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SOL (MSHA) V. GATEWAY 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 PROCEEDING Docket No. PENN 88-268 A.C. No. 36-00906-03695
v.	Gateway Mine
GATEWAY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner, Secretary of Labor (Secretary);
David Saunders, Safety Director, Gateway Coal Co., Prosperity, Pennsylvania, for Respondent (Gateway).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. 75.200 charged in an order issued under section 104(d)(2) of the Act on May 3, 1988. Gateway concedes that the violation occurred and does not contest the finding that it was significant and substantial. It does contest the finding that it was caused by Gateway's unwarrantable failure, and the amount of the proposed penalty.

Pursuant to notice, the case was heard on January 10, 1989, in Washington, Pennsylvania. Glenn Stricklin and Russell Knight testified on behalf of the Secretary. William Wilson, Stephen Strange and David Saunders testified on behalf of Gateway.

FINDINGS OF FACT

1. Gateway is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Gateway Mine. The mine produces coal which enters interstate commerce and its operation affects interstate commerce.

2. On May 3, 1988, Federal coal mine inspector Glenn Stricklin issued a section 104(d)(2) withdrawal order charging that Gateway failed to comply with its approved roof control plan in the No. 2 entry at the No. 42 crosscut, 9 butt section. This was one crosscut outby the face. The order states that the diagonal distance of a four way intersection measured 66 feet and that a clay vein was present. Supplemental supports were not installed. Respondent concedes these facts. The order was issued at 10:00 a.m.

3. The approved roof control plan for the subject mine provides that where the diagonal distance in an intersection exceeds 60 total feet, supplemental supports in the form of posts or cribs must be set.

4. As he approached the intersection, Inspector Stricklin saw an obvious clay vein which extended into the interesection. Slate was flaking from the roof at the clay vein. The inspector tested the roof by the sound and vibration method using his solid wooden walking stick. He found the roof very drummy. Russell Knight, the UMWA safety committeeman who accompanied the inspector, confirmed that the roof sounded drummy. A drummy or hollow sound is a sign of a bad roof condition. Respondent argues that because the inspector did not have a metal cap on his testing rod, the test was invalid. I reject this contention. Inspector Stricklin has been a coal mine inspector for 19 years, and worked 20 years in the mines prior to becoming an inspector. Mr. Knight has worked in the subject mine for over 12 years and has been a safety committeeman for 7 years. They certainly are able to recognize a dangerous roof condition. The record does not indicate that Respondent's representatives made any test of the roof. I find that the area of the roof near the clay vein was drummy and dangerous.

5. The clay vein was evident. Respondent was aware of it and had installed extra roof bolts and larger plates in the intersection involved in this proceeding. The excessive diagonal distance in the intersection was evident, and Respondent should have been aware of it. Respondent has frequently been cited for having excessive diagonal distance in intersections. There is no evidence that Respondent was aware of the slate flaking from the roof, but it should have been aware of it by visual observation of the area.

6. At the time of the inspection, the area was not being mined. Respondent was advancing the beltline. However, the area was a well travelled area. It is required to be inspected prior to each shift, and the section foreman normally passes the area frequently during each shift.

7. Respondent had experienced two unintentional roof falls during the development of this area--both involving clay seams.

8. Respondent abated the condition by setting four posts in the intersection, one next to the clay seam, and three on the opposite side. The condition was abated and the order terminated at 11:15 a.m.

ISSUES

1. Whether the violation of 30 C.F.R. 75.220 was caused by Respondent's unwarrantable failure to comply with the safety standard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

JURISDICTION-VIOLATION

Respondent is subject to the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

Respondent has conceded that the violation cited in the contested order occurred, and that it was significant and substantial.

UNWARRANTABLE FAILURE

The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987). The violation in Emery involved 4 roof bolts in a haulageway between crosscuts which had "popped" their bearing plates at least a week before the inspection. The Commission held that the failure of preshift or onshift examiners to detect and correct this condition was not such aggravated conduct in view of the extraordinary efforts by Emery to support the roof adequately. See also Quinland Coals, Inc., 10 FMShRC 705 and The Helen Mining Company, 10 FMSHRC 1672 (1988).

In the instant case, Gateway was aware of the clay seam and the danger it created: additional roof bolts were installed. It was aware that two unintentional roof falls had occurred in the vicinity of other clay seams. It should have been aware of the fact that the intersection in question exceeded the size which under the roof control plan would require the setting of posts or cribs. It should have been aware of the drummy condition of the

roof in the vicinity of the clay seam. It should have been aware of the flaking of slate from the roof in the vicinity of the clay seam. The violation charged here was not, as in Emery, the failure to adequately suport the roof. It was the failure to comply with a specific roof control plan requirement: when the total diagonal distance of an intersection exceeds 60 feet, posts or cribs shall be set. Gateway's failure to comply with this requirement was, in my judgment, aggravated conduct, constituting more than ordinary negligence. Gateway should have been aware of the excessive distance in the intersection. This fact, coupled with its awareness of the clay seam, the violations of the same roof control provision previously cited by MSHA, the previous roof falls, and the condition of the roof, made compliance with the requirement for setting posts imperative, even urgent. Failure to comply was aggravated conduct.

PENALTY

Gateway is a large mine producing in excess of one million tons of coal annually. It is the only mine operated by Respondent. Its history of prior violations is moderate. Its negligence with respect to the violation found is high. The violation was serious. Gateway exhibited good faith in promptly abating the violation. I conclude that $1000 is an appropriate penalty for the violation considering the criteria in section 110(i) of the Act.

ORDER

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

1. Order No. 3093167 issued May 3, 1988, is AFFIRMED including its findings that the violation was significant and substantial and was caused by Respondent's unwarrantable failure to comply with the standard.

2. Respondent shall within 30 days of the date of this order pay the sum of $1000 as a civil penalty for the violation found.

James A. Broderick
Administrative Law Judge