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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 88-348-R
Order No. 2946760; 8/12/87

Shoemaker Mine

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

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-74
A.C. No. 46-01436-03708

Shoemaker Mine

DECISION

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

Before: Judge Broderick

STATEMENT OF THE CASE

In the contest proceeding, Consol challenges the order of withdrawal issued under section 104(d)(2) of the Act on August 12, 1987, alleging an unwarrantable failure violation of 30 C.F.R. 75.200. In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. The cases were ordered consolidated for the purposes of hearing and decision in my prehearing order issued February 24, 1988. Pursuant to notice the cases were called for hearing in Wheeling, West Virginia on June 23, 1988. Lyle Tipton, Howard Snyder, and Keith Daniels testified on behalf of the Secretary. Michael Blevins, Michael Yarish, Larry Dow, Dave Hudson, and Lloyd Behrens testified on behalf of Consol. Both parties have filed post hearing briefs. I have considered the

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entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

At all times pertinent to this proceeding Consol was the owner and operator of an underground coal mine in Marshall County, West Virginia, known as the Shoemaker Mine. During the year 1986, the subject mine produced 2,334,000 tons of coal. During the twenty four months prior to the date the contested order was issued, 595 violations were assessed and paid, having been charged during 717 inspection days. Eighty six were violations of 30 C.F.R. 75.200, four were of 75.202. This means there were more than eight violations in every ten inspection days, including almost 1.3 roof control violations. I consider this a significant history of prior violations. A withdrawal order was issued under section 104(d) on August 28, 1986, and there was no intervening clean inspection between that date and the date of the order contested herein.

MAINLINE HAULAGEWAY

The mainline haulage was originally developed many years ago beginning at the River portal. The River portal is now the area from which coal is moved to the outside of the mine. The coal is transported in coal cars (normally forty five 20 ton cars) with two locomotives, one in front and one in the rear. The locomotives weigh approximately 50 tons each. Each locomotive has one operator who sits on the trolley wire side (or "tight side") of the locomotive. The locomotives are electrically powered by an overhead 250 volt D.C. uninsulated wire. On a typical day, the motors travel through the mainline haulage every 10 to 15 minutes. There is a water line and a high voltage transmission cable paralleling the trolley wire and water sumps throughout the area. The area is required to be examined before each shift or three times in a 24 hour period. There is a high velocity of air, approximately 180,000 cubic feet per minute in the mainline haulage. This causes deterioration of roof and ribs especially in the summer months. The roof was initially supported in large part by planks, through which three roof bolts were inserted. The planks were installed on five foot centers. Additional supports were installed at crosscuts only if the roof showed need for such supports. The crosscuts had previously been driven, and the coal removed. The roof had fallen on many but not all of the crosscuts. It was not Consol's practice, and there was no requirement in its roof control plan that bolts or other roof supports be installed where the crosscuts intersected the mainline haulage.

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103(g) COMPLAINT

On July 21, 1987, mainline motorman, Bill Whitlatch, reported to union safety committeeman Howard Snyder and Consol foreman, Mike Yarish, that a rock had fallen on a crib "inby the passway." Snyder and Yarish went to the area. The rock was hanging over the crib leaning toward the track. Yarish said he would have to shut down the haulage to take down the rock and he decided to have it done during the next weekend. However, when Snyder returned to work the following Monday he was told by the foreman who had worked on the weekend that the crib felt tight and he did not see any reason to take it down. Snyder reported this to Yarish. Yarish told yet another foreman to take care of it the following weekend. The following Monday, Snyder saw that the condition was not corrected. He contacted the other safety committeemen who submitted a 103(g) complaint to federal mine Inspector Tipton on August 12, 1987. The complaint requested an investigation of "bad roof conditions along main line haulage that were reported to management." In addition to the complaint related to the rock fall on the crib, on several occasions during the weeks preceding August 12, 1987, Snyder told Yarish about areas of unsupported or inadequately supported roof in the mainline haulage.

INSPECTION AND WITHDRAWAL ORDER

On August 12, 1987, Inspector Tipton came to the subject mine to perform a regular inspection. He was given the 103(g) request by Keith Daniels. He proceeded to an area of the mainline haulage from the Whittaker Portal to the River Portal, accompanied by mine foreman Larry Dow and chairman of the mine safety committee Keith Daniels. The inspector cited four areas of what he considered inadequately supported roof and issued the contested withdrawal order.

a) The first area cited by Inspector Tipton was three blocks outby the top end of the number six passway. The inspector determined that because there was an area of eight feet, four inches between cribbing supports, and no supports were installed between the trolley wire and the rib line, the roof was not adequately supported. Consol's representative who accompanied the inspector did not disagree with the inspector's findings, but was of the opinion that the area was adequately supported.

b) The next area cited was one block further outby. The crosscut had fallen in. There was cribbing in the area, but the inspector measured 12 feet between cribbing or breaker supports. Consol's representative did not disagree with the measurements

