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SOL (MSHA) V. GREEN RIVER COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-34 A.C. No. 15-13469-03580
v.	Docket No. KENT 86-143 A.C. No. 15-13469-03567
GREEN RIVER COAL COMPANY, INC., RESPONDENT	Green River No. 9 Mine
GREEN RIVER COAL COMPANY, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. KENT 86-150-R Citation No. 2216772; 8/20/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. KENT 86-151-R Citation No. 2216773; 8/20/86 Green River No. 9 Mine

DECISION

Appearances: Flem Gordon, Esq., Gordon and Gordon, P.S.C., Owensboro, Kentucky for Green River Coal Company, Inc.; Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor.

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. 801 et. seq., the "Act", to challenge citations and withdrawal orders issued to Green River Coal Company, Inc. (Green River) by the Secretary of Labor and for review of civil penalties proposed by the Secretary for the violations alleged therein.

Citation No. 2216776, issued pursuant to section 104(a) of the Act, charges a violation of the standard at 30 C.F.R. 75.200 and alleges as follows:

> The roof in the No. 1 entry cut-through at Spad No. 3600 was not supported and persons had been traveling through this area. This citation is issued as part of a 107(a) order therefore no abatement time is needed.

The cited standard provides in relevant part that "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".

Inspector James Franks of the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at the No. 9 Mine on August 26, 1986, with this colleague, Inspector Larry Cunningham, when he discovered in the intake escapeway to the No. 1 Unit an area of unsupported roof in a cut-through. The cut-through area, was 10Äfeet wide and 15 to 18 feet long and was totally without roof support. Franks opined that when coal had been loaded-out from the subject area the scoop or loader had pushed piles up to the sides creating a hill across the entry. There were machine tracks on top of the pile and it was "well worn, not a one-shot deal". Based on this evidence Franks opined that miners had been regularly using the cited area as a passageway. Franks also thought there was a "strong possibility" that pumpers had been in area because there was water in the cut-through. Bill Blaylock, the union representative at the scene, also told Franks that the cut-through had been completed for more than a week and "had been reported".

Franks also testified that there was an 18 inch streamer hanging from the roof at one end of the cut-through signifying that the area was "dangered off" but there was no such warning on the other end of the cut-through. According to Franks the cited area could properly have been "dangered off" in accordance with the roof control plan thereby avoiding a violation of the cited standard, however Franks opined that in order to do so a streamer must be suspended from both ends of the dangerous unsupported area (Government Exhibit 4 page 4 paragraph 12). Franks explained that if only one end of the unsupported danger area is "dangered off" with a streamer then persons approaching from the opposite side would not be adequately warned. Franks also testified that it had been MSHA's practice for at least 15 years to require both sides of such an area to be "dangered off".

Within this framework of undisputed evidence it is clear that there was a violation of the cited standard and that the violation was "significant and substantial" and serious. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). In summary, the evidence shows that a significant area of unsupported roof existed in a cut-through area some 15 to 18 feet long. It is undisputed that miners were passing beneath this unsupported roof in spite of the placement of an 18 inch streamer signifying a dangered-off area. The violation was further aggravated by the fact that the cited area was used as an escapeway and that the roof in the area had a history of instability and falls. Indeed,

according to Franks there were several roof falls on the same unit on the very day of his inspection. I find that such an unsupported area of roof in a mine having a recent history of roof falls and with miners continuing to travel beneath that roof under the circumstances constituted a "significant and substantial" and serious violation. Mathies Coal Co., Supra.

The fact that one entrance to the "cut-through" could be entered without warning that it was "dangered-off" also supports a finding of operator negligence. In addition, the fact that miners had been traveling beneath the unsupported roof in apparent disregard of the existing warning streamer shows a lack of supervision, training and/or discipline. See Secretary v. A.H. Smith Stone Co., 5 FMSHRC 13 (1983). For this additional reason I find that the violation was the result of operator negligence.

Citation No. 2216493 issued on May 2, 1986, pursuant to section 104(d)(1) of the Act (Footnote 1) alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.200 and charges as follows:

> There is a violation of the roof control plan dated November 27, 1985, in that timbering on the No. 5 unit in the intake is 1,330 feet outby the unit belt tail and in the return it is 910 feet outby the belt tail. The plan requires timbering to be within 250 feet to the corresponding location of the tail piece (page 14).

Respondent does not dispute that the intake and return were not timbered as alleged in the citation but initially maintained that the roof control plan in effect at the time the citation was issued did not require timbering of the intake and return entries. Additional evidentiary development was permitted post-hearing by way of depositions and, at continued proceedings on January 20, 1988, the Respondent withdrew its defense and admitted the violation as alleged.

It is undisputed that the violative conditions had existed for more than two weeks and that the cited entries were subject to mandatory weekly inpections by the mine operator. The operator has withdrawn its defense and now presents no excuse or justification for its failure to have provided required timbering in more than 3,000 feet of the mine in direct contravention of the specific provisions of its own roof control plan. Under the circumstances I find the violation was the result of an inexcusable omission or failure to act of an aggravated nature and that it was therefore due to the "unwarrantable failure" of the operator to comply. See Emery Mining Corporation v. Secretary 9 FMSHRC ÄÄÄÄ, Docket No. WEST 86Ä35ÄR (December 11, 1987.

