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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 PROCEEDING Docket No. LAKE 86-35 A.C. No. 11-01845-03586
v.	
ZEIGLER COAL COMPANY, RESPONDENT	Zeigler No. 5 Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Brent L. Motchan, Esq., ViceÄPresident and General Counsel, Zeigler Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act", in which the Secretary charges the Zeigler Coal Company (Zeigler) with one violation of the mandatory standard at 30 C.F.R. 75.200. The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on March 28, 1988, at St. Louis, Missouri. Documentary exhibits and oral testimony were received from both parties.

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. 75.200 provides as follows:

75.200 Roof control programs and plans.

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each

> coal mine and the means and measures to accomplish such system. 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. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Condition or Practice

Order No. 2614140 cites a violation of 30 C.F.R. 75.200 for the following condition:

> The roof control plan approved for this mine was not being followed in unit No. 2 in the cross-cut between 3 and 4 South entries at 2550 feet. The machine operator while loading coal was 3 1/2 feet inby the last row of permanent roof support in the cross-cut. The roof control plan for this mine states that work shall not be performed inby unsupported roof. Unit 2 in South off West off 2nd main North off 1st Main West off Main North.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted:

1. On August 26, 1985, Zeigler had a roof control plan in compliance with MSHA regulations, which had been approved by MSHA.

2. During the 24 month period preceding the issuance of the instant order of withdrawal, Zeigler had a total of 38 assessed violations.

3. During the calendar year preceding the issuance of the instant order of withdrawal, the Zeigler No. 5 Mine had produced 985,638 tons of coal and the controlling entity produced 2,872,758 tons of coal.

4. Payment of the proposed assessed penalty would not affect Zeigler's ability to remain in business.

5. The Commission and the presiding administrative law judge have jurisdiction over this proceeding.

Discussion and Analysis

Inspector Jesse B. Melvin, who issued the subject order on August 26, 1985, testified on behalf of the Secretary. He has been a coal mine inspector for some 15-1/2 years, and further testified as to his qualifications, training and experience with MSHA and previously as an underground coal miner for 19 years.

While inspecting the Zeigler No. 5 Mine on August 26, 1985, Inspector Melvin deduced by his observations and a series of measurements that the operator of a continuous mining machine on an earlier shift had travelled 3 1/2 feet inby permanent roof support. He therefore concluded that a violation of 30 C.F.R. 75.200 had occurred and so issued the 104(d)(2) order at bar.

The continuous miner had been mining in the crosscut from the No. 3 entry side towards the No. 4 entry on the shift prior to the inspection. However, the continuous miner was not in the crosscut when the inspector viewed the area on August 26, 1985.

Since the mining machine was no longer in the unbolted crosscut at the time of his inspection, the inspector calculated the position of the miner operator vis-a-vis the last row of roof bolts by a series of measurements he made with the assistance of Mr. Johnson, a safety committeeman travelling in the mine with him. They observed the impression left by the front edge of the pan of the mining machine on the bottom and measured from there back to the last row of roof-bolts which was 23 1/2 feet. They then located the continuous mining machine in an adjacent area and measured it from the front of the pan to the miner operator's seat. That distance turned out to be 19 feet. Subtraction yielded the result that the miner operator on the previous shift had proceeded inby permanent roof support by approximately 3 1/2 feet.

The accuracy of the 23 1/2 foot pan-to-bolt measurement necessarily depends on the ability to see the impression of the pan on the bottom. The inspector is positive he observed the impression of the pan on the bottom. He explained that where

anything heavy sits down on something that is soft, it will leave an impression of it. Then, when it (the pan) drags back, it shows where the machine has travelled backwards. Mr. Johnson also testified that the impression of the pan was clear. He stated that after the crosscut was bolted, enabling him to get in there, he assisted Inspector Melvin with the measurement by holding his end of the tape measure at the edge of the pan impression. Mr. Dennis Collins, a former timberman at the Zeigler No. 5 Mine, further corroborated the testimony of the inspector and Johnson on this critical point. He testified that he witnessed the Melvin/Johnson measurement and also observed the tracks of the continuous mining machine pan on the bottom.

Mr. Don Kroll, currently the manager of safety and training at the Murdock Mine of the Zeigler Coal Company, testified on behalf of the respondent. On the date in question herein, he was in the safety department at the Zeigler No. 5 Mine and had accompanied the inspector that day. He testified that at that time, in the crosscut from 3 to 4, there was a 1 1/2 foot notch left on the left hand rib and a 4 1/2 foot notch along the right hand side, of a 17 foot wide crosscut. The respondent's point being that it would have been very difficult, although admittedly not impossible, to get the head of the miner through that hole in the crosscut and therefore the miner operator himself could not have penetrated so deeply as to be under unsupported roof.

Mr. Kroll also testified that he did not see any mark or track from the pan of the continuous miner on the bottom.

I make the necessary credibility finding concerning the visibility of the impression of the pan on the bottom in favor of the Secretary. Three witnesses, including the inspector, state they clearly saw it and recognized it as an impression of the miner's pan on the bottom. I also find it credible that the measurement from the front of that pan impression back to the last row of bolts was 23 or 23 1/2 feet. This was also corroborated testimony. I further find as a fact that the distance from the front of the pan of the miner back to the operator's seat on the miner was measured to be and is 19 feet. It therefore follows that I agree with the inspector and find as a fact that the miner operator was inby permanent roof support by a distance of 3 1/2 feet. I therefore conclude that the Secretary has established a violation of 30 C.F.R. 75.200, as alleged.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825.

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary . . . must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

I have already found an underlying violation of the mandatory safety standard. The safety hazard contributed to by the violation and the consequences of the same are obviously serious injury and/or death from a roof fall. The only remaining element is the reasonable likelihood that the hazard contributed to will result in an event, such as a roof fall in which someone will be seriously injured or killed. In this regard, Inspector Melvin testified that there had already been roof falls in other units close to the cited area and that in his opinion it is reasonably likely to expect miners working under unsupported roof to be seriously injured or killed in the event of a roof fall in such an area. The continuous miner had a canopy installed and the roof conditions in the crosscut were generally described as good, but I nevertheless conclude that the instant violation of the cited mandatory safety standard was significant and substantial and serious.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip., No. 88Ä1019 (D.C.Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act."

In this case, the Secretary argues that Zeigler demonstrated a moderate degree of negligence. All of the Secretary's evidence

is to that effect. The order is marked that way and the inspector testified consistent with that marking at the hearing. Therefore, even making this finding as urged by the Secretary, as I do for purposes of assessing the civil penalty, that is not sufficient to sustain an "unwarrantable failure" finding. Furthermore, there is no other evidence contained in this record that would support a finding of aggravated conduct on the part of Zeigler with respect to this violation. Accordingly, I will modify the 104(d)(2) order at bar to a citation issued under 104(a) of the Act, and affirm the significant and substantial violation of 30 C.F.R. 75.200 as such.

With regard to the civil penalty to be assessed in this case, I have throughly reviewed the record and considering the statutory criteria contained in 110(i) of the Act, conclude that an appropriate penalty for the violation found herein is $400.

ORDER

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

1. Order No. 2614140 properly charged a violation of 30 C.F.R. 75.200 and properly found that the violation was significant and substantial. However, the order improperly concluded that the violation resulted from Zeigler's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a 104(d)(2) order. Accordingly, Order No. 2614140 IS HEREBY MODIFIED to a 104(a) Citation and AFFIRMED.

2. The Zeigler Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $400 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge