

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 6 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 85-169
Petitioner : A.C. No. 46-02493-03536
 :
v. : Quinland No. 1 Mine
 :
QUINLAND COALS, INC., :
Respondent :

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, VA, for
Petitioner:
William D. Stover, Esq., Quinland Coals, Inc.,
Beckley, WV, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole, 1/ I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACTS

1. Respondent's Quinland No. 1 Mine was formerly owned and operated by Westmoreland Coal Company under the name of Ferrell Mine.

1/ Respondent's Objection to Acceptance of Posthearing Evidence is rejected. The preshift reports of Dayton Lane are the best evidence of the reports filed by Lane. They are received as evidence in this proceeding. Respondent's Motion for a Protective Order is moot, because no other preshift reports of Lane were submitted by the Secretary after such motion and before entry of this Decision.

2. In November, 1980, at **Westmoreland's** mine there was a methane explosion that killed five people. After the explosion and recovery of the bodies, seven seals were installed in the Main East area of the mine to seal off the explosion area from the active workings. The atmosphere in the area behind the seals consists of a high level of methane and a low level of oxygen. This is desirable because an explosive concentration of methane is between five and fifteen percent. That is, if methane is above 15 percent, or below five percent, it is scientifically considered to be nonexplosive. If the oxygen level is kept below sixteen percent, it is also scientifically considered that there will not be enough oxygen for combustion. It is important for the seals to operate effectively to prevent the atmosphere behind them from leaking out into the active workings, since the high methane and low oxygen content would present a serious hazard to persons in the active workings.

3. As a result of the 1980 accident, the mine was designated by MSHA to receive a spot inspection every five days pursuant to § 103(i) of the Act. In a spot inspection, an inspector takes samples of the atmosphere behind the seals, checks the seals to make sure that they are not leaking or being crushed and that the roof conditions are adequate, and tests to be sure the methane is staying behind the seals.

4. On October 11, 1984, Inspector Ernest Thompson made a spot inspection of Respondent's mine under § 103(i). In the Main East area he took samples of the atmosphere from behind the seals. At the No. 7 seal he observed a large roof fall in the entry, which he described as follows in his testimony at the hearing:

There was cribs at the end of the falls. They had all the weight they could stand. They were crushing. There was eight or ten posts broke in the center of the entry. The top was broke all to pieces, and I could hear the gas hissing out of the top coming through the cracks in the top (Tr. 24).

* * * *

Their top had dropped down. Part of the top dropped down approximately an inch from the remainder. The roof, in my opinion, had already fallen. It wasn't on the mine floor. It was leaning on what supports they had in there and the seal. It was crushing out the seal (Tr. 26).

Inspector Thompson also observed that the broken posts had not been replaced. In his opinion, the condition had been in existence for some time because the broken posts had a lot of dust on them, leading him to believe that they had been broken for at least a month to two months. The roof site was an active working place where preshift examiners and other workers were required to go on a regular basis. Inspector Thompson found an inadequate roof condition, and issued § 104(d)(1) order (No. 2144040) charging a violation of 30 C.F.R. § 75.200, alleging that this was a significant and substantial violation, that negligence was high, and that the violation was reasonably likely to result in a fatal injury.

5. On the same day Inspector Thompson issued § 104(d)(1) Order No. 2144047, alleging a violation of 30 C.F.R. § 75.303, as follows:

The preshift examination made by Dayton Lane on 10/10 and 10/11/84 for No. 7 seal in Main East area was inadequate in that No. 7 seal was leaking excessively (more than 5% methane was detected) and the mine roof was inadequately supported and Mr. Lane certified this area to be clear.

Inspector Thompson testified that he tested the air for methane about six feet from the No. 7 seal and detected methane in the area. He took a bottle sample which, when analyzed, showed a methane level of 5.64 and oxygen level of 19.21 (Ex. G-9). This was an explosive level of methane and a low level of oxygen.

6. The preshift examiner, Dayton Lane, had certified the area to be clear during the examination he conducted between 5:00 and 7:50 a.m. on October 11, 1984 (Ex. G-15).

DISCUSSION WITH FURTHER FINDINGS

The Roof Conditions Cited in Order No.
2144040

The cited standard, 30 CFR § 75.200, requires, in part, that "the roof and ribs of all active underground roadways, travelways, and working places be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." I credit Inspector Thompson's testimony as to the roof conditions and find that the roof support in the No. 7 seal entry was inadequate to protect persons from roof falls. There were broken timbers that had not been replaced, contrary to Respondent's roof control plan. The roof was breaking or damaging the seal, and methane was leaking into the active working area. This was a dangerous condition.