It is undisputed that a roof fall in the cited area could interrupt the ventilation at the working faces and cause a methane buildup. With the relatively high methane emissions at this mine (more than 1 million cubic feet every 24 hours) it would be reasonably likely to expect reasonably serious injuries to the underground miners. Furthermore the intake was also one of the mine escapeways and a roof fall resulting from the untimbered roof could reasonably be expected to prevent this intended use with fatal consequences. The violation was accordingly serious and "significant and substantial". Mathies Coal Co., Supra.

Section 104(d)(1) Order No. 2216772, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.316 and charges as follows:

> The intake air course for the No. 3 unit was not separated from the return air course of the No. 7 unit with

permanent stoppings (the brattice had been knocked out at this location) at Spad No. 6159 in the main north-west entry.

In the amended order the Secretary alleges that these facts constitute a violation of the operator's ventilation plan under 30 C.F.R. 75.316. In particular the Secretary maintains that the operator violated paragraph A, page two, of the ventilation plan which reads as follows:

> Permanent stopping- (concrete blocks, dry stacked and sealed on pressure side or sealed and held in place with mortar and/or block bond or equivalent shall be erected between the intake and return air courses in entries and shall be maintained to and including the third connecting cross cut outby the faces of the entries on the return side and shall be maintained to the unit tailpiece on the intake side. Mandoors shall be constructed of metal. Metal brattices may be used in face area).

MSHA Inspector James Franks testified that during a spot inspection on August 20, 1986, several miners complained that the operator was knocking out brattices and thereby affecting the intak air. Investigating the complaint, Franks walked the intake air course to the No. 3 unit and, near Spad 6159, observed that brattic had indeed been knocked out. According to Franks, the cited condition could short circuit the intake air for the No. 3 unit and the return air from the No. 7 unit could contaminate the No. 3 unit Fire and smoke on the No. 7 unit would proceed to the No. 3 unit if there were lower air pressure in the No. 3 unit.

In addition, Franks observed that the relatively high methane concentration that existed in the No. 3 unit might not be properly diluted and removed because of the cited condition. He observed that the No. 3 unit had a more serious history of methane. Franks further observed that, depending on the resistance of the air, there was a reasonable likelihood of an accident leading to serious injuries e.g. suffocation from smoke or a methane explosion or ignition. There was a history of ignitions and one mine fire at the No. 9 mine. Five or six men were performing repair/maintenance work on the No. 3 unit when the order was issued.

Franks also thought that the violation was result of high operator negligence. The brattice had admittedly been knocked out intentionally for the purpose of creating a supply road after the regular supply road had become impassible because of water and mud

Grover Fischbeck, the Green River Safety Supervisor, acknowledged that the permanent stopping blocks had been knocked out at Spad 6159 and only a curtain remained. According to Fischbeck

the supply road was impassible and it was therefore necessary to carry supplies through the No. 3 intake.

Within this framework of evidence it is clear that this violation is also proven as charged and that it was "significant and substantial" and serious. Mathies Coal Co., supra; Secretary v. Monterey Coal Company, 7 FMSHRC 996 (1985). Even assuming, arguendo, that management had initially intended for the stoppings to have been knocked-out only between shifts, it is apparent from the evidence that the condition remained while miners were working on the unit, contrary to that alleged intent. In addition, because the violative condition was intentionally created by management and not corrected before miners were exposed to the dangers, the violation was the result of inexcusable aggravated conduct constituting more than ordinary negligence and was therefore due to "unwarrantable failure". Emery Mining Corporation, Supra.

Order No. 2216773, as amended, also issued pursuant to section 104(d)(1) of the Act, also alleges a violation of the ventilation plan (Exhibit 7 page 2 paragraph A) under 30 C.F.R. 75.316 and charges that "[t]he intake air course was not separated from the return air course with permanent stoppings. Brattice had been knocked-out) on the No. 7 unit 007 main north entries at Spad No. 6509."

It is again undisputed that the permanent stopping had been knocked out at Spad 6509 as alleged. According to Inspector Franks there was no measurable movement of air at the last open crosscut in the No. 7 unit. There was also one percent methane at the face area and the unit was continuing to produce coal in the presence of Robert Carter, the face boss. Franks observed that with the ventilation short-circuited, methane concentrations could reasonably be expected to build-up with the associated risk of fire or explosion. According to Franks there was a greater likelihood for the short circuit to occur on the No. 7 unit than on the No. 3 unit although it was quite possible for the No. 3 unit to be contaminated because of air being short-circuited into the No. 3 unit. In regard to gravity and negligence both Franks and Fischbeck relied upon their testimony on these issues provided with respect to Order No. 2216772. Under the circumstances I similarly find that the violation herein was "significant and substantial", serious and due to the "unwarrantable failure" and high negligence of the operator.

In determining the appropriate civil penalties to be assessed I have also considered that the violative conditions in these cases were abated in accordance with the Secretary's directions, that the operator has a significant history of violations and that it is of moderate size.

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ORDER

Green River Coal Company, Inc., is directed to pay the following civil penalties within 30 days of the date of this decision: Docket No. KENT 86Ä143: Citation No. 2216493- $750; Docket No. KENT 87Ä34: Citation No. 2216776- $400; Order No. 2216772- $500; and Order No. 2216773- $400. The Contest Proceedings Docket Nos. KENT 86Ä150ÄR and KENT 86Ä151ÄR are denied and dismissed.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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Footnote starts here:-

~Footnote_one

1 Section 104(d)(1) of the Act provides as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.