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and concluded that the inspector was not satisfied with the distance between cribs.

c) The third area cited was at a crosscut further outby. There was an area of eight feet, by seven feet on each side of a crib which was unsupported. There was also a large rock which had fallen on a crib dislodged from the roof at the edge of a crosscut which had fallen in.

d) The fourth location cited was at a crosscut two blocks inby the inby end of the number one passway. Crib supports were 12 feet apart with the unsupported roof extending into the trolley wire entry. There was a dislodged crib in the center of the opening with a large rock balanced on top of it almost directly over the high voltage transmission cable, the water line, and the trolley wire. The rock was on the edge of the crib and a failed roof bolt hung from the roof into the rock.

The inspector considered that the roof was not adequately supported in the cited areas to protect persons from roof falls. He determined that the violation was significant and substantial and was caused by the unwarrantable failure of management to comply with the standard. The condition was abated the same day by the installation of additional cribs and, in the third area, of additional roof bolts. One new crib was installed in the first location, two in the second and three in the third. In the fourth location, after the rock was removed, additional cribbing was added to the middle crib.

I find as facts that the roof conditions in the areas cited by the inspector were essentially as he described them, including the areas he measured between cribs and other roof supports. His testimony was corroborated by his contemporaneous notes and by the testimony of the union safety committee chairman Keith Daniels. The testimony of Consol's representative who accompanied the Inspector did not contradict his factual findings.

ISSUES

1. Whether the roof in the areas cited in the mainline haulageway was adequately supported to protect persons from roof falls?

2. If a violation is found, was it significant and substantial?

3. If a violation is found, was it caused by Consol's unwarrantable failure to comply?

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4. If a violation is found, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Consol was at all times subject to the provisions of the Federal Mine Safety and Health act, and I have jurisdiction over the parties and subject matter of this proceeding.

VIOLATION

There was testimony both by government witnesses and Consol witnesses concerning the spacing of the crib supports. There was some indication that the Inspector required such supports on five foot centers, and that he followed an MSHA policy which required roof supports in all crosscuts along haulageways. The order, however, charges Consol with failing to provide adequate roof support. The Inspector explained that a roof fall in a cross cut (expected) will continue across the haulageway unless cribs or other supports are placed at the edge of the crosscut. Failure to install such supports renders the haulageway roof inadequate. I concur in the inspector's analysis, and conclude that the areas of unsupported roof in the four cited area were such as to render the roof inadequately supported to protect persons from roof falls.. The two areas where rocks had fallen on dislodged cribs were obviously inadequately supported on that basis alone. I conclude that the order properly charged a violation of 30 C.F.R. 75.200.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated significant and substantial if it contributes to a safety hazard which will reasonably likely result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984). The area involved here was heavily travelled. The locomotives and coal cars cause considerable vibration. The area of unsupported roof was substantial and adjacent to crosscuts which had fallen in or were expected to fall in. A roof fall in one of the cited areas was reasonably likely, as was the fall of the large rocks poised on the cribs. All such falls would be reasonably likely to result in serious injuries. A roof fall could directly injure miners travelling the area (examiners, pumpers); it could fall on the track and cause a derailment; it could fall on a power line and result in a mine fire. The violation was properly denominated significant and substantial.

UNWARRANTABLE FAILURE

Unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2010 (1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). In this case, Consol had been notified of the rock fallen on the crib on July 21. Consol's foreman said he would have it removed on the weekend. He did not do so. He was reminded of it the following week, but still did not have it removed. A 103(g) complaint was filed with the federal inspector. With respect to the general condition of the roof in the areas cited, there is disputed testimony as to whether the condition was obvious and known to Consol. The area was examined once each shift, or three times per working day. The inspector's contemporaneous notes state that "the violations were so obvious they jumped out at you when you ride past so nobody could have examined this haulage on a daily basis and not see these crosscuts were falling out in to the track entry." Consol's witnesses testified that the roof condition in the haulageway was stable and adequately supported. However, with respect to the rock on the dislodged crib, there is no genuine dispute. Consol knew of the condition. The condition was hazardous. Consol was guilty of aggravated conduct constituting more than ordinary negligence in failing to correct the condition between July 21 and August 12, 1987. The violation was due to Consol's unwarrantable failure to comply.

CIVIL PENALTY

Consol is a large operator, with a significant history of prior violations at the subject mine. The violation was serious, and caused by Consol's aggravated negligence. It was promptly abated in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$1000.

ORDER

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

1. Order No. 2946760 issued August 12, 1987, including its findings that the violation was significant and substantial and caused by unwarrantable failure is AFFIRMED. The Notice of Contest is DISMISSED.

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2. Consol shall within 30 days of the date of this order pay a civil penalty in the amount of \$1000 for the violation found.

James A. Broderick
Administrative Law Judge