Respondent was negligent in allowing this violation to exist. Dust on the broken posts indicated that the condition had been in existence for a long time. In addition, Respondent's witness McClure testified that the condition of broken timbers was longstanding, having been in existence when he started work there in August of 1984. Although McClure was of the opinion that the unbroken timbers and cribs provided adequate roof support, he was aware that the roof control plan required that broken timbers be replaced and that there were some broken timbers that had not been replaced as of October 11, 1984.

The Preshift Examination Cited
in Order No. 2144047

The cited standard; 30 CFR § 75.303, requires that within three hours immediately preceding the beginning of any shift a certified person examine all active workings of the mine, examine seals to determine whether they are functioning properly, and examine active roadways, travelways and approaches to abandoned areas. Dayton Lane testified that he was the certified person responsible for conducting the preshift examination of the Main East seals on October 11, 1984. He conducted a preshift examination between 5:00 and 5:45 a.m. Although he was aware of the broken timbers, roof fall, and cracks in the roof in the area of the No. 7 seal, he did not report these conditions in his preshift report. Instead, he noted "clear" in the preshift mine examiner's book for that day (Ex. G-15, p. 4). It was his opinion that the roof was adequately supported.

I credit the inspector's testimony on this point, and I find that the roof was inadequately supported and that this condition should have been reported in Lane's preshift report. It was a violation of § 75.303 to fail to report this condition.

However, the methane hazard found by Inspector Thompson does not establish a violation of the preshift examination requirements cited in Order No. 2144047. As noted above, the preshift examiner is required to examine seals to determine whether they are functioning properly. This would include examining them to make sure they are not leaking methane. Inspector Thompson heard a hissing sound from the cracks in the roof above the seal. This fact, when combined with the high methane reading obtained from the methane detector and bottle sample, establishes that methane was leaking at the time Inspector Thompson was there. However, methane leakage was not a constant condition, and there is no proof that there was methane leakage at the time of Lane's preshift examination.

Lane testified that he tested for methane at the No. 7 seal and found, none, and he did not hear hissing in that area. There is no evidence that conditions were otherwise when he made his inspection.

The Test of a Significant
and Substantial Violation

In Secretary of Labor v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that the Secretary must prove the following elements to establish that a violation of a safety standard is significant and substantial: (1) the violation of a safety standard; (2) a discrete safety hazard, that is, a measure of danger contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.

The roof conditions cited in Order No. 2144040 created the danger of a roof fall. Since a number of people (about seven) regularly went into this area, there was a reasonable likelihood that one of them would be injured if a roof fall occurred. The type of injury which could result, of course, could be a fatality. Also, the roof conditions were allowing methane to escape. This could result in an explosion or, if a person were present when a large quantity of gas was escaping, he or she could be killed as a result of low oxygen.

The practice cited in one part of Order No. 2144047, i.e., failing to conduct an adequate preshift inspection of the roof, created a serious hazard.' The purpose of the preshift examination is to detect and report hazardous conditions, so that corrective measures can be taken. The failure to report the dangerous roof condition could have significantly and substantially contributed to a serious mine accident.

However, the second part of Order No. 2144047, the failure to report leaking methane, was not proved by a preponderance of the evidence.

Respondent is a large operator. At the time of the inspection, Quinland Mine No. 1 was producing about 800,000 tons of coal a year and employed about 150 employees.

Considering all of the criteria of section 110(i) of the Act a civil penalty of \$850 is ASSESSED for the roof violation (30 C.F.R. § 75.200).

Considering all of the criteria of section 110(i) of the Act, a civil penalty of \$450 is ASSESSED for the preshift examination violation (30 C.F.R. § 75.303). This penalty is reduced from the Secretary's proposal of \$900 because of the failure to prove the part of the charge concerning failure to report a methane hazard in the preshift report.

CONCLUSIONS OF LAW

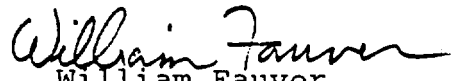
1. The Commission's administrative law judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.200 on October 11, 1984, as charged in Order No. 2144040.

3. Respondent violated 30 C.F.R. § 75.303 on October 11, 1984, as charged in that part of Order No. 2144047 pertaining to a roof hazard, but the Secretary did not meet his burden of proving a violation as to the part alleging a failure to report a methane hazard.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above-assessed civil penalties in the total amount of \$1,300 within 30 days of this Decision.



William Fauver
Administrative Law Judge

Distribution:

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