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

ROCHESTER & PITTSBURGH COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS Docket No. PENN 88-284-R Order No. 2888902; 7/14/88
v.	Docket No. PENN 88-285-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 2888903; 7/14/88 Greenwich Collieries No 2. Mine Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 89-72 A.C. No. 36-02404-03740
v.	Greenwich Collieries No. 2 Mine
ROCHESTER & PITTSBURGH COAL COMPANY, RESPONDENT	

DECISION

Appearances: Joseph A. Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania for Contestant/Respondent. Paul D. Inglesby, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Rochester & Pittsburgh Coal Company (R&P), has filed notices of contest challenging the issuance of Order No. 2888902 (Docket No. PENN 88-284-R) and Order No. 2888903 (Docket No. PENN 88-285-R) at its Greenwich No. 2 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $2,200 for the violations charged in the above two contested orders.

Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania on April 27, 1989. John L. Daisley testified for

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the Secretary. He was the only witness. After the Secretary rested, R&P moved that the two orders at bar be modified to citations issued under 104(a) of the Act and affirmed as such and that an appropriate civil penalty be assessed. I granted that motion on the record at the hearing. Pursuant to the Rules of Practice before this Commission, this written decision confirms the partial bench decision I rendered at the hearing as well as disposes of the remaining issues in the cases.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act; and (3) whether the violations were "significant and substantial." Additional issues include the inspector's "unwarrantable failure" findings with respect to the two contested section 104(d)(2) orders.

Stipulations

The parties have agreed to the following stipulations, which I accepted (Tr. 4-6):

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The respondent demonstrated good faith in the abatement of the orders.

6. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that:

a. The respondent company's annual production tonnage is 10,554,743;

b. And that the Greenwich Collieries No. 2 Mine's annual production tonnage is 1,195,419.

8. Greenwich No. 2 Mine was assessed 879 violations over 1,224 inspection days during the 24 months preceding the issuance of the subject order.

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

10. The respondent admits to at least a recording violation of 30 C.F.R. 75.305 in each of the cited instances.

Discussion

R&P stipulated to the fact of violation concerning both of the orders at bar, at least insofar as a recording violation is concerned. Quite candidly, the company is also of the opinion that the examinations cited in these two orders were not in fact done. However, they were not willing to stipulate to that as a fact because they were unable to determine whether the examinations were or were not done.

Section 104(d)(2) Order No. 2888902 was issued to the operator on July 14, 1988, cites a violation of 30 C.F.R. 75.305 and the condition or practice states as follows:

The required weekly examination for hazardous conditions for P9 intake, P-9 right and left returns including bleeder rooms, and the alternate escapeway from P-9 to P-20 for July 6, 1988, was recorded as being made by Joseph D. Mantini, mine examiner. However, an inspection of this area on 7-13-88 did not reveal any evidence, dates, times, and initials of the physical presence of the examiner in these areas. The last date of examination was 6-29-88-JM. The person

> making such examinations and tests shall place his initials and the date and time at the place examined.

Section 104(d)(2) order No. 2888903 was likewise issued on July 14, 1988, cites a violation of 30 C.F.R. 75.305 and alleges as follows:

> The required weekly examination for hazardous conditions for main S return from regulator to 23 La Bour pump, alternate escapeway from 23 La Bour pump to T4, BE points in T2 and T-4 intake and return entries for July 7,1988, was recorded as being made by Joseph D. Mantini, mine examiner. However, an inspection of this area on 7-14-88 did not reveal any evidence of dates, times, and initials of the physical presence of the examiner in these areas. The last date of examination of these areas was 6-30-88 J.M. The person making such examinations and tests shall place his initials and the date and time at the places examined.

Inspector Daisley testified that at the time he made his inspections of the above two cited areas, he could not find any times, dates or initials as evidence that the weekly examination for hazardous conditions was conducted for the week stated in the orders. This establishes in my mind a rebuttable presumption that the required inspections were not in fact done. This presumption is not rebutted in the record and therefore I am satisfied that the inspections were not accomplished and the Secretary has established the cited violations in both instances under consideration herein.

Furthermore, the failure to examine the cited areas for almost two weeks when some of these areas were designated as alternate excapeways and could very well have been blocked by roof falls or accumulations of water is a very serious situation. Also, there could have been a dangerous undetected accumulation of methane which is a potential hazard for a mine fire or explosion. The inspector was of the opinion that this practice he cited with regard to the failure to examine significantly and substantially compromised the health and safety of the miners. I concur and find both of these proven violations to be significant and substantial violations of the cited mandatory standard and serious. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I disagree with the Secretary, however, on the issue of unwarrantability. Mr. Mantini, a rank-and-file miner was assigned the responsibility to examine the cited portions of the mine and as I found above, he did not perform the examinations. However, Mr. Mantini did certify that he had performed the

examinations in the mine examiner's book and as the inspector testified, as far as the operator is concerned that entry would indicate that Mantini had actually performed the examinations. The mine examiner's book was falsified, apparently by Mr. Mantini, and unbeknownst to the operator.

Inspector Daisley very candidly admitted that in his opinion management was not aware of the violation and that they were, in effect, entitled to rely on the mine examiner's book. As far as management was concerned, the required examinations were done. The inspector also testified that in his opinion, excluding the intentional misconduct of Mr. Mantini, no other employee of R&P was in any manner negligent concerning this violation.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has further refined and explained this term, and concluded that it means "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 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988).

The Secretary urges that the misconduct of Mantini be imputed to the mine operator in this instance because even though Mantini is a rank-and-file miner, he was given mine examiner status by the operator, at least for the limited period of time covering "miners vacation," and essentially became the operator while performing the certified mine inspections.

In this case, Mantini's misconduct was willful and intentional. He did not perform the required examinations, he knew he did not, and yet he certified in the operator's official records that he had performed them. I have a lot of trouble with the idea that a rank-and-file employee's intentional misconduct is imputable to management as their own "aggravated conduct" when there is absolutely no evidence in the record that any member of mine management actually knew or even should have known that the examinations were not done. The inspector admitted as much. Therefore, I reject the notion that a rank-and-file miner's intentional misconduct is per se imputable to the operator simply because the operator has appointed that individual to be a mine examiner.

This case is reminiscent of that line of Commission precedent where it has been repeatedly held that an operator is liable for violations of the Act and the mandatory standards promulgated thereunder that are attributable to the "idiosyncratic and unpredictable" acts of its rank-and-file

employees. I believe this language includes intentional violations committed by its employees, and R&P is responsible therefore for the two violations at bar. However, with regard to unwarrantability findings, I believe the requisite "aggravated conduct" must be the operator's conduct, not the rank-and-file miner's. For this reason, I modified the two 104(d)(2) orders at bar to citations issued under 104(a) of the Act.

For penalty assessment purposes, it is settled that rank-and-file employee negligence is not imputable to the operator. The operator's negligence in these instances must be determined by an examination of the operator's own conduct. Secretary of Labor v. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-65 (August 1982). In this case, I find the evidence of operator negligence established in the record to be nil.

On the basis of the foregoing findings and conclusions, including the Stipulations accepted herein, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of $450 for each of the two violations found herein is appropriate and reasonable.

ORDER

It is ORDERED that Order Nos. 2888902 and 2888903 be MODIFIED to 104(a) citations.

It is further ORDERED that the operator pay $900 within 30 days from the date of this decision.

Roy J. Maurer
Administrative Law Judge