This was not a "judgment call" as contended by Emery. About a year before the MSHA inspection, witness Tucker's safety committee recommended to the mine foreman that the rib be checked.

The contest of Order No. 2503819 should be dismissed.

Conclusions of Law

Based on the record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Contestant failed to meet its burden of proof in WEST 86Ä35ÄR and WEST 86Ä36ÄR.

3. Contestant's conduct constituted an unwarrantable failure to comply with the regulation.

4. The contests filed herein should be dismissed.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

1. The contest filed in WEST 86Ä35ÄR is dismissed.

2. The contest filed in WEST 86Ä36ÄR is dismissed.

John J. Morris
Administrative Law Judge