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

RUSHTON MINING COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. PENN 86-100-R Order No. 2692910; 2/7/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 86-167 A.C. No. 36-00856-03560
v.	Rushton Mine
RUSHTON MINING COMPANY, RESPONDENT	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor (Secretary); Joseph T. Kosek, Jr., Esq., Ebensburg, Pennsylvania, for Rushton Mining Company (Rushton).

DECISION

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton is contesting an order of withdrawal issued February 7, 1986, under section 104(d)(2) of the Federal Mine Safety and Health Act (the Act) charging a violation of Rushton's approved roof control plan. In the civil penalty proceeding, the Secretary seeks a penalty for the violation charged in the order. Because both proceedings involve the same order and the violation charged in the order, they were consolidated for the purposes of hearing and decision. Pursuant to notice, the case was heard in State College, Pennsylvania, on November 20, 1986. Donald J. Klemick testified on behalf of the Secretary. Raymond G. Roeder, William Phillip Southard, Lemuel Hollen, Jr., Donald Lee Baker, and Andrew John Dunlap testified on behalf of

Rushton. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, in making the following decision.

FINDINGS OF FACT

PRELIMINARY FINDINGS

Rushton is the owner and operator of an underground bituminous coal mine in Centre County, Pennsylvania, known as the Rushton Mine. Rushton is a "moderate-to-a-large size operator." In the two years prior to the violation we are concerned with here, the subject mine had 293 paid violations, 19 of which were violations of the roof control plan. This history is not such that penalties otherwise appropriate should be increased because of it. The violation involved here was abated in good faith.

THE 104(d) ORDER

On February 7, 1986, Federal Mine Inspector Donald Klemick arrived at the subject mine at about 7:45 a.m., to perform a regular ("AAA") inspection. When he arrived at the mine, he was informed by Rushton officials that an unintentional roof fall had occurred at about 5:10 a.m. in the HÄButt section. Klemick notified his supervisor by telephone and was instructed to conduct a noninjury accident ("AFC") investigation. Inspector Klemick briefly talked on the surface to some members of the crew including the operator of the continuous miner which had been struck by the fall. He then proceeded underground to the HÄButt section to continue the investigation. He determined that the pillar between entries oneand two had been entirely mined through and one lift had been taken from the pillar between entries two and three when the roof fall occurred, and partially covered the continuous miner. Breaker posts were not set in the crosscut between entries two and three. Inspector Klemick determined that this constituted an unwarrantable failure violation of the approved roof control plan and issued a withdrawal order at 10:20 a.m. under section 104(d)(2) of the Act.

ROOF CONTROL PLAN

Drawing No. 8 of the Plan shows the sequence of pillaring when bolting is required. "B" option on the Drawing was being followed by Rushton here. Following this option, two pillars can be mined by taking Cut "A" from one, "B" from the second, "C" from the first and "D" from the second. The pillars are to be mined from separate entries and not from the crosscut, since breaker posts are required in the crosscut between the two entries.

Safety Precaution 37 of the Plan requires that a minimum of two rows of breaker posts be installed on not more than 4 foot centers across each opening leading to pillared areas, "and such posts shall be installed before production from the split to be protected is started. Such posts shall be installed between the lift being started and the expected breakline . . . " Safety precaution 46 of the Plan provides that the width of a roadway leading from the solid pillars to a final stumpshall not exceed 14 feet. At least two rows of posts must be set on each side of the roadway, and only one open roadway leading to a final pushout stump is permitted.

PRIOR INSPECTIONS

The method of pillar mining cited here (mining two pillars from a single roadway) had been followed by Rushton for more than one and a half years. Rushton had never been cited by MSHA previously for this procedure.

The entire mine with the exception of the WÄ4 section had been regularly inspected by MSHA since the previous section 104(d) order with no similar violations being cited. There were seven days in November and December 1985, when MSHA inspectors were in the WÄ4 section. These inspections were apparently conducted by specialists and not as part of a regular inspection.

ISSUES

1. Did Rushton violate its approved roof control plan by mining two pillars from a single roadway?

2. If so, would the alternative procedure result in a diminution of safety to the miners?

3. If a violation is established, was it properly cited in an order issued under section 104(d)?

   a. Was it issued as a result of an investigation rather than an inspection?

   b. Is the Secretary precluded from asserting its position on this issue by collateral estoppel?

   c. Does the evidence show an intervening clean inspection?

