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GREENWICH COLLIERIES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GREENWICH COLLIERIES, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 87-62-R Order No. 2691006; 11/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 87-63-R Order No. 2691007; 11/26/86 Docket No. PENN 87-64-R Order No. 2691008; 11/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 87-109 A.C. No. 36-02405-03664
v.	Greenwich No. 1 Mine
ROCHESTER & PITTSBURGH COAL COMPANY, RESPONDENT	

DECISION

Appearances: Joseph Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor; Joseph Yuhas, Esq., and Joseph Kosek, Jr., Esq. Ebensburg, Pennsylvania for Greenwich Collieries and Rochester and Pittsburgh Coal Company.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act", to challenge three withdrawal orders issued by the Secretary of Labor under Section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violations alleged therein.

At hearing the Secretary filed a Motion for an Order Approving Settlement with respect to two of the orders at issue, Order Nos. 2691006 and 2691008, proposing a reduction in penalties from $1,500.00 to $1,200.00. I have considered the representations and documentation submitted in connection with

the motion and I conclude that the profferred settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion is accordingly granted. In light of the settlement the mine operator requested to withdraw its contests of the same orders. The request is granted and Contest Proceedings Docket Nos. PENN 87Ä62ÄR and PENN 87Ä64-R are dismissed.

The remaining order at issue, No. 2691007, charges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202 and states as follows:

> "Loose not adequately supported roof was present in the belt entry in the D8Ä1 active working section 50 ft. outby spad 12106. A cutter extended from the LÄ1 entry through the cross cut and across the belt entry. The roof in the belt entry was broke [sic] and loose some of which previously fell out. The roof in the LÄ1 entry was caving. Torque tests of the bolts in the belt entry indicated that some had bled off and some were loading up. The area was bolted with four foot conventional bolts. This area was pre-shifted by James Hartzfeld on the 12:01 to 8:00 a.m. shift."

The cited standard requires that "loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The evidence shows that Samuel Brunatti an inspector for the Federal Mine Safety and Health Administration (MSHA), was inspecting the D8Ä1 section of the subject mine in the early morning of November 26, 1986, when he discovered that some roof in the area of the LÄ1 entry had fallen from a "cutter". (See Exhibit No. 1). As described by Brunatti a "cutter" is a visual break in the roof. In this case the "cutter" passed from the roof of the LÄ1 entry through a crosscut and across the roof of the belt entry. Some rock had fallen out of the cutter in the belt entry. In Brunatti's presence the union escort then "torque tested" approximately ten of the roof bolts around the "cutter" in the belt entry. As he reported to Brunatti some of the bolts had "bled off" and were taking no pressure at all while others were "overloaded". Brunatti observed that the roof had also broken off from the plates around 3 or 4 of these suspect bolts.

Donald Sewalish, the day shift section foreman on the D8Ä1 section on November 26, also observed these roof conditions at the time of the inspection. He agreed that the roof had indeed caved in the LÄ1 entry, that rock had fallen from the roof of the belt entry and that additional roof support was needed in the belt entry. Sewalish directed his crew to set supplemental posts to support the roof around the "cutter" in the belt entry.

Within the framework of this essentially undisputed evidence it is clear that the violation is proven as charged. It is undisputed that loose and unsupported roof was found hanging in the "cutter" in the belt entry and a significant number of roof bolts were not providing any support in the area. The testimony of Inspector Brunatti that fatal injuries were also likely for workers passing beneath the unsupported "cutter" is also essentially undisputed. Brunatti observed that the cited area was in a retreat mining section thereby placing additional stress and pressure on the subject roof. Brunatti also observed that the mobile bridge operator would be expected to travel beneath the danger area during the course of his workshift. Within this framework I find that the violation was indeed of high gravity and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I do not however find that the Secretary has met his burden of proving that the violation was the result of the "unwarrantable failure" of the operator to comply with the cited mandatory standard. Ziegler Coal Corporation, 7 IBMA 280 (1977); United States Steel Corporation, 6 FMSHRC 1423 (1984). Inspector Brunatti in support of his finding of "unwarrantable failure" relied upon unwritten hearsay recollections of a statement by a miner of uncertain identity to the effect that the cited "cutter" had been "working" the day before. Brunatti also relied on his recollection of the absence of roof material from the "cutter" in the belt entry leading to the conclusion that debris had previously been removed. Brunatti concluded that the materials must have been removed on a prior shift because the belt was not operating at the time of his inspection and other unidentified miners reported that they had not loaded any rock material on that shift. Thus, according to Brunatti, the operator must have been aware of the bad roof at least since the previous shift.

On the other hand I find the testimony of Frederick Bender, a union employee who had worked on the preceeding shift (the midnight to 8:00 a.m. or third shift) in the D8Ä1 section under James Hartzfeld to be particularly credible. Bender saw no evidence that the "cutter" had been working during this shift and testified that the condition of the "cutter" had not changed since the 24th. Bender found that the roof around the "cutter" had been solid when he checked it at the beginning of his shift. Bender further testified that when he left D8Ä1 section around 7:15 a.m. on the 26th the roof was neither loose nor working.

James Hartzfeld, the section foreman on that shift, testified that he performed an on-shift examination on November 26th, covering the area of the "cutter" and found conditions to be "normal". Hartzfeld further testified that no one on his crew

reported any dangerous conditions in the area. Finally Hartzfeld testified that he completed a pre-shift examination between 5:00 a.m. and 7:00 a.m. on November 26th and during this exam had passed through the cross-cut in which the "cutter" existed. He did not find any abnormal conditions at that time.

Donald Sewalish was, as previously noted, the D8Ä1 section foreman on the 8:00 a.m. Ä 4:00 p.m. day shift. He had not yet completed his pre-shift examination of the face areas when he met Inspector Brunatti near the "cutter" where some rock had fallen. Brunatti had not yet examined the area in LÄ1 entry where the roof had caved. He and Brunatti then discovered that problem together. Sewalish was in the same area on November 25th performing both a pre-shift and on-shift examination and found no unusual roof problems. Moreover none of his work crew complained about roof conditions that day.

Within this framework of evidence I am constrained to find that the roof fall in the belt entry at the location of the "cutter" had occurred sometime after the preshift examination performed at the end of the third shift but before the commencement of the day shift and the discovery of the fall by Brunatti. Under these circumstances I cannot attribute significant negligence or determine that the violation was due to the "unwarrantable failure" of the operator to comply with the standard. Accordingly the order at bar must be modified to a citation under Section 104(a) of the Act.

In determining the appropriate penalty in this case I have also considered that the operator is of moderate size and has a significant history of violations. I also observe that the violation was abated within the limits prescribed by the Secretary.

ORDER

Order No. 2691006 is affirmed with a civil penalty of $700. Order No. 2691008 is affirmed with a civil penalty of $500. Order No. 2691007 is modified to a "significant and substantial" citation under section 104(a) of the Act with a civil penalty of $200. The civil penalties are to be paid within 30 days of the date of this decision. Contest Proceedings Docket Nos. PENN 87Ä62ÄR and PENN 87Ä64-R are dismissed. Docket No. PENN 87-63-R is granted to the extent that Order No. 2691007 is modified to a "significant and substantial" citation under Section 104(a) of the Act.

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Gary Melick
Administrative Law Judge
(703) 756Ä6261