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

GREEN RIVER COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. KENT 90-95-R
v.	Order No. 3420071; 1/25/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	No. 9 Mine Mine ID 15-13469
	CIVIL PENALTY PROCEEDING
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Docket No. KENT 90-133 A.C. No. 15-13469-03741
	No. 9 Mine
v.	Mine ID #15-13469
GREEN RIVER COAL COMPANY, RESPONDENT	

DECISION

Appearances: B. R. Paxton, Esq., Paxton & Kusch, P.S.C., Central City, Kentucky, for the Contestant/Respondent;
William F. Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Green River Coal Company, Inc., (Green River), has filed an application for review challenging the issuance of Imminent Danger Withdrawal Order No. 3420071 at its No. 9 Mine. The Secretary of Labor (Secretary) has also filed a petition seeking civil penalties in the total amount of $2400 for the violations charged in Citation Nos. 3420072 and 3420073, which were issued in conjunction with the aforementioned imminent danger order.

The general issue in a contest case concerning an imminent danger order is whether the cited condition could reasonably be expected to cause death or serious physical harm. The limited issue herein is whether such a condition existed at the time the subject order was written.

An issue more specific to this case raised by Green River is to what extent the existence of a functioning CO monitoring system that will give an immediate fire warning will ameliorate what would otherwise undoubtedly be an imminent danger condition.

The general issues in the civil penalty proceeding are whether the citations were properly issued, i.e., whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial", as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Pursuant to notice, these cases were heard in Owensboro, Kentucky on June 14, 1990. The parties each declined to file post-hearing proposed findings of fact and conclusions of law but rather orally argued on the trial record. I have considered the entire record herein and make the following decision.

I. Docket No. KENT 90-95-R; Order No. 3420071

Order No. 3420071, issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), charges as follows:

> The following condition of which collectively constitutes an imminent danger was observed in the 1B-Belt entry. 30 CFR 75.0400. Accumulation of loose coal and Float Coal dust, 30 CFR 75.1725 - 23 bad or damaged belt rollers. The belt was running on the ground in 2 different locations loose coal underneath, for a total distance of 210 feet.
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> Section 107(a) of the Act provides in part as follows:
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> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other

mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Mr. Michael McGregor, Safety Director for Green River was called and testified, initially at the behest of the Secretary. He furnished Belt Examiner's Reports for the days and weeks just prior to the issuance of the imminent danger order at bar. Suffice it to say that there were a multitude of reports concerning bad rollers and the belt running on the ground, as well as coal accumulations noted.

Federal Coal Mine Inspector Ronald Oglesby then testified that he arrived at the mine at about 10:00 a.m. on January 25, 1990, and proceeded underground, accompanied by Mr. McGregor. When they started to walk the 1B-Belt Entry, he found accumulations of loose coal and coal dust. There were also bad rollers and places where the belt was running in coal on the bottom. The bottom belt was running on top of the ground. The rollers had been damaged and destroyed to the point that they were no longer operable. The inspector found the belt running on the ground in two different locations and a situation where some of the belt rollers were warm and in some instances, even the coal surrounding them was already warm.

More particularly, the inspector found 23 bad rollers. However, subsequently 28 were replaced to abate the condition. They were in varied condition. In some of these rollers, the bearings were completely gone, creating a fire hazard from the heat of friction. In others, not only were the bearings gone on the rollers, but the rollers themselves had spun until they had broken the rod running through the roller.

This condition likewise presents a source of friction and heat and therefore is a fire hazard.

The inspector also testified that there was combustible material present in the same areas where the heat was being generated from the bad rollers. The entire beltline had accumulations of coal dust, float coal dust and other loose coal. These accumulations were from two to six inches deep generally. The belt itself was on the ground, running in loose coal, two to six inches deep, for a length of 150 feet at two points along the 1B-Belt line. Additionally, there were two major areas of float coal dust extant, one near the head, and the other near the tail.

The credible evidence in this record establishes that accumulations of black coal dust was deposited on top of previously rock dusted surfaces along the belt conveyor system at the locations described by the inspector. Furthermore, float coal dust was deposited on the ribs, the floor and the belt structure itself. These accumulations were located in belt conveyor areas which included potential sources of ignition, i.e., the overheating damaged belt rollers.

The inspector believed the mine hazard presented by the accumulation of coal dust was a fire. Since sixteen miners worked on the No. 1 unit and were inby the belt, he was justifiably concerned that they would be exposed to fire and smoke hazards, and possible entrapment. Moreover, I conclude and find that the inspector's credible testimony establishes that the float coal dust accumulations in question which I believe one may assume were cumbustible and were located in areas where potential ignition sources were present, presented a fire and smoke hazard as well and also possibly an explosion hazard.

The existence of accumulations of coal dust and float coal dust along a rather extended area of the belt line along with the number of damaged and overheating rollers that were present to provide a ready source of friction heat could also propagate any fire that got started. In defending this case, the respondent put a lot of emphasis on the existence of a carbon monoxide monitoring system on the belt line that picks up any kind of smoke that contains carbon monoxide. There are sensors located along the belt line at each header and tail piece and at each 2000 foot interval. The system alarms outside and the outside person can then determine where the problem is located. He thereupon calls on the mine phone to the foreman underground and he will go to the suspected location and find out what the problem is. Within five minutes, someone is in the alarmed area to investigate. Therefore, respondent's theory is that as long as this monitoring system is working there can be no imminent danger

because to have a fire large enough to cause serious injury would take longer than five minutes to build up. By that time, it would be discovered and corrective action begun.

However, the decision the inspector had to make on the scene was whether the condition he found could reasonably be expected to cause death or serious physical harm to the miners working in that area. The focus is on the "potential of the risk to cause serious physical harm at any time." The legislative history of the Act states the intention of Congress to give inspectors "the necessary authority for the taking of action to remove miners from risk," and that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

The focus is clearly and properly on the potential of the risk involved and I find that there was plenty of potential for a mine fire here given the conditions the inspector found. All the ingredients were present: accumulations of combustible materials and nearby ignition sources.

Respondent's argument fails to recognize the role played by MSHA inspectors in eliminating imminently dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists. The Seventh Circuit recognized the importance of the inspector's judgment:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.
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> Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

For all the reasons enumerated earlier in this decision, I find that the inspector did not abuse his discretion in this instance; an imminent danger did exist at the time he wrote the order. Furthermore, in my opinion, the presence of the monitoring system does nothing to change the basic situation the inspector found. There was still a danger of a mine fire starting that could produce a significant amount of smoke and/or fire before that condition could be abated.

Accordingly, I find that there was an imminent danger and affirm Order No. 3420071.

II. Section 104(a) Citation Nos. 3420072 and 3420073

These two section 104(a) citations were issued in conjunction with the imminent danger order discussed earlier in this decision.

Citation No. 3420072 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1725 and charges as follows:

> A violation was observed in the 1B-Belt entry in that there were 23 bad or damaged rollers. The rollers were damaged to the extent some were cut into, some half missing from center rods, some completely missing from stands.
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> (This citation was one of the factors that contributed to the issuance of imminent danger Order No. 3420071, dated 1/25/90 therefore, no abatement time was set.)

Citation No. 3420073 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.0400 and charges as follows:

> A violation was observed in the 1B-Belt entry in that [an] accumulation of loose coal and float coal dust was present on previously rock dusted surfaces. The loose coal was present between No. 19 and No. 20 crosscut, from No. 7 to No. 9 crosscut, and from No. 3 to No. 2 crosscut. The loose coal was from 2 to 6 inches in depth. 4 ft wide under the belt. The belt was running in loose coal in two of the places. The loose coal was deposited on both sides of the belt. The total distance of loose coal was 280 ft. Float coal dust was present on previously rock dusted, starting at the first overcast inby the 1B-header and extending for 4 crosscuts in the 1B-Belt entry, the second place float coal dust was present was starting at the 1C-Belt header and entending 5 crosscuts outby. The float coal dust was deposited on the floor, ribs, timbers, and belt structure. Total distance both locations was 630 feet.
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> (This citation was one of the factors that contributed to the issuance of imminent danger Order No. 3420071 dated 1/25/90 therefore, no abatement time was set.

Respondent admits the violation of the mandatory standard in both citations, but disputes the "significant and substantial" findings contained therein.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the

mine involved. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

I have previously recited the pertinent facts earlier in this decision. The same conditions that caused the violations of the two mandatory standards at bar were also the basis for the imminent danger withdrawal order that the inspector issued at the same time. Since I have previously found an imminent danger existed, that is, a condition "which could reasonably be expected to cause death or serious physical harm" it follows that these are "significant and substantial" violations as well under the test announced by the Commission in Mathies, supra.

If a fire were to occur, it would be reasonably likely that the miners would be exposed to smoke and fire hazards and suffer disabling injuries of a reasonably serious nature, even given the presence of the operable CO monitoring system. By the time the fire could be finally extinguished, it is reasonably likely that serious injuries would have already occurred.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for each of the above violations is $1000.

ORDER

1. Section 107(a) Order No. 3420071 IS AFFIRMED.

2. Section 104(a) Citation Nos. 3420072 and 3420073 ARE AFFIRMED.

3. Green River Coal Company, Inc., is ordered to pay the sum of $2000 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge
Administrative Law Judge