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SOL (MSHA) V. ELK COAL
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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 No. VA 86-10 A.C. No. 44-06269-03501
v.	
ELK CREEK COAL CORPORATION, RESPONDENT	Docket No. VA 86-15 A.C. No. 44-06269-03502 Docket No. VA 86-37 A.C. No. 44-06269-03505 No. 1 Mine

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Greg Mullins, President, Elk Creek Coal Corp., Grundy, Virginia, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," for ten alleged violations of regulatory standards. The general issues before me are whether the Elk Creek Coal Corporation (Elk Creek) violated the cited regulatory standards and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violations were "significant and substantial." If violations are found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2763732 charges a violation of the standard at 30 C.F.R. 77.1001 and reads as follows:

> Loose, heavy material was present on the highwall between the right hand side of the No. 2 portal and the left hand side of the No. 4 portal. The highwall had not been stripped, sloped or benched in

any manner to correct this condition. This condition was one of the factors that contributed to the issuance of immenent [sic] danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited standard, 30 C.F.R. 77.1001, requires that "[l]oose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

The testimony of MSHA Inspector Larry E. Brown in support of the cited violation is, in essential respects, undisputed. During the course of performing an electrical inspection at a new high voltage substation at the subject mine on December 3, 1985, Brown observed loose material on the highwall. The material consisted of different sized rock - from hand size to about one half the size of a chair - beginning some 25 feet up the highwall extending to the top. In particular he observed loose material between the No. 2 and No. 4 entries where the highwall was 80 to 85 feet "straight up." Brown also observed a scoop operating beneath this area of loose material.

In defense, Greg Mullins, President of Elk Creek testified that an inspector had examined the highwall on November 14, 1985, and had "approved it." Even assuming however that the highwall conditions were acceptable on November 14, 1985, that is no defense to violative conditions existing on December 3, 1985. Accordingly the violation is proven as charged. The "significant and substantial" findings, the likelihood of serious injuries and the moderate negligence found by the inspector are substantiated by the record and are not disputed.

Citation No. 2763733 charges a violation of the operator's temporary roof control plan under the standard at 30 C.F.R. 75.200 and states as follows:

> A cut of coal had been taken from the No. 3 entry and a canopy had not been installed over the portal. The roof control plan requires that canopies be installed prior to the start of mining operations. This condition was one of the factors that contributed to the issuance of imminent danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited roof control plan then in effect provides in relevant part that: "[m]ining shall commence under a substantially constructed canopy of sufficient size to protect

the workmen from falling material." According to Inspector Brown, work had been performed in the entry, including roof bolting, the installation of supports and the removal of coal. He accordingly surmised that a number of employees must have passed beneath the highwall and would have been exposed to the danger of falling rock.

In defense, Greg Mullins testified that at the time work was being performed in the entry a portable canopy was erected and provided adequate protection for the miners. Mullins noted that no one was seen by the Inspector working in the cited entry and construction material was present from which the portable canopy had been built. Mr. Mullins' testimony in this regard is undisputed and accordingly I cannot find that the violation has been proven as charged. Citation No. 2763733 is therefore dismissed.

Citation No. 2763734 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 77.1005 and charges as follows:

> Coal was being stockpiled against the highwall between Nos. 2 and 3 portals and loose material had not been removed from the highwall. This condition was one of the factors that contributed to the issuance of imminent danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited standard provides in relevant part as follows:

> Hazardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work.

According to Inspector Brown, work was being performed beneath the highwall between the No. 2 and No. 3 portals and coal was being stockpiled. According to Brown two persons were subject to fatal injuries from rock falls. One was operating an endloader removing coal and another was piling the coal with a scoop. Brown observed that the condition of the highwall could further deteriorate over a short period of time because of weathering, temperature changes and the extraction of coal from the entries beneath.

Mullins again claims that an inspector had examined the cited highwall on November 14, 1985 and had "approved it." This evidence does not however provide a defense for violative conditions existing on December 3, 1985.

Accordingly the undisputed testimony of Inspector Brown amply supports the "significant and substantial" violation as charged. The undisputed evidence also supports a finding of high gravity and moderate negligence. The cited conditions were in plain view. Brown's testimony is also fully corroborated by the testimony of MSHA Inspector Luther Ward who was also present when Brown issued this citation.

Citation No. 2763639 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 77.1001 and reads as follows:

> Loose hazardous material, (rock) was present on the highwall beginning approximately 5 feet to the right of the No. 2 drift opening and extending to the far right side of the No. 4 drift opening. The highwall ranges from approximately 50 feet high to approximately 80 feet high. This violation is a contributing factor to the issuance of 107.A order no. 2763638 dated 2/19/86. Therefore, a termination due date is not given.

MSHA Special Investigator Carl Coleman was performing a spot inspection on February 19, 1986, when he discovered the cited conditions. Based on his observations he opined that the loose material on the highwall could fall and strike miners working below. He observed that wood and rock dust had been stored along the base of the highwall and a trailing cable ran along the base of the highwall, therefore making it highly likely that miners would be exposed to the danger of the rocks falling. According to Coleman a rock falling from 50 to 80 feet could cause fatal injuries. He felt that the dangerous conditions were obvious and should have been discovered during the required daily examination.

In defense, Mullins again observed that the highwall had been inspected on November 14, 1985, and had then been "approved." This evidence is not a defense to the conditions existing more than 3 months later however. In the absence of any contradictory evidence I accept the testimony of Inspector Coleman and find that the "significant and substantial" violation is proven as charged, that the violation was of high gravity and it was the result of operator negligence.

Citation No. 2762857 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. 75.200 and charges as follows:

> The approved roof control plan was not complied with in the No. 2 and No. 4 entries on the 001 active section for installation of the resin grouted roof bolts. The crosswise spacing of the installed roof bolts in several difference [sic]

locations measured to 53 inches to 66 inches wide. The approved roof control plan requires that roof bolt spacing be 48 inches wide beginning at portal and extending underground the approximate distance of 60 feet.

The charges are based upon the diagram on pages 14 and 15 of the operator's roof control plan (Exhibit G-4) showing a 4-foot by 4-foot crosswise spacing of roof bolts. According to MSHA Inspector Ronald Matney the roof bolts he found on December 10, 1985, were indeed in excess of that requirement.

According to Matney the entry had been driven some 60 feet in the No. 2 and No. 4 headings and approximately 20 rows of roof bolts had been installed with 4 roof bolts in a row. Approximately 20 bolts in each entry exceeded the plan requirement. Matney believed this condition to be particularly hazardous because of the shaley slate roof and because of the nearby outcropping. It is not disputed that with the excess spacing between roof bolts loose rock could fall on miners resulting in very serious injuries. By December 17, the condition had been completely abated.

In defense Mullins testified only that he never "saw" any bolts more than 48 inches apart. The fact that Mullins failed to see the violative conditions is no defense. The undisputed evidence clearly supports this "significant and substantial" violation and the negligence associated therewith.

Citation No. 2762858 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. 75.200 and charges as follows:

> The approved roof control plan was not complied with on the 001 section in the No. 4 entry in that the entry width was measured to be 20 feet wide for the distance of approximately 20 feet beginning at approximately 40 feet inby portal and extending underground the distance of approximately 20 feet. The approved roof control plan requires that width for entry be 16 feet.

The testimony of Inspector Matney in support of this violation is also undisputed. The roof control plan (page 14, Exhibit G-4) requires the entry to be no more than 16 feet wide. Here it is not disputed that the entry was 20 feet wide for a linear distance of 20 feet at a point 40 feet inby the portal. Coleman opined that under the circumstances a roof fall would be reasonably likely and result in serious injuries. The condition was abated by the installation of cribs on December 12.

In defense, Mullins testified that he had placed 8 timbers in the cited area to reduce the entry width to 16 feet. Mullins admitted however that the roof control plan requires cribbing and that timbers are not sufficient. Under the circumstances the "significant and substantial" violation is proven as charged. I find some reduction in the gravity of the offense due to the fact that Mullins had placed some timbers in the entry in some effort to remedy the violation. The violation was the result of gross operator negligence however for knowingly violating a provision of the roof control plan.

Citation No. 2762859 alleges a violation of the standard at 30 C.F.R. 75.1713-2 and charges as follows:

> A communication system, telephone or other means of prompt communication were not established from the mine to the nearest point of medical assistance for use in an event of an emergency.

The cited standard provides as follows:

> (a) Each operator of an underground coal mine shall establish and maintain a communications system from the mine to the nearest point of medical assistance for use in an emergency. (b) The emergency communications system required to be maintained under paragraph (a) of this section 75.1713.2 may be established by telephone or radio transmission or any other means of prompt communication to any facility (for example, the local sheriff, the state highway patrol, or local hospital) which has available the means of communication with the person or persons providing medical assistance or transportation in accordance with the provisions of section 75.1713.1.

According to Inspector Coleman there indeed was no communication system at Elk Creek meeting the noted requirements. Moreover the on-site Supervisor, George Owens, admitted that he did not have a communications system. According to Coleman there was a telephone within 1 1/2 miles of the mine site and since the mine had not been developed very far, medical assistance could have been obtained "pretty fast."

According to Mullins there was also a "CB" radio in a pickup truck that was always parked at the mine. Mullins did not however establish that the "CB" provided a method of communication to a requisite medical or other emergency facility as required by the cited standard. Mullins disagreed with Matney and claimed that the nearby mine having a telephone was located only 1,000 feet away. Under the circumstances however I believe that the violation is proven as charged but was of minimal gravity and the result of little negligence.

Citation No. 2762860 alleges a violation of the standard at 30 C.F.R. 75.313 and charges that "the S and S scoop serial No. 482-1567 was being used in the face area of the No. 2 entry without a methane monitor."

The cited standard, 30 C.F.R. 75.313, requires in essence that an approved methane monitor be installed on any electric face equipment and that such monitor be kept operative, properly maintained and frequently tested. According to Coleman the cited scoop was being used as a loading machine and had no methane monitor. He felt that the violation was not "significant and substantial" because the mine was new (having been developed only 60 feet underground) and there had never been any methane found therein.

In defense Greg Mullins testified that he "didn't think" the scoop was in operation. Under the circumstances this moderately serious violation is proven as charged. Since management had to authorize the use of the cited equipment it clearly knew of the violative condition. Accordingly I find the violation was the result of operator negligence.

Citation No. 2763482 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 48.6 and charges in relevant part as follows: Burl Vires . . . employed underground on the 001 section as a roof bolt operator has not received the newly employed experienced miner training." Citation No. 2763484 similarly charges that employee Blane Owens had not received the newly employed experienced miner training.

According to Inspector Coleman both employees admitted that they had not been given any training. According to Coleman employees not having received such training might not be familiar with the roof control plan, the electrical and other equipment, and the availability of emergency communications systems. He was particularly concerned that the new employees would not be trained in the spacing of roof bolts and the necessity of supplemental support, and felt that this deficiency would reasonably likely lead to serious injuries.

In defense Mullins testified that both employees had received training at previous mining jobs and that in fact they had been given training at Elk Creek. According to Mullins they were merely unable to produce the corresponding training certificates. I do not however find this testimony credible in light of the admissions by both employees that they indeed had not received the requisite training. Accordingly the violations are proven as charged. Based on the undisputed testimony of Inspector Coleman these violations were also "significant and substantial" and of high gravity.

Since Mullins clearly knew of the training requirements I find that the violations were also the result of operator negligence.

In determining the appropriate civil penalties in these cases I have also considered the testimony that the cited mine is not now in operation. According to Mullins however the mine will be reopened as soon as market conditions warrant. I have also considered that the operator is small in size, has a moderate history of violations, and that the violations were abated within the framework of the Secretary's requirements. Accordingly the following civil penalties are deemed appropriate:

Citation No. 2763732 - $400
Citation No. 2763733 - vacated
Citation No. 2763734 - $400
Citation No. 2762857 - $100
Citation No. 2762858 - $ 30
Citation No. 2762859 - $ 20
Citation No. 2762860 - $100
Citation No. 2763482 - $200
Citation No. 2763484 - $200
Citation No. 2763639 - $400

ORDER

The Elk Creek Coal Corporation is hereby directed to pay civil penalties of $1,850 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge