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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. KENT 89-126
A.C. No. 15-13469-03699

v.

Mine No. 9

GREEN RIVER COAL CO., INC.,
RESPONDENT

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
B. R. Paxton, Esq., Paxton & Kusch, Central City,
Kentucky, for Respondent Green River Coal Co., Inc.
(Green River).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for a violation of 30 C.F.R. 75.200 charged in a section 104(d)(2) order of withdrawal issued November 21, 1988. Pursuant to notice, the case was called for hearing in Owensboro, Kentucky, on September 12, 1989. George L. Newlin testified on behalf of the Secretary; Michael McGregor testified on behalf of Green River. The record was kept open to allow the Secretary to file a computer print out of prior violations by Green River at the subject mine. Green River contends that the history is not relevant because of a change in management of the mine. Both parties have filed posthearing briefs on this issue and I will discuss and decide that question in this decision. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

Green River is the owner and operator of an underground coal mine in Hopkins County, Kentucky, known as the Green River No. 9 Mine. The management of the mine changed in November 1988. MSHA agrees that the new management has a new attitude toward safety:

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it is aware of safety problems and is trying to correct them. Weekly safety meetings are held involving all employees.

On November 21, 1988, Federal mine inspector George Newlin was engaged in an on-going general inspection ("AAA inspection") of the subject mine. In the Northwest B return aircourses, he observed that one row (on the left side) of timbers had been knocked down and not replaced. Some of the timbers on the right side were down and the right side was covered with gob. The area was passible, but with difficulty. At least 30 days prior to November 21, the gob, resulting from rock falls, had been cleaned out of an adjacent entry and deposited in the entry in question. At the same time the timbers had been knocked down. The fireboss book had referred to the condition for seven weeks. The roof was bolted and supported and was in stable condition. The area where the timbers were down extended for a distance of 120 to 300 feet. Timbers were missing on both sides for about 50 feet, and on the left side for more than 120 feet. The entire entry was about 910 feet long.

Inspector Newlin issued a section 104(d)(2) withdrawal order alleging a violation of 30 C.F.R. 75.220 because the timber line was not continuous in the return from crosscut No. 65 to crosscut No. 52 as required in the approved roof control plan.

The approved roof control plan in effect at the mine required one return aircourse to be timbered. A double row of timbers is required, six feet apart, with five foot centers on the advance. The area is required to be travelled every seven days by the fireboss. Otherwise, miners are not normally in the entry.

Respondent has about 200 employees. It produces more than one million tons of coal annually. The history of prior violations shows that 1,074 paid violations were cited during the 24 months prior to the order involved herein, of which 139 were roof control violations. Since the new management took over about November 15, 1988, only one (d) order has been issued to Green River, the one involved here.

The order was terminated December 12, 1988, when timbers were set in the entry as required by the roof control plan. The abatement was effected promptly and in good faith.

REGULATION

30 C.F.R. 75.200 provides in part as follows:

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager,

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that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

ISSUES

1. Whether the evidence establishes a violation of 30 C.F.R. 75.220 on November 21, 1988
2. If so, whether the violation resulted from Green River's unwarrantable failure to comply with the standard?
3. If a violation is established what is the proper penalty?
 - a. In view of the change in mine management, is it proper to use the two year history of prior violations as a criterion in determining the appropriate penalty?

CONCLUSIONS OF LAW

Green River is subject to the provisions of the Federal Mine Safety and Health Act (the Act) in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence clearly establishes that Green River was not in compliance with its approved roof control plan in the Northwest B return aircourse on November 21, 1988. A substantial number of posts required by the plan were dislodged, and had been dislodged for many weeks. The inspector believed the condition was not significant and substantial because it was unlikely to result in injury: the roof was in stable condition and was adequately bolted.

However, the condition had existed for a substantial period of time and had been noted in the fireboss book for seven weeks. The company must have been aware of the condition and, until the order was issued, it made no attempt to correct it. The Commission has held that unwarrantable failure is established by a showing of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987). The circumstances here clearly point to aggravated conduct constituting more than ordinary negligence: the repeated references in the fireboss book which were ignored establish more than ordinary negligence. Green River's attempt to show that the fireboss was attempting to persuade the company to timber the adjacent entry which had a higher roof is a lame

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excuse. The order including the unwarrantable failure finding should be affirmed.

At the hearing, it was agreed that the computer printout of Green River's violation history could be offered post-hearing. Respondent objected on the ground of relevance, arguing that the change in management of the mine on November 15, 1988, renders any prior history of violations irrelevant and immaterial. Green River Coal Co., Inc., is a corporation and has been the operator of the subject mine during the entire period in question. Section 110(i) of the Act obliges me to consider "the operator's history of previous violations" as one criterion in determining an appropriate penalty. See Secretary v. Peabody Coal Co., 1 FMSHRC 28 (1979).

Although the history of prior violations is therefore a statutorily mandated criterion to be considered in fixing the amount of the penalty, the improved safety record and safety outlook of the new management should also be taken into consideration. The purpose of the civil penalty provisions of the Act is to promote safety in the mines, not to collect money for the Federal Government.

I conclude that under all the circumstances of this case an appropriate penalty is \$300.

ORDER

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

1. Order No. 3296525 issued November 21, 1988, is AFFIRMED.
2. Respondent shall, within 30 days of the date of this decision, pay the sum of \$300 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge