CCASE:
BETH ENERGY MINES V. SOL (MSHA)
DDATE:
19900302
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

BETH ENERGY MINES, INC., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. PENN 88-149-R Order No. 2941672; 2/4/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Livingston Portal Eighty Four Complex Mine I.D. #36-00958
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 88-197 A.C. No. 36-00958-03727
v.	Livingston Portal Eighty Four Complex
BETH ENERGY MINES, INC., RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 89-154 A.C. No. 36-00958-03767 A
v.	Livingston Portal Eighty Four Complex
SAMUEL J. KUBOVCIK, EMPLOYED BY BETH ENERGY MINES, INC., RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 89-155 A.C. No. 36-00958-03769 A
v.	Livingston Portal Eighty Four Complex
JOHN RONTO, EMPLOYED BY BETH ENERGY MINES, INC., RESPONDENT	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, RESPONDENT	CIVIL PENALTY PROCEEDING Docket No. PENN 89-156 A.C. No. 36-00958-03727
v.	Livingston Portal Eighty Four Complex
JAMES NUCCETELLI, EMPLOYED BY BETH ENERGY MINES, INC.	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Beth Energy Mines, Inc., Samuel J. Kubovcik, James Nuccetelli and John A. Ronto;
James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor.

Before: Judge Melick

Dockets No. PENN 88-149-R and PENN 88-197

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 Order No. 2941672 issued by the Secretary of Labor pursuant to section 104(d)(2) of the Act against Beth Energy Mines, Inc., (Beth Energy) and for review of civil penalties proposed by the Secretary for the violation alleged therein.1

As amended at hearing, Order No. 2941672 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.303 and charges as follows:

> Representative [sic] of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring in 20 empty cars under "I" Beams that were not straped [sic] or saddled. Then proceed to come back through area second time with motor, and rehung the danger-board. This violation occurred on January 31, 1988.

The cited standard reads in part as follows:

> If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of

> the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

At hearing the Secretary maintained that the violation occurred in this case when construction foreman John Ronto authorized the removal on January 31, 1988, of a danger sign and danger tag at the No. 53 trolley switch thereby allowing a miner to pass into the area so "dangered off". While the Secretary acknowledges that Mr. Ronto, a certified assistant mine foreman, was also a qualified mine examiner and was therefore authorized to remove such signs if he found no violation or hazard he did so unlawfully in this case because both a hazardous condition and a violation of a mandatory safety standard continued to exist at this time within the "dangered off" area.2

Summary of the Evidence

On January 30, 1988, around 2:00 or 3:00 p.m., Donald Rados, a Beth Energy Mine Examiner, discovered five unsaddled beams in the 4-butt empty track area near the No. 80 stopping. According to Rados it was the uniform practice at the subject mine to saddle beams placed in haulageways immediately after installation of beams or, at the latest, before traffic was permitted in the area. Rados observed that the roof in the cited area was in bad shape. He thought the area was particularly dangerous because it had a history of derailments and indeed he had previously reported these types of dangerous conditions in the "Fire Boss" books in the past. According to Rados derailments could occur with a locomotive pushing the cars and the cars could be pushed as much as 100 feet before the locomotive operator might notice the derailment.

Rados accordingly "dangered" the area off by placing a danger sign at the mouth of the empty track off the main haulage and by placing a danger tag on the trolley switch. According to Rados such danger signs mean that no one is to enter the "dangered" area except those "authorized by law". Rados, following company procedures, then warned the dispatcher not to send empty cars into the danger area and advised one of the "bosses" of the "dangered off" area. Rados also made a written entry in the mine examiner's book warning of the danger (See Exhibit G-3).

John Ronto was construction foreman on the 12:01 a.m. shift on January 31, 1988, with a 4-man crew. He too was a certified mine examiner. Together with his supervisor, acting shift foreman Sam Kubovcik, he learned that coal on the belt was hindering the work of a subcontractor. Kubovcik later called Ronto directing him to obtain some empty rail cars stored in the 4-Butt area to use to remove the coal from the belt. According to Ronto, Kubovcik advised him that unsaddled beams were in the 80 Stopping area and that whoever Ronto sent to obtain the empty rail cars should be so warned and should proceed with caution.

Ronto thereupon directed two locomotive operators to meet him at the 4-Butt dump area. Ronto testified that he then proceeded to the 80 Stopping, examining the roof, the beams, the legs, and the track clearance and condition. Ronto struck each leg with a hammer and checked its alignment and clearance. According to his testimony Ronto found the track to be in good shape and dry and clean. Ronto testified that he also measured between the tracks and the posts and found what he deemed to be ample clearance on both sides. Ronto then proceeded to the dump to wait for the locomotive operators.

Ronto later received a call from the locomotive operators inquiring about the danger sign. Ronto told them "everything was O.K." and that they were to bring in the empty cars. Ronto remained in the area to give directions. He estimated the speed of the locomotive and cars to be not more than one or two miles per hour. After the cars had been removed and the track mounted Fletcher returned to the area, the miners asked Ronto what to do with the danger sign. Ronto believed that he responded "let's put everything back the way we found it". According to Ronto the danger sign was replaced "possibly" over concern about the unstrapped beams. Ronto testified that he did not believe there was "considerable danger" but nevertheless left the danger sign as a caution to people who might not otherwise know of the conditions. Ronto acknowledged that he did not make any

entry in the mine examiner's book that the dangerous conditions previously reported by Mine Examiner Rados had at any time been eliminated.

MSHA Coal mine inspector Alvin Shade received a request to investigate the alleged violation on February 4, 1988, pursuant to section 103(g)(1) of the Act. Shade later interviewed witnesses and examined the subject area of the mine. The previously dangered area consisted of 5 "I" beams set on 8 inch by 8 inch posts over a 20 foot area. The beams had been strapped by the time of his examination on February 4. Shade concluded that indeed a hazard had been presented by such beams existing without strapping and that it was a "significant and substantial" violation of the cited standard. Shade believed that if any of the posts should have become dislodged by a rail car it could have caused the beam to fall. He observed that bolts were in the roof area but the roof was sagging and needed the support of the additional beams. Shade concluded that the condition could have resulted in a lost time accident.

Shade also concluded that the violation was the result of high negligence, aggravated conduct and "unwarrantable failure" for the reason that Construction Foreman Ronto replaced the danger sign upon his departure from the dangered off area. Shade believed that this act was an admission by Ronto that he knew a danger continued to exist throughout the time the empty cars were removed.

James Nuccetelli was acting chief construction foreman at the Beth Energy Eighty Four Mine on January 30 and 31, 1988. According to Nuccetelli the beams had been installed in the cited area on the 12:01 a.m. shift on Saturday, January 30, 1988, because of reports from fire bosses that the roof was getting "heavy". The beams were to be saddled on the Sunday, January 31, day shift. Nuccetelli agreed that the Beth Energy Roof Control Plan did in fact require saddling of the beams but contends that they had a "reasonable time" to accomplish this task. Nuccetelli observed that according to past practices they had been given up to 4 days to strap beams on even the main haulage area where there is more activity. According to Nuccetelli, these practices had been permitted over the years by MSHA inspectors. Nuccetelli also disagreed with Rados' conclusion that the unsaddled beams posed a danger but he, like Ronto, did not seek to overturn Rados' posting of the danger signs and reporting of hazardous conditions in the Mine Examiner's books.

On the morning of January 31st Nuccetelli purportedly warned shift foreman Kubovcik that the beams were not saddled

and told him to check the safety of the area in question before obtaining the empty cars.

Acting Shift Foreman Sam Kubovcik testified that he was called early on the shift concerning the need to remove coal from the belt. Nuccetelli told him to have Ronto inspect the 4-Butt area empty track and to remove the empty cars but since the beams had not been saddled, only if he determined the area was safe. Based upon Ronto's opinion, Kubovcik also opined that there was no hazard at that time. Kubovcik also contends that they were permitted a "reasonable time" to strap the beams.

Ronald Bizick a mine inspector for the Beth Energy Eighty Four Mine, testified that he could not recall any injuries at the mine caused by unstrapped beams falling. He also testified that he knew of MSHA inspectors who had themselves traveled beneath unsaddled beams in the main haulageway of the mine without having cited that condition.

James Gallick, Director of Safety and Environmental Health for Beth Energy, is "responsible for reviewing its roof control plans. It was Gallick's understanding that beams in the Eighty Four mine need only be strapped within a "reasonable time". He believed that a "reasonable time" meant until the next idle shift following the installation of the beams--which could be up to five days later. Gallick acknowledged however that even after the dispute in this case arose there had been no effort to amend the roof control plan to specify the time within which beams must be strapped. It was also Gallick's opinion that only "imminent dangers" need be dangered off and reported as a danger in the mine examiner's book. Although Gallick had never observed the conditions cited in this case it was his opinion that no "imminent danger" existed. Gallick also concluded that it was not reasonably likely for an accident to occur in the cited area based on his understanding that no injuries have ever occurred at Beth Energy mines as a result of a displaced beam.

In rebuttal, Alfred Paterini, a Beth Energy mine examiner for the previous 13 years, testified that it had been the practice at Beth Energy mines to strap beams on the same shift or the shift immediately following installation. According to Paterini it had also been the practice at Beth Energy where beams had not been strapped, for transportation to be provided up to the affected area and for miners to then be routed around the unstrapped beams. Paterini also recalled that there had been derailments in the cited area on several occasions and that he had been sent to

reset legs under beams displaced by derailments in that particular area.

Also in rebuttal, Mine Examiner Donald Rados testified that indeed an "imminent danger" existed in the cited entry when he dangered it off. When dangering the area off he put up a tag and 2-brattice boards across the empty track and erected a danger sign on the barrier. Evaluation of the Evidence

In determining whether a violation existed in this case it is necessary to decide whether at the time Foreman John Ronto had the cited danger sign and danger tag removed, and at the time of the entry of the locomotive operator into the previously "dangered off" area there then continued to exist either a violation of a mandatory health or safety standard or a hazard in that area within the meaning of 30 C.F.R. 75.303. I find in this case that both a violation of a mandatory safety standard (i.e. a violation of the Roof Control Plan) and a hazard of a significant nature continued to exist at that time. Since Ronto would have been authorized to remove the danger signs only if there was no hazard and no violation of a mandatory health or safety standard he was in clear violation of the cited standard in authorizing and directing that danger tag and sign to be removed.

The Secretary maintains in this case that the following provisions of the Beth Energy Roof Control Plan were violated:

> 19. On haulageways, all cross bars or beams shall be installed with some means of support that will prevent the beam or cross bar from falling in the event the supporting legs are accidently dislodged.

It is undisputed that at the time Ronto authorized entry into the dangered-off area the beams at issue had in fact not been "installed with some means of support that will prevent the beams or cross bar from falling in the event the supporting legs are accidently dislodged". Beth Energy and its agents argue however that this Roof Control Plan requirement that "beams shall be installed with some means of support" actually means that the support may be installed up to five days after the beams themselves are installed. I disagree. The Roof Control Plan could not be more clear and unambiguous in requiring that the means of support must be provided at the same time the beams are installed. If indeed it was the intent of the parties to allow "five days"

or "until the next idle shift" or for some other "reasonable time" for installation of the support after the beams themselves are installed, the Plan could easily have so provided. Thus it is clear that a violation of a mandatory standard (30 C.F.R. 75.220) existed at the time Foreman Ronto authorized the removal of the danger sign and tag and accordingly directed the commission of a violation of the regulatory standard at 30 C.F.R. 75.303

The testimony of experienced mine examiner Don Rados is also credible and is sufficient in itself to support a finding that a significant hazard continued to exist at the time Foreman Ronto authorized and directed removal of the danger tag and sign. This testimony is fully corroborated by that of the experienced MSHA Inspector, Alvin Shade. Even Ronto himself acknowledged that although the conditions did not pose a "large hazard" and they were "not a considerable danger" a "caution to people" was nevertheless warranted. For this additional reason then it is clear that a violation of 30 C.F.R. 75.303 was committed by Ronto.

The evidence also supports the "significant and substantial" findings in the citation at bar. In order to find a violation "significant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984). Here I have found that there was indeed a violation of the mandatory safety standard at 30 C.F.R. 303(a), and that a discrete safety hazard i.e. exposure of miners to the hazard of falling beams, was contributed to by the violation. I further find it reasonably likely that the hazard of falling beams would have resulted in an injury and that it was reasonably likely that resulting injuries would be reasonably serious or fatal.

Whether the violation was the result of the "unwarrantable failure" of Beth Energy to comply with the law depends on whether it was the result of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987) appeal pending (D.C. Cir. No.

88-1019). In the Emery case the Commission compared ordinary negligence (conduct that is inadvertent, thoughtless, or inattentive) with conduct that is not justifiable or excusable. On the facts of this case I conclude that the conduct of the operator's agents in authorizing the removal of the danger tag and sign and permitting an employee to remove rail cars from the "dangered off" area (and where the facts constituting a hazard and a violation of the Roof Control Plan were then known to the operator's agents) constituted such aggravated conduct as to meet the definition of "unwarrantable failure". Indeed the conduct of the operator's agents, Ronto, Kubovick and Nuccetelli, was so aggravated that it constituted violations of Section 110(c) of the Act. For the same reasons noted, infra, this conduct also constitutes "unwarrantable failure". Considering the criteria under section 110(i) of the Act I find that a civil penalty of $1,000 is appropriate.

Finally, Beth Energy's claims herein that a Section 104(d) violation cannot be based upon an after-the-fact investigation are rejected. Secretary of Labor v. Emerald Mines Co., 9 FMSHRC 1590 (1987), aff'd 863 F.2d 51 (D.C. Cir. 1988).

Docket Nos. PENN 89-154, PENN 89-155, and PENN 89-156

These cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to section 110(c) of the Act charging Samuel Kubovcik, John Ronto and James Nuccetelli as agents of the corporate mine operator (Beth Energy) with knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of the mandatory standard at 30 C.F.R. 75.303 as charged in Citation No. 2941672 previously upheld i this decision.

Section 110(c) of the Act provides in part of follows:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer or agent of such corporation who knowingly authorized, ordered, or carriedb out such violation, failure, or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under Subsection (a) and (d).

There is no dispute in this case that each of the three named Respondents were, at the time of the alleged violation, agents of Beth Energy. Upon the credible evidence before me I find that all of the cited agents "knowingly authorized, ordered, or carried out" the violation charged in this case. Mssrs. Ronto, Nuccetelli and Kubovcik all acknowledge that

when they issued orders to obtain the empty cars from the dangered-off area they were fully aware of the requirements of the Roof Control Plan including the requirement that "beams shall be installed with some means of support". It is undisputed moreover that they were also then aware of the fact that the cited beams were without support and that the area had been legally "dangered-off" by a qualified mine examiner pursuant to 30 C.F.R.   75.303. Since the language of the Roof Control Plan is clear and unambiguous in its requirement that the means of support be installed contemporaneous with the installation of the beams it may reasonably be inferred that they "knowingly authorized [and] ordered" the violation herein. Their self serving claims that the Roof Control Plan granted them a "reasonable time" of up to five days to support the beams by strapping or saddling are without credible legal or factual basis.

Under the circumstances the Secretary has sustained her burden of proving that the three agents of the operator cited herein were in violation of Section 110(c) of the Act. Considering the relevant criteria under Section 110(i) of the Act I find that penalties of $400 each are appropriate.

ORDER

Order No. 2941672 is modified to a citation under Section 104(d)(1) of the Act and Beth Energy Mines, Inc., is directed to pay a civil penalty of $1,000 within 30 days of the date of this decision. John A. Ronto, James Nuccetelli and Samuel Kubovcik are in violation of Section 110(c) of the Act as charged and are directed to pay a civil penalty of $400 each within a 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE

1. Section 104(d) of the Act reads 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.

(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.

2. At the conclusion of the Secretary's case-in-chief a motion to vacate the Section 104(d)(2) withdrawal order was made on the grounds that the Secretary failed to produce any evidence of the absence of an intervening clean inspection following the issuance of the precedential Section 104(d)(1) Order. See United Mine Workers of America v. FMSHRC 768 F.2d 1477 (D.C. Cir. 1985). The motion was granted and the order was accordingly modified to a citation under Section 104(d)(1) of the Act. See Footnote 1 supra.