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

GREEN RIVER COAL COMPANY, INCORPORATED, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. KENT 88-13-R Order No. 2836161; 10/19/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. KENT 87-243-R Order No. 2835472; 9/2/87
	Docket No. KENT 87-244-R Order No. 2836053; 9/10/87
	No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS
	Docket No. KENT 88-63 A.C. No. 15-13469-03635
v.	Docket No. KENT 88-92-B A.C. No. 15-13469-03643
GREEN RIVER COAL COMPANY, INCORPORATED, RESPONDENT	Docket No. KENT 88-98 A.C. No. 15-13469-03645
	Green River No. 9 Mine

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor;
Flem Gordon, Esq., Gordon & Gordon, P.S.C., Owensboro, Kentucky and B.R. Paxton, Esq., Paxton & Kusch, P.S.C., Central City, Kentucky, on the brief for Green River Coal Company, Inc.

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 by the Secretary of Labor against the Green River Coal Company, Incorporated (Green River) and for

review of civil penalties proposed by the Secretary for the related violations.

Docket No. KENT 88Ä98

Order No. 2844181, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the regulatory standard at 30 C.F.R. 75.316 and charges as follows: (Footnote 1)

> The ventilation system and methane and dust control plan was not being followed in the working section in entries left off Northwest parallel (No. 1 unit 001) in that (1) There was no perceptible movement of air reaching the end of the line curtain in No. 6 entry (used smoke to determine velocity) (2) Only 675 cubic feet of air a minute was reaching the end of the line curtain in No. 5 entry (used smoke). Methane was detected in the faces of these places. Methane content 1.4 percent. The plan requires that at least 1,200 cubic feet of air be reaching the end of line curtain in all faces except those being cut, loaded and/or drilled.

In relevant part the ventilation plan (Exhibit GÄ2) provides that "all other working faces shall have a line brattice (wing curtain) installed within 15 feet of the face with a minimum of 1,200 c.f.m. when measured at the end of the wing curtain."

It is undisputed that Inspector Louis Stanley of the Federal Mine Safety and Health Administration (MSHA) found on October 2, 1987, no perceptible air movement at the end of the line curtain at the No. 6 entry and only 675 cubic feet per minute (cfm) at the end of the line curtain at the No. 5 entry--locations where 1,200 cfm is required. 1.4 percent methane was also found in each of the cited entries and, according to Stanley this methane concentration would be expected to increase without proper ventilation. Stanley also observed that the roof bolter was expected to operate in the cited areas "fairly quickly" in the mining sequence thereby providing a potential ignition source for the methane. Under these circumstances Stanley opined that a methane explosion was "highly likely" and the ten miners working on the section would be seriously injured. Within this framework of credible evidence I conclude that the violation is proven as charged and was "significant and substantial". See Mathies Coal Company, 6 FMSHRC 1 (1984).

In order to sustain the order under section 104(d)(2) of the Act the Secretary has the burden of proving inter alia that the violation charged therein was caused by the "unwarrantable failure" of the mine operator to comply with the cited standard.fn.1 supra. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence, in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987), appeal filed January 1988 (D.C.Cir. No. 88Ä1019) In the Emery case the Commission compared ordinary negligence as

conduct that is "inadvertent" "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure, i.e. conduct that is "not justifiable" or "inexcusable". According to Inspector Stanley the violation at issue was the result of "high negligence" and, presumably "unwarrantable failure" because the section foreman "should have known" of the insufficient air and that the foreman was working in the nearby No. 3 entry. This testimony is clearly not sufficient to meet the stringent standards for unwarrantibility set forth in the Emery decision.

In addition Assistant Mine Superintendent and General Mine Manager Thomas Morris testified that after the instant order was issued he discovered that a roof fall in an entry located 20 to 25 crosscuts from the unit at issue had crushed a stopping impeding the air entering the unit. After the stopping was repaired and the roof timbered the ventilating air was then increased to the required amount. In addition, according to an out-of-court statement by Section Foreman Steve Jones, Jones had "made his faces" indicating that he had completed his on-shift examination before the order was issued. According to that statement Jones arrived on the unit at 8:30 a.m. and took an air reading at the intake at 8:45 a.m. where he found 12,150 "feet of air". According to the statement, Jones found 3,360 "feet of air" behind the wing curtain at the face of the No. 4 entry at around 9:30 that morning and 3,420 "feet" behind the wing curtain of the face at the No. 3 entry at around 9:45 that morning. The order at bar was issued at 10:00 a.m. and according to Jones' statement he learned that the intake air was lost at 9:50 a.m. This undisputed evidence further supports a finding that the violation was the result of ordinary negligence and not conduct that was "not justifiable" or "inexcusable". Accordingly, the order at bar must be modified to a citation under 104(a) of the Act.

Order No. 2844183, also issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.1306 and charges as follows: "[t]he magazine used for storage of explosives for the working section and entries left off Northwest parallel (No. 1 Unit 001) was sitting [sic] in the No. 1 entry about 20 feet from the face with two doors open and two boxes of explosives half in and half out of the magazine".

The cited standard, 30 C.F.R. 75.1306, provides in relevant part that "when supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction"

It is undisputed that the cited magazine was constructed with sliding doors from which 250 pound boxes of explosives were protruding "halfway out". The violation has accordingly been proven as charged. Inspector Stanley opined that the explosives would not likely be run into or set off because there were no ignition sources nearby nor traffic in the cited entry. The violation was therefore not of high gravity. He believed however that the violation was the result of "high negligence" and presumably "unwarrantable failure" because the section foreman "knew or should have known of the location of the explosives magazine". Again however the proof does not support the allegations.

The evidence does not show that acts of, or omissions by, the section foreman were the result of more than ordinary negligence or that they were "not justifiable" or "inexcusable". In addition, according to Assistant Safety Director Grover Fischbeck, the section foreman first inspects the faces upon arriving on the section before directing the miners to their duties. Fischbeck theorized that the foreman may have seen the magazine with its doors closed and that later the shot firer may have removed some explosives leaving other explosives halfway outside. In support of this theory Fischbeck noted that the "shooter" did in fact have explosives in his possession at the time the violation was cited. In any event it is clear that the Secretary has not met her burden of proving the high degree of negligence required to support a finding of "unwarrantable failure". The order must accordingly be vacated and modified to a citation under section 104(a) of the Act.

Order No. 2844182, also issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard 30 C.F.R. 75.304 and charges as follows:

> The on-shift examination for hazardous conditions was not adequate on the working section in entries left off Northwest parall [sic] (No. 1 unit 001) in that (1) Only 5,760 cubic feet a minute of air was present at the last stopping on the intake side of the section; (2) Methane at a concentration of 1.2 percent to 1.4 percent was detected in all six of the working faces; (3) The air volume at the end of the line curtain in two of the six working places was less than the minimum required by the ventilation system and methane and dust control plan. The working section had power on equipment and equipment was working in the face; (4) The explosive magazine for the working section was sitting in the No. 1 entry about 20 feet from the face with the doors open and two boxes of

> explosives half in and half out of the magazine. A sample of the atmosphere at the face of the No. 5 entry was taken 10 feet from the face 6 feet from the rib and 1 foot from the roof.

The cited standard, 30 C.F.R. 75.304, provides in part that "at least once during each coal producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so".

According to Inspector Stanley, the existence of the four conditions cited in the order was evidence per se that the working section was not being examined sufficiently. According to Stanley even though an onshift examination had been performed at 8:30 that morning ongoing examinations should have been made to discover any violations subsequently occurring.

While it is not disputed that the conditions existed as alleged, it is noted that the two former conditions cited in the order were not violations of any statute, regulation or policy. The latter two violations charged in the order were identical to the violations affirmed in this decision in Order Nos. 2844181 and 2844183.

While evidence of the existence of a number of violative conditions can raise an inference that a violation of the cited standard has occurred, See e.g. Secretary v. Manalapan Mining Co., 9 FMSHRC 355 (1987) and Secretary v. Peabody Coal Co., 4 FMSHRC 678 (1982), the evidence in this case does not raise such an inference. Two of the four conditions cited in the order were admittedly not violations of any regulation or statute and the remaining two conditions were found not to be the result of significant negligence. These two conditions could have arisen rapidly following the onshift examination performed by section foreman Jones between 8:30 a.m. and the time the section was energized at 9:25 a.m. Indeed the first orders citing problems in the section were issued at 10:00 a.m. There was also credible evidence that the ventilation problem may have arisen suddenly shortly after Jones' onshift examination that morning when a stopping became crushed as a result of a roof fall short-circuiting the ventilation. Under the circumstances I do not find that the Secretary has sustained her burden of proof. Accordingly, Order No. 2844182 must be vacated.

Order No. 2836279, also issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the operator's roof control plan under the regulatory standard at 30 C.F.R. 75.200 and alleges that "the

approved roof control plan was not being followed as the No. 5 entry on the No. 7 unit was 27 feet wide at the third row of roof bolts outby the face area." The operator's roof control plan provides in relevant part that "the entry width cannot exceed 20 feet maximum" (Exhibit BÄ3).

As MSHA Inspector Allan Head entered the No. 4 entry on December 4, 1987, he observed that ribs had been "rounded out". He measured the width with a 50 foot fiberglass tape and found it to be 27 feet to 23 feet wide over 7 to 10 feet linear distance. Head concluded that without additional support over this span there was the danger of slate falling on miners working in the area. Head also concluded that the violation was result of high negligence because the condition was "very obvious" and that the next cut beyond the widened area was "narrower". According to Head, rock from the roof only three inches to six inches thick falling upon a miner could cause disabling injuries. Head estimated that mining had occurred in the entry from 4:00 p.m. until 10:00 p.m. the night before his inspection and he opined therefore that the face boss should have seen the excessive width. Indeed, according to Head, even with the wing curtain on one side of the entry in place the entry was "obviously" in excess of the required 20 foot width. Head acknowledged however that the violation could have resulted from "inattentiveness".

Within this framework of evidence I find that the violation is proven as charged. The Secretary has failed however to sustain her burden of proving that the violation was "significant and substantial" or was the result of high negligence or "unwarrantable failure". Inspector Head conceded that the violation may have been the result of mere "inattentiveness". See Emery Mining Corp., supra. The order is therefore modified to a citation under Section 104(a) of the Act.

ORDER

Order No. 2844182 is vacated. Order Nos. 2844181, 2844183 and 2836279 are modified to citations under section 104(a) of the Act and Green River Coal Company, Inc., is directed to pay civil penalties of $500, $300, and $200 respectively, within 30 days of the date of this decision.

Docket No. KENT 88Ä63 and KENT 87Ä244ÄR

Order No. 2835472, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the operator's ventilation plan under the regulatory standard at 30 C.F.R 75.316 and charges as follows:

> The old No. 5 unit set up was not being ventilated properly as to keep methane from accumulating in the old dead end heading. There was 1.3 percent CH4 present at the last row of roof bolts in the left breaks between No. 6 and 5 entries. There was no perceptible movement of air at the end of the line brattice (curtin) [sic] in this heading when checked with a smoke tube. Also the block curtin [sic] between No. 6 and 5 entries the second crosscut outby the faces was down on the mine floor.

The ventilation plan provides in relevant part that "all dead-end places shall be ventilated, and when practical, crosscuts will be provided at or near the face of each entry room before the place is abandoned". (Exhibit BÄ2).

According to Inspector Head, beginning on August 31, 1987, and continuing on September 1, and on September 2, he found methane exceeding one percent in the cited area. On the latter date and when the order was issued, he discovered 1.3 percent methane and found no air movement. According to Head, methane could build-up in the cited area and should there be an ignition from a roof fall there could be an explosion or fire. The explosions or fire could extend the 200 to 300 feet to the active sections where eight workers would be exposed to burns and "broken ear drums". He observed that the mine was also known as a "gassy mine" with two-million cubic feet of methane liberated every 24 hours. He concluded therefore that it was likely to have methane build up to explosive levels.

Head concluded that the violation was the result of high negligence because the same type of violation was found for three consecutive days. On August 31, and on September 1, he had issued section 104(a) citations for the same violation. In mitigation Dave Harper testified on behalf of the operator that a ventilating curtain was found lying on the mine floor and speculated that it may have been dislodged by a scoop cleaning up the area. Such speculation can however provide but little mitigation under the circumstances of this case.

Within this framework of evidence I conclude that the violation was the result of high negligence and of the "unwarrantable failure" of the operator to comply with the cited standard. The repeated violation of the same standard at the same location for three consecutive days clearly warrants a finding that the violation was a result of conduct that was "not justifiable" and "inexcusable". See Youghgiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987). Based on the undisputed evidence of Inspector Head I also conclude that the violation was "significant and substantial". See Mathies Coal Company, supra.

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At hearing the parties agreed to a proposal for settlement of Order No. 2836053 in which Green River agreed to pay the proposed penalty of $600 in full. I have considered the documentation and representations in support of the motion and I conclude that it comports with the requirements of section 110(i) of the Act. Accordingly the motion is accepted.

ORDER

Contest proceedings Docket Nos. KENT 87Ä243ÄR and KENT 87Ä244ÄR are denied. Order No. 2835472 is affirmed. Order No. 2836053 is also affirmed and Green River Coal Company, Inc., is directed to pay civil penalties of $900 and $600, respectively within 30 days of the date of this decision.

Docket No. KENT 88Ä92ÄB

At hearing the parties move to approve a settlement agreement with respect to the two citations at issue in this proceeding, Citation Nos. 2836161 and 2836172. Green River has agreed to pay the proposed civil penalties of $900 and $800, respectively, in full. I have considered the representations and documentation submitted in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

Green River Coal Company, Inc., is hereby directed to pay civil penalties of $1,700 within 30 days of the date of this decision.

Docket No. KENT 88Ä13ÄR

Green River withdrew its contest of this proceeding at hearing in conjunction with the proposed settlement of the citation at issue in Civil Penalty Proceeding Docket No. KENT 88Ä92.

ORDER

Contest Proceeding KENT 88Ä13ÄR is dismissed.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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Footnote starts here:-

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

(1) 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 unwarrantable 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 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.

~Footnote_two

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.