

CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
DDATE:
19880722
TTEXT:

~917

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 88-8-R
Order No. 2947173; 9/9/87

Shoemaker Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-112
A.C. No. 46-01436-03713

Shoemaker Mine

DECISION

Appearances: B. Anne Gwynn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves the contest by Consol of a withdrawal order issued under section 104(d)(2) of the Federal Mine Safety and Health (Act), and a petition for a penalty by the Secretary for the safety violation alleged in the withdrawal order. Pursuant to notice the consolidated cases were heard in Wheeling, West Virginia, on June 23 and 24, 1988. Federal Mine Inspector Lyle Tipton and Robert Polanski testified on behalf of the Secretary. Lloyd Behrens, Dave Hudson and Michael Blevins testified on behalf of Consol. Counsel for both parties waived their rights to file post hearing briefs. I have considered the entire record on the basis of which I make the following decision.

FINDINGS OF FACT

1. Consol is the owner and operator of the subject mine located in Marshall County, West Virginia.

2. In 1986, the subject mine produced 2,334,000 tons of coal. Consol is a large operator.

3. There were 715 inspection days at the subject mine in the 24 month period prior to the issuance of the contested order. During that period 563 paid violations were assessed against the mine, of which 463 were termed significant and substantial. Eighty-six of these violations were of 30 C.F.R. 75.200 and two were of 30 C.F.R. 75.202. I consider this a substantial history of prior violations.

4. There was no intervening clean inspection between August 28, 1986, when withdrawal order 2828131 was issued under section 104(d)(2) of the Act, and September 9, 1987, when order 2947173 (the order contested herein) was issued.

5. Sometime during the week of August 31, 1987, a miner, Dave Tkach told Consol Safety Inspector Lloyd Behrens that the entrance into the Brit Run Pumper Shanty had some areas of unsafe roof and should be checked. This area is parallel to and close to a part of the 5 North intake escapeway. Behrens went to the area of the pumper and "couldn't find anything." He did not inform Tkach of this.

6. The fresh air escapeway is required to be inspected by the operator at least once each week. On September 9, 1987, during the midnight shift, Consol safety inspector Tom Duffy walked the 5 North fresh air escapeway. He found 23 conditions needing corrective action, all having to do with the condition of the roof. He tagged the areas needing correction. He prepared a three page report of the conditions and noted that a total of 42 posts and one crib were required to correct the conditions. Copies of his report were given to the Assistant Superintendent, Dave Hudson and to Safety Supervisor Michael Blevins, among others. The reports were made prior to the shift change at 8:00 a.m. on September 9.

7. Dave Hudson thereafter directed the Assistant shift foreman, Jack Marvin "to continue posting in the 5 North Air Courses." Two sections were then working inby this area and dependent on the escapeway.

8. Federal Mine Inspector Tipton arrived at the mine to make a regular quarterly inspection between 8:00 and 9:00 a.m. on September 9, 1987. Robert Polanski, a member of the mine safety

~919

committee, told Tipton that there were hazardous roof conditions in the intake air escapeway and that a pumper named Tkach had complained of them. For this reason Tipton proceeded to the 5 North intake air escapeway.

9. Inspector Tipton found 18 separate locations along approximately 2000 feet of the escapeway where the roof was unsupported or inadequately supported. In three of the locations, the roof was totally unsupported, and the inspection team had to leave the escapeway to an adjoining airway and double back to the escapeway beyond the unsupported area.

10. The unsupported roof resulted from the failure of the bolts to hold. Some of the bolts were dangling, others had fallen to the mine floor; some bearing plates were dislodged; some rock and cap coal had fallen to the mine floor. I find as facts that the conditions were essentially as found by Inspector Tipton and that there were 18 areas of unsupported or inadequately supported roof in the 5 North intake escapeway on September 9, 1987.

11. The intake air escapeway was approximately 5000 feet long. It had been roof bolted many years previously using conventional metal bolts. The area has a high velocity of air and high humidity. Both of these conditions tend to cause rapid deterioration in the mine roof and ribs. However, the roof conditions found by Inspector Tipton on September 9, 1987, were such that they could not have occurred in less than one week.

12. The conditions cited in the contested order were promptly abated after the order was issued. The work of abatement had actually commenced before the order was issued. The order was terminated at 5:22 p.m. on September 9, 1987.

ISSUES

1. Did the condition found by Inspector Tipton on September 9, 1987, constitute a significant and substantial violation?

2. Did the condition result from the unwarrantable failure of Consol to comply with the mandatory standard?

3. What is the appropriate penalty for the violation cited in the order?

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine, and I have jurisdiction over the parties and the subject matter of this proceeding.

2. The condition found to exist in the 5 North intake escapeway of the subject mine by finding of fact No. 10 constitutes a violation of 30 C.F.R. 75.200. The roof was not supported or otherwise controlled adequately to protect persons from falls of the roof. The escapeway is an active underground travelway. Consol did not seriously contest the fact of violation.

3. For a violation to be of a significant and substantial nature, there must be a reasonable likelihood that the hazard contributed to will result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (1984). The hazard in the case before me is two fold: (1) a roof fall endangering miners travelling the escapeway; (2) the blockage or rendering impassable the designated escapeway. The condition of the roof here was such that a fall was reasonably likely to occur; in fact some falls had occurred. The escapeway was without any roof support in at least three areas. Any injury resulting from a roof fall would likely be serious. I conclude that the violation charged in the contested order was of a significant and substantial nature.

4. Unwarrantable failure was held by the Commission to mean "aggravated conduct, constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997 (1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). I conclude that the violation cited in the contested order was due to Consol's unwarrantable failure because (1) the condition was such that it must have existed for more than seven days prior to the order; therefore it existed when the examination of the area was made (or should have been made) on or about September 2, 1987; (2) Consol was put on notice of the "ratty" and unsafe condition of the roof in the area when the pumper Dave Tkach complained of it during the week of August 31, 1987; (3) Consol safety inspector Duffy during the midnight shift on September 9, found 23 areas in the escapeway needing corrective action. Yet there was no corrective action taken until after Inspector Tipton began his inspection of the escapeway after the beginning of the day shift. These facts in my judgment establish aggravated conduct, constituting more than ordinary negligence.

5. The condition cited was serious and was caused by Consol's aggravated conduct. Consol is a large operator with a significant history of prior violations at the subject mine. The

~921

violation was promptly abated in good faith. There is no evidence that the imposition of a penalty will affect Consol's ability to continue in business. I conclude that an appropriate penalty for the violation is \$1000.

ORDER

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

1. Order 2947173 issued September 9, 1987, is AFFIRMED, including its special findings that the violation charged was significant and substantial and resulted from Consol's unwarrantable failure to comply.
2. Consol's notice of contest of the order is DISMISSED.
3. Consol shall within 30 days of the date of this order pay a civil penalty of \$1000 for the violation found herein.

James A. Broderick
Administrative Law Judge