4. If a violation is established, was it caused by Rushton's unwarrantable failure to comply?

5. If a violation is established, was it significant and substantial?

6. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

Rushton concedes that it was not complying with the provisions of the roof control plan set out in Option "B" of Drawing No. 8, but argues that the double row of posts in the drawing was not intended to define "where the timbers were going to be, but the point at which they would end." (Tr. 102.) Whatever Rushton's intention, it seems clear to me that the drawing contemplates mining the two pillars from separate entries in alternate cuts, and not from the crosscut. If the breaker posts were installed in accordance with the drawing it would not be possible to mine the two pillars from the crosscut. Neither safety precaution No. 37 nor safety precaution No. 46 is inconsistent with this interpretation of Drawing No. 8. On the contrary, safety precaution 37 requires two rows of breaker posts "across each opening leading to pillared areas, and such posts shall be installed before production from the split to be protected is started." I would interpret this to prohibit mining two pillars from a single roadway which would require the continuous miner to pass an opening in a pillar. I conclude that the mining method followed by Rushton and cited here was violative of the approved roof control plan.

DIMINUTION OF SAFETY DEFENSE

Rushton argues that compliance with the Inspector's interpretation of the roof control plan would result in a diminution of safety for the miners involved. Both the section foreman and the miner operator testified that it would be less safe to approach the pillar from the entry than it was from the crosscut. The miner operator stated that his vision was better approaching from the crosscut. Rushton did not, however, rebut the Inspector's testimony that the miner approaching from the crosscut would be passing an opening in the second pillar, where the roof is weakened, to take the final cut in the first pillar. In the inspector's opinion, this practice poses a serioius hazard to the miner operator. I accept the inspector's judgment on this question, and conclude that this hazard outweighs any hazard occasioned by approaching each pillar from the entry. I conclude that Respondent has failed to establish a diminution of safety defense.

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INVESTIGATION/INSPECTION

COLLATERAL ESTOPPELÄISSUE PRECLUSION

Rushton asserts that the section 104(d)(2) order was improperly issued because it resulted from an investigation rather than an inspection. It further asserts that this issue has been previously litigated by the parties and determined by a Commission administrative law judge in Greenwich Collieries v. Secretary, 8 FMSHRC 1105. In Greenwich, Judge Maurer granted a partial summary judgment to the operator on the ground that the contested 104(d)(1) orders were issued following an accident investigation, and did not result from an inspection. The case is presently before the Commission on interlocutory appeal by the Secretary. Although counsel has stated that Rushton and Greenwich are operating entities of the Pennsylvania Mines Corporation, there is little or no evidence in the record from which I could determine if they are identical parties for the purpose of collateral estoppel. More importantly the facts in the two cases are significantly different: In Greenwich, the contested orders were issued on March 29, 1985, following an investigation of a mine explosion which occurred on February 16, 1984. The underground portion of the investigation began on February 25, 1984, and was concluded on April 5, 1984. Sworn statements were taken from March 27, 1984, until April 27, 1984. The final investigation report was issued September 6, 1985. In the present case the contested order was issued on the day the alleged violation occurred following the inspector's visit to the area where the violation occurred. As my analysis will show hereafter, these factual differences may be decisive. Therefore, whether or not Greenwich and Rushton are identical parties, doctrine of issue preclusion does not apply here.

INVESTIGATION

Rushton argues that the issuance of a section 104(d)(2) order charging an unwarrantable failure violation is improper when it results from an investigation rather than an inspection. Seven decisions or orders of Commission judges so held. Four of the cases are pending on appeal before the review Commission. The other cases were apparently settled.

THE MINE ACT

Section 104(a) of the Mine Act provides in part:

> If, upon inspection or investigation, the Secretary believes that an operator has violated this Act, or any mandatory standard, he shall, with

reasonable promptness, issue a citation to the operator. [Emphasis added]

Section 104(b) provides for the issuance of a withdrawal order "if, upon any follow-up inspection," an authorized representative of the Secretary finds that the operator failed to abate a citation issued under section 104(a).

Section 104(d)(1) of the Mine Act provides in part:

> If, upon any inspection of a mine, an authorized representative of the Secretary finds that there has been a violation, and if he also finds that such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure to comply, he shall include such finding in any citation given to the operator If, during the same inspection or any subsequent inspection of such mine within 90 days an authorized representative finds another violation and finds such violation to be also caused by an unwarrantable failure to comply, he shall forthwith issue an order7" [Emphasis added]

Section 104(d)(2) provides in part:

> If a withdrawal order has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative who finds upon any subsequent inspection the existence of violations similar to those that resulted in the issuance of a withdrawal order under paragraph (1) until such time as an inspection discloses no similar violations. [Emphasis added]

Section 104(e) involving a pattern of violations refers to inspection. Section 104(g)(1) providing for orders withdrawing miners who have not received the requisite safety training who are discovered "upon any inspection or investigation pursuant to section 103 of this Act." Section 103 requires the Secretary to make frequent inspections and investigations of mines, to investigate accidents, to inspect at the request of representatives of miners or of miners.

Section 107(a) provides that "[i]f, upon any inspection or investigation an authorized representative finds an imminent danger he] shall issue an order [of withdrawal]"

THE COAL ACT

Section 104(a) of the Coal Act provides for the issuance of a withdrawal order "if, upon any inspection of a coal mine," an imminent danger is found.

Section 104(b) of the Coal Act corresponds to Section 104(a) of the Mine Act, but it provides for issuance of notices of violation (rather than citations) "if, upon any inspection of a coal mine," a violation is found. Section 104(c)(1) of the Coal Act corresponds to section 104(d)(1) of the Mine Act and is virtually identical to it. Similarly, section 104(c)(2) of the Coal Act is virtually identical to section 104(d)(2) of the Mine Act. The Secretary cites two cases under the coal act for the proposition that unwarrantable failure notices and orders were upheld in cases where the inspector did not observe the violation. Rushton Mining Co., 6 IBMA 329 (1976) and Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976). However, the Rushton case was a penalty case and Valley Camp case a compensation proceeding. In neither case was the order itself directly challenged by the mine operator.

Neither the Mine Act nor the Coal Act defines "inspection" or "investigation." Nor can I determine any basis in the language of either Act for concluding that they were intended to mean essentially the same thing or that a variance in meaning was intended.

The Coal Act uses the term investigation (and the terms "inspections and investigations") in section 103. Investigation seems to be used with reference to obtaining information relating to health and safety conditions, and determining the causes of accidents and illnesses in mines. Section 104 which provides for issuance of notices of violation (citations under the Mine Act) and closure orders for imminent danger and unwarrantable failure to comply uses only the term inspection. However, it is clear that under the Coal Act, notices and orders could be issued without the inspector actually observing the cited condition or conduct. Sewell Coal Company, 2 IBMA 80 (1975); Rushton Mining Company, 6 IBMA 329 (1976); Peabody Coal Company, 1 FMSHRC 1785 (1979).

The 1977 Act uses the terms "inspection or investigation" in referring to citations (section 104(a)) and imminent danger withdrawal orders (107(a)). It uses only the term "inspection" in referring to 104(b) closure orders for failure to abate a citation, and in referring to 104(d) citations and orders. Judge Steffey in Westmoreland Coal Company, discussed hereafter, contends that the Mine Act inserted the term investigation in

104(a) and 107(a), because such citations and orders could be issued based upon an inspector's belief that a violation occurred; it did not insert the term in 104(d) which required citations and orders to be based on findings.

However, the legislative history of the Mine Act indicates that Congress did not intend to change the unwarrantable failure provisions of the Coal Act: after referring to certain decisions of the Board of Mine Operations Appeals, the Senate Committee Report in discussing unwarrantable failure closure orders states:

> These decisions have considerably restored the unwarrantable failure closure order as an effective and viable enforcement sanction, and it is for that reason that S. 717 retains this sanction in essentially the same form

S.Rep. No. 95Ä181, 95th Cong., 1st Sess., 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978).

The "findings" required in a 104(d) citation or order (unwarrantable failure; significant and substantial) by their nature seem not susceptible to inspector observation. In most cases they must be based upon circumstances, prior history, knowledge of the operator's management personnel, etc. For example, an the ispector ordinarily cannot determine whether a violation was caused by willful intent or a serious lack of reasonable care merely by observing the violation itself.

It may be helpful to briefly review the administrative law judge decisions which concluded that it was improper for MSHA to issue a section 104(d) order on the basis of an investigation. The first of these decisions was issued by Judge Steffey in Westmoreland Coal Company, Docket No. WEVA 82Ä340ÄR, et. al., Order Granting in Part Motion for Summary Decision (May 4, 1983). The case before Judge Steffey involved thirteen section 104(d)(2) orders issued July 15, 1982, based on an investigation conducted in December 1980, which followed a mine explosion which occurred November 7, 1980. Judge Steffey concluded on the basis of his analysis of the legislative history of the 1969 Act that an inspection was thought to be capable of being conducted in a single day, and an investigation could take weeks or months. He thought it significant that the 1977 Mine Act permitted a citation or an imminent danger closure order to be issued "upon inspection or investigation," whereas the Coal Act requirement that unwarrantable failure orders be issued "upon any inspection" was continued in the Mine Act. Judge Steffey stated that his review of the legislative history convinced him "that Congress

did not intend for unwarrantable failure provisions of section 104(d) to be based on lengthy investigations" or upon "a belief" that a violation occurred. The orders before him were based not "upon an inspection but upon sworn statements taken during an accident investigation made 19 months prior to the time the orders were issued." Judge Steffey's order vacating the withdrawal orders was based on the facts that they resulted from subsequent investigations and not from an inspection and that they were not issued "promptly" as required by section 104(d)(2).

A similar issue was considered by Judge Lasher in Emery Mining Company v. Secretary, 7 FMSHRC 1908 (1985). There the contested order was issued April 17, 1985, five days after the alleged violation occurred, and was based on statements made by miners to the inspector. The violative condition was not observed by the inspector. Judge Lasher agreed with Judge Steffey and concluded that "the Act does not permit a section 104(d)(2) order to be based on an investigation but the order must be based on and it must have been a product of an inspection of the site." Southwestern Portland Cement Company, et. al. v. Secretary, 7 FMSHRC 2283 (1985) involved citations and orders issued on April 3, 1985, under Section 104(d) for alleged violations occurring on January 10, 1985. The citations and orders resulted from an investigation which followed employee complaints on February 7, 1985. Judge Morris held that the Act does not permit a section 104(d) order to be based on an investigation. "Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d) order may not be issued." In Nacco Mining Company v. Secretary, et. al., 8 FMSHRC 59 (1986), Chief Judge Merlin, following the decisions above referred to, held that a section 104(d)(1) citation was improperly issued following an investigation of a section 103(g)(1) complaint. The citation was dated June 5, 1985, and alleged a violation occurring May 30, 1985, consisting of a miner operator going inby permanent roof supports. Emerald Mines Corporation v. Secretary, 8 FMSHRC 324 (1986), also involved a section 104(d)(1) citation which was issued following a section 103(g)(1) investigation. The alleged violation occurred on July 29, 1985; the section 103(g) complaint was received on July 30, 1986. The investigation began July 31, and continued through August 1. The citation was written on August 8, 1985, as a section 104(a) citation and modified on August 23, 1985, to a section 104(d)(1) citation. Judge Melick held that these facts established that the section 104(d)(1) citation was not based upon an inspection of the mine but upon an investigation through interviews and examination of records. He therefore held it improper, following the other administrative law judge decisions. Finally, Judge Maurer in Greenwich Collieries v. Secretary, 8 FMSHRC 1105, held invalid section 104(d)(1) orders issued on

March 29, 1985, following an investigation of a mine explosion which occurred on February 16, 1984.

