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SOL (MSHA) V. JIM WALTER RESOURCES
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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. SE 89-93 A. C. No. 01-01401-03748
v.	No 7 Mine
JIM WALTER RESOURCES, INCORPORATED, RESPONDENT	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
R. Stanley Morrow, Esq., Jim Walter Resources, Incorporated, Birmingham, Alabama, for Respondent.

Before: Judge Weisberger

Statement of the Case

In the proceeding, the Secretary (Petitioner), pursuant to a Petition for an Assessment of Civil Penalty, filed on May 15, 1989, seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. 75.312. Respondent filed its Answer on May 19, 1989. Pursuant to a telephone conference call with counsel for both Parties, on September 5, 1989, the matter was set for hearing on September 13, 1989, in Birmingham, Alabama. At the hearing, Don Greer testified for Petitioner and Greg Franklin testified for Respondent. Post hearing Proposed Findings of Fact and Memorandum of Law were filed on October 6, 1989. Respondent filed its Reply Brief on October 13, 1989, and Petitioner filed its Reply Brief on October 16, 1989.

Stipulations

1. Jim Walter is the owner and operator of the No. 7 Coal Mine.

2. The Commission has jurisdiction to hear this proceeding.

3. Jim Walter Resources is a large-sized operator for purposes of the Act.

4. Payment of a penalty which may result out of this litigation would not affect its ability to continue in the business.

5. The violation alleged was abated in good faith.

6. The history of violations at Respondent's No. 7 Mine is average for an operation of that size.

Findings of Facts and Discussion

The 92 longwall section, at Respondent's No. 7 Mine, is a longwall operation whereby coal is extracted by a shear which cuts the coal from the approximately 850 foot wide coal face. The shear cuts from the tailgate to the headgate (Entry No. 4). The face is ventilated by air from the adjacent No. 4 Entry and No. 3 Entry, with most of the air coming from the No. 3 Entry. In the longwall mining cycle, the working or coal face advances in an outby direction, i.e., towards the entrance.

On February 14, 1989, at approximately 12:45 a.m., the long-wall panel was inspected by Don Greer, an MSHA Inspector. At that time, he noted that the shear was cutting the working face outby crosscut A, but that the face was being ventilated by air from Entry No. 3 which passed through crosscut A to the face. He indicated that the roof in crosscut A was supported by bolts, and accordingly, it would not be a violation of the roof control plan for a miner to be in crosscut A. However, he did not enter crosscut A as he "perceived," (Tr. 38), that it was dangerous, inasmuch as a "tremendous" amount of rock and material, (Tr 39), as a result of the normal mining procedure, was being supported by shields. He indicated, essantially, that there also was a build up of rock in a gob area. This material was located approximately 20 feet to the right of a coal pillar, which abutted crosscut A inby. He indicated that he was concerned that this material had created pressure on the roof of crosscut A. He indicated that the area to the right of crosscut A was unsupported except for the shields. According to Greer, as the shields advanced outby, in the normal mining process, there would be increased pressure on the roof of crosscut A due to the normal falling of the roof.

Greer issued a section 104(a) Citation, alleging a violation of 30 C.F.R. 75.312, supra, which provides, as pertinent, that "Air that has passed through an abandoned area or area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine." Thus, in order to orevail, petitioner must establish that the air ventilating the face passed through either an "abandoned" area or one that is "unsafe for inspection."(FOOTNOTE 1)

30 C.F.R. 75.2(h) defines an abandoned area as an area that is ". . . not ventilated and examined in a manner required for working places under subpart D of this part 75." The evidence is unequivocal that crosscut A was ventilated. According to a plain reading of section 75.2(h), supra, an area is abandoned if it is not ventilated and examined. Inasmuch as the 75.2(h), supra, uses these two conditions in the conjunctive, if one condition has not been met, i.e., if the area has been ventilated, as here, it can not be considered abandoned.(FOONOTE 2)

Although Greer did not inspect the roof in crosscut A, I find that the record does not contradict his opinion, that the roof therein is subject to pressure from the falling roof as part of the normal ore mining process. Indeed Greer testified that he observed some crumbling from the pillar abutting crosscut A. Franklin also essentially agreed that the advance of the longwall extraction, which causes the roof to fall, does transmit pressure on the pillar abutting crosscut A. As such, I find based upon the testimony of Greer that crosscut A was unsafe for inspection. Accordingly, inasmuch as air passed through crosscut A on its way to the face, Respondent herein did violate 30 C.F.R. 75.312, supra.(FOOTNOTE 3)

According to Greer, as the normal longwall mining process retreats outby, there is increased pressure on crosscut A due to the build up of materials in the gob areas adjacent to it. However, although a hazard of a roof fall in crosscut A is thereby created, Petitioner has not established the manner in which the violation herein, i.e., air passing through that area on the way to the face, contributes to a hazard of the rib or roof falling in crosscut A. Greer also indicated that it is likely that there would be methane in the gob area as the seam "is a known gassy seam of coal" (Tr. 54). He testified that as the air passes

through the gob, there is a potential for it to pick up methane and transport it to the face. Greer indicated that, on the day he was present, in the normal mining process the face would have retreated another 12 to 15 feet that shift, thus increasing the likelihood of methane arriving at the face. In this connection, he indicated that the night foreman had told him that, in general, it is his policy to let the following shift, the day shift, make any ventilation changes.(FOOTNOTE 4) Greer indicated that methane reaching the face could cause an ignition or explosion, which could be initiated by problems with electrical equipment at the face, or by sparks generated by the tops of the bits of the shear. He indicated that in the event of a fire or explosion, he would expect miners present in the working section to suffer burns or fatalities in the severest of cases. However, He indicated, in cross-examination, that no gas was found in crosscut A, and that gas samples taken an hour after he issued the citation were within the legal limits. He also indicatedthat it was his "perception" that while an accident "could occur" he did not "foresee" it happening before the violation could be corrected (Tr. 60). Further, the evidence has not established that air traveling through crosscut A results in a greater likelihood of its passing through the gob area and picking up methane, as opposed to air traveling up the headgate entry and then on to the face. Hence, I conclude that it has not been established that there was a reasonable likelihood that the violation herein contributed to the hazard of fire or explosion. Accordingly, I find it has not been established that the violation herein was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC 3-4 (1984)).

In assessing a penalty herein, I adopt the stipulations of the Parties with regard to the factors set forth in section 110(i) of the Act. I further find that the violation herein was of a moderate degree of severity. The evidence herein is not very persuasive that there was a significant hazard occasioned by coursing the air through crosscut A as opposed to the hazard to one present in crosscut A occasioned by the condition of the roof and rib there. I find that Respondent herein was moderately negligent. Considering all of the above, I conclude that Respondent shall pay a penalty of $75 for the violation found herein.

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ORDER

It is hereby ORDERED that Respondent shall, within 30 days of this Decision, pay $75 as a penalty for the violation found herein. It is further ORDERED that Citation 3012364 be amended to reflect the fact that the violation therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. No argument is made by Petitioner that the area in question was inaccessible. Nor does the evidence support such a finding.

~FOOTNOTE_TWO

2. I also find that it has not been established that the area in question was not examined. Greer opined that he would not inspect crosscut A. His opinion is clearly not probative of whether in fact that area was actually examined by Respondent in the manner required for working places. Testimony from Respondent's witnesses similarly does not establish that the area was not examined. According to Greg Franklin, Respondent's ventilation engineer, he was told by Paul Phillips, a foreman, that on the date in question miners used crosscut A as a dinner hole, and that men traveled through that area. He indicated that crosscut A was to be inspected.

~FOOTNOTE_THREE

3. I reject Respondent's argument, as set forth in its Brief, that Petitioner must show that the air contained .25 percent of methane to establish a violation of section 75.312, supra. I find that the second sentence in section 75.312, supra, does not qualify or modify the first sentence. Inasmuch as the evidence establishes that the terms of the first sentence were violated, I find that Respondent was in violation of section 75.312, supra.

~FOOTNOTE_FOUR

4. I place more weight on the statement of policy, given by the foreman of the night shift, the actual shift in question, rather than the general statement of Franklin that it is policy to make ventilation changes as they are needed.