CCASE:
SOL (MSHA) V. VALLEY CAMP COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-1075
	:	A. C. No. 46-01977-03737R
v.	:	
	:	VC No. 12-A Mine
VALLEY CAMP COAL COMPANY, Respondent	:	

DECISION

Appearances: Pamela S. Silverman, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Valley Camp Coal Company, (Respondent) of 30 C.F.R. 75.316. Pursuant to notice, the case was heard in Charleston, West Virginia, on April 20, 1993. At the hearing, Sonny A. Davenport, testified for Petitioner, and Richard Waugh, and Harold L. Proctor, testified for Respondent.

Subsequent to the hearing, on June 1, 1993, Petitioner filed a Brief, and Respondent filed an Argument in Support of Findings of Fact and Conclusions of Law. Respondent's Reply was received on June 7, 1993, and Petitioner's Reply Brief was received on June 11, 1993.

Findings of Fact and Discussion

I. Violation of 30 C.F.R. 316

On April 24, 1990, Sonny A. Davenport, an MSHA inspector, inspected Respondent's No. 12-A Mine. He observed that in the One Right Section, between entries 2 and 3, there were no stoppings in the first two crosscuts outby the face. He also observed that there were only check curtains in the 3rd and 4th crosscuts outby the face. He issued a Section 104(d)(2) order alleging a violation of 30 C.F.R. 75.316. Section 75.316 supra, in essence, requires a mine operator to comply with its ventilation plan. That plan, as pertinent, provides as follows:

"Permanent stoppings shall be erected between the intake and return air courses and shall be maintained to and including the third connecting crosscut outby the faces of entries ... ." (Government Exhibit No. 3, p.3) Respondent has conceded the violation, and I find based on the testimony of Davenport, that Respondent herein did violate Section 316, supra.

II. Unwarrantable Failure

According to the uncontradicted testimony of Davenport, when he examined the return entry at approximately 9:00 a.m. on April 24, there were permanent stoppings only up to the 5th crosscut outby the face, and there were no permanent stoppings in the 4th and 3rd crosscuts outby the face, in violation of the ventilation plan. Thus, Respondent initially had been in violation of the ventilation plan when the present 2nd crosscut outby the face was initially cut through, as the record does not establish that there were permanent stoppings installed in the 3rd crosscut outby the face (the present 4th crosscut outby the face)as required by the ventilation plan. The record does not contain the testimony of any persons having personal knowledge as to the amount of time that elapsed between when Respondent was first in violation of the ventilation plan, and when the violative conditions were observed and cited by Davenport.(Footnote 1) Nor is there any documentary evidence on this point.

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1 According to Respondent's Safety Director, Richard Waugh, it takes approximately an hour to cut a 30 foot break or crosscut between two entries, and its takes approximately an hour and a-half to cut an advance into the face, which is a 45 foot cut. There is no evidence in the record as to the actual mining sequence that took place i.e., the number of cuts taken between the time the violative condition initially occurred, and the state of development of the section as observed by Davenport on April 24. According to Harold L. Proctor, who was the foreman of the day shift at the time in question, a sequence of mining straight across all six entries, as depicted in numerical order on Government Exhibit No. 4, was the sequence that was used "most of the time". (Tr.120) Considering the number of cuts in this sequence, and the lack of coal production during the mid-night shifts, it would have taken approximately 26 hours for mining to have progressed from the time the crosscut creating the violative condition was cut through, until the state of development was in place as observed by Davenport. However, according to Proctor, Respondent also utilized other sequences "a lot" (sic) (Tr.121) in which only three entries were advanced at a time. Under this sequence approximately 18 1/2 hours would have elapsed between the time the violative condition was created, and the extent of the development of the section that was observed by Davenport.

The Preshift Mine Examiner's Report for the area in question for April 23, 1990, indicates that an examination was made between 2:00 p.m. and 2:30 p.m. but there is no notation that stoppings were needed. However, the Preshift Mining Examiner's Report for April 24, 1990, for the area in question indicates an examination between 4:00 p.m. and 4:30 p.m., and notes as follows: "need stopping intake and return". The Preshift Miner Examiner's Report for April 23, 1990, indicates an examination of the area in question between 9:30 p.m. and 10:30 p.m., and contains the following notation: "need stoppings intake and return".

There is insufficient evidence in the record that Respondent had taken timely action to correct the violative conditions. According to Davenport, when he made his inspection on April 24, no one was working on constructing the stoppings, and he did not observe any stacks of blocks or construction materials. Richard Waugh, Respondent's Safety Director, who was present with Davenport, did not indicate that he observed any work being performed on the construction of stoppings. However, he indicated that Harold Proctor, the day shift foreman, had informed him on April 24, after Davenport issued the order in question, that when the crew had first arrived on the section that day, he (Proctor) had assigned two men to get blocks for the stoppings. However, Proctor testified that he did not remember talking to Waugh, nor did he remember anything about the construction of stoppings on the morning in question. Nor did he recall telling two men on the crew to get blocks for stoppings.

In essence, Respondent argues that it fully heeded all the notations in the Preshift Mine Examiner's Report, and did all the requisite work with the exception of the construction of the stoppings in the return entries. However, no evidence was adduced by personnel having personal knowledge as to why Respondent had not installed permanent stoppings as required by the ventilation plan in a timely fashion i.e., no evidence was presented to mitigate its negligent action in this regard. In this connection, I find that the record establishes that: (1) Respondent initially violated its plan when it cut through the present second crosscut outby the face without constructing a permanent stopping in the third crosscut outby the face (the present 4th crosscut outby); (2) Respondent continued mining until, when observed by Davenport on 9:00 a.m. April 24, the face had advanced, and an additional crosscut had been cut; and (3) when observed by Davenport, Respondent was in violation of having no permanent stoppings at both the 3rd and 4th crosscuts outby the face.

Within the framework of the above evidence, I conclude that the degree of Respondent's negligence herein was more than

ordinary, and constituted aggravated conduct.(Footnote 2) (See, Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).

III. Penalty

Although the gravity of the violation herein was low considering the fact that there was no methane present, and the air velocity was more than adequate, the violation resulted from Respondent's high degree of negligence as set forth above (II, infra). Taking this factor into account, as well as the other statutory factors set forth in Section 110(i) of the Act, as stipulated to by the parties at the hearing, I conclude that a penalty of $500 is appropriate for the violation found herein.

ORDER

It is hereby ORDERED that the Order issued by the inspector be affirmed as written. It is further ORDERED that Respondent shall, within 30 days of this decision, pay $500 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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2 Davenport indicated that in his view unwarrantable failure means "knew or should have known" (Tr.54). It thus appears that he did not use the proper test, as set forth by the Commission in Emery, supra, in concluding that Respondent's negligence herein constituted an unwarrantable failure. I find however, based upon a de novo analysis of the record, that the evidence before me establishes an unwarrantable failure, as defined in Emery supra, on the part of Respondent.