All of the above cases involve orders and citations issued days, weeks, or months after the alleged violations occurred. The orders and citations were based (at least in major part) on interviews of miners conducted by the inspector and not upon the inspector's observing the site of the violation. In the case before me, the Inspector saw evidence of the practice which he believed was violative of the roof control plan. Joint Exhibit 1 shows what he saw: the miner is approaching the pillar between No. 1 and No. 2 entries from the crosscut in front of the pillar between No. 2 and No. 3 entries from which a cut had been taken. Breaker posts had not been set in the crosscut. The fact that the inspector was directed, after he arrived at the mine, to conduct an "investigation" of the roof fall seems irrelevant to me. Although he obviously did not witness the violation when it occurred, he saw physical evidence of the violation which was cited. Therefore, whether the inspector was in the mine conducting an investigation or an inspection, he found the violation "upon [an] inspection" of the mine. This case is distinguishable from each of the above cases cited. Whether a 104(d) citation or order can be issued when evidence of the violation is not observed by the inspector is not a question presented here.

I conclude that it was not improper under the facts of this case, to issue a section 104(d)(1) order on the basis that it resulted from an investigation rather than an inspection.

INTERVENING CLEAN INSPECTION

The Secretary must establish that a "clean inspection" has not occurred between the underlying section 104(d)(1) order and the contested section 104(d)(2) order. Kitt Energy Corporation, 6 FMSHRC 1596 (1984), aff'd sub nom. UMWA v. FMSHRC, 768 F.2d 1477 (1985). The evidence in this case shows that all areas of the mine received a clean regular inspection except the WÄ4 section. However, the evidence further shows that inspectors were in the WÄ4 section, an inactive section, on seven occasions conducting technical inspections. Whether they inspected it "for all hazards during the time period in question," UMWA v. Kitt Energy, supra, at p. 1480, is not clear from the record. Since the burden is on the Secretary, I conclude he has not established that there was no intervening clean inspection.

UNWARRANTABLE FAILURE

Although I have concluded that the contested order was not improper because it followed an investigation of an unintentional

roof fall, I still must determine whether the evidence establishes that the violation (whether properly charged in an order or a citation) was caused by Rushton's unwarrantable failure to comply with the mandatory standard. The Commission has held that an unwarrantable failure to comply may be established by a showing that the violation resulted from indifference, willful intent, or a serious lack of reasonable care. United States Steel Corporation, 6 FMSHRC 1423 (1984).

Rushton's witnesses (including the section foreman and members of the crew involved) testified that in their opinion the cited practice was not violative of the roof control plan, and was, in fact, safer than the alternative. There was also some general testimony that other MSHA inspectors had observed this practice in the past without citing it. The practice of taking two pillars from a single roadway, however, was only followed when mining the first two pillars in a row. Other testimony indicated that it was done between 25 and 40 percent of the time. I cannot conclude from this testimony that other MSHA inspectors approved or condoned the practice. I am of the opinion that the practice was a clear violation of Drawing No. 8 of the approved roof control plan. Rushton should have been aware of that. If Rushton felt, as it apparently did and does, that some other method was safer or otherwise preferable, it should have sought to modify the plan. It did not seek to do so. I conclude that the violation resulted from a serious lack of reasonable care, and was therefore properly charged as an unwarrantable failure violation.

SIGNIFICANT AND SUBSTANTIAL

The cited practice required the continuous miner to pass an open or mined area in the pillar between entries 2 and 3 to take the final cut in the pillar between entries 1 and 2. This exposes the miner operator to a weakened roof area. Whether the violation contributed to the roof fall which occurred here or not (the evidence is unclear), the violation contributed to a hazard (weakened roof, potential fall). There was a reasonable likelihood that the hazard contributed to would result in a serious injury. See Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). Therefore, the violation was significant and substantial. The fact that an injury did not occur here is hardly evidence that the violative practice did not contribute to a hazard likely to result in injury.

PENALTY

The violation was serious. It resulted from Rushton's negligence. I have previously found that Rushton is a moderate-to-large operator, and has a favorable history of prior

violations. The violation here was abated timely and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $750.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2692910 is MODIFIED to a citation under section 104(d)(1) of the Act charging a significant and substantial violation of 30 C.F.R. 75.200 caused by Rushton's unwarrantable failure to comply. As modified, the citation is AFFIRMED. The contest is thus GRANTED IN PART and DENIED IN PART.

2. Rushton shall within 30 days of the date of this decision pay the sum of $750 as a civil penalty for the violation found herein.

3. Upon payment of the civil penalty, these proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge