CCASE:
SOL (MSHA) V. S & H MINING, INC.
DDATE:
19931022
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 93-9
	:	A. C. No. 40-03011-03534
v.	:	
	:	Docket No. SE 93-10
S & H MINING, INC. Respondent	:	A. C. No. 40-03011-03535
	:	
	:	Docket No. SE 93-98
	:	A. C. No. 40-03011-03540
	:	
	:	S & H Mine No. 7

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Imogene A. King, Esq., Frantz, McConnell & Seymour, Knoxville, Tennessee, for the Respondent.

Before: Judge Feldman

These cases are before me as a result of petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act). These proceedings were conducted on September 28 and September 29, 1993, in Knoxville, Tennessee. Mine Safety and Health Administration Inspector Don A. McDaniel testified on behalf of the Secretary. The respondent called Paul G. Smith, President of S & H Mining, Incorporated. The parties waived the filing of posthearing briefs.

These matters concern a 104(a) citation and ten 104(d) orders that were issued as a result of the respondent's alleged unwarrantable failure. The total civil penalty proposed by the Secretary for these 11 alleged violations is $27,420.00. At the hearing, I issued a bench decision disposing of the 104(a) citation in issue and three of the 104(d) orders in question. After extensive testimony and several adjournments for the purpose of settlement discussions, the parties proffered a

settlement motion for the remaining seven 104(d) orders which was granted on the record. This decision formalizes my bench decisions and incorporates the parties' settlement agreement. The substance of my bench decisions and the parties' approved settlement result in a civil penalty assessment totaling $10,775.00.

Bench Decisions

The following alleged violations(Footnote 1) concern the respondent's failure to make current annotations to its mine map for its No. 3 Right Section; the respondent's lack of adherence to its approved roof-control plan in its No. 3 Right Section; and mud and water conditions observed by McDaniel in the respondent's main entry intake escapeway. The text of the bench decisions concerning each of these four alleged violations, with non-substantive edits, is as follows:

> Order No. 3382919 (Gov. Ex. 3) was issued on July 21, 1992, by Inspector McDaniel for an alleged violation of section 75.1202. This mandatory safety standard requires that mine maps must be kept up-to-date with temporary notations and revisions. The testimony of McDaniel was that updated maps of different entries are important because once an entry is sealed, there is no way of determining the configuration of the sealed entry. If there is any subsequent mining adjacent to a sealed entry, it is important for the sealed area to be accurately reflected on a map in order to avoid unanticipated structural problems.
>
> McDaniel testified that the map he observed during his July 21, 1992, inspection did not reflect pillars after the 35th crosscut. Therefore, pillar rows 35, 36 and 37 were not depicted on the map.
>
> However, the testimony is undisputed that on June 2, 1992, approximately seven weeks prior to the date McDaniel issued this order, the respondent submitted a map to MSHA that was accompanied by its proposed ventilation plan that illustrated everything midway through the 37th row of pillars. Thus, the only area not shown on the map submitted to MSHA on June 2, 1992, that was inconsistent with McDaniel's observations on July 21, 1992, was essentially the No. 1 through No. 6 entries between the 37th and 38th crosscut outby.

_____

1 The parties stipulated that the cited mandatory health and safety standards contained in 30 C.F.R. Part 75, revised as of July 1991, shall apply in these proceedings. (Vol. II, tr. 4).

As such, the mine map that MSHA had on June 2 was substantially accurate, even though McDaniel may have been shown a mine map that was less accurate during his inspection. Consequently, I find that the likelihood of injury is substantially reduced because the only inaccuracy on the map in MSHA's possession (which is also maintained by the respondent) is the lack of the 38th crosscut.

In summary, I am crediting the testimony of McDaniel that he was shown a map without current annotations. However, the substantially accurate June 2 Map is a significant mitigating factor. Therefore, I am modifying Order No. 3382919 to a 104(a) citation, and I am deleting the significant and substantial designation. I am also lowering the degree of the respondent's negligence from high to moderate. The penalty assessed for this citation is $200.00. (Tr. Vol. II, 43-47).

Order No. 3382964 (Gov. Ex. 7) was issued by McDaniel on July 23, 1992, for an alleged violation of section 75.220 for the respondent's purported failure to adhere to its approved roof-control plan. The respondent was cited for beginning to mine a pillar by making a 38 inch wide cut in the pillar without first installing timbers in the outby crosscut. This cut was witnessed by McDaniel. The respondent has stipulated to the fact of a technical violation but has asserted that the cut was inadvertently made by the continuous miner operator during the cleaning of an entry.

The Secretary has the burden of proving that the pillar was being mined. McDaniel arrived at the respondent's mine on July 23 at 6:15 a.m. Order No. 3382964 was issued at 1:30 p.m. The continuous miner operator, Steve Phillips, was aware of McDaniel's presence at the mine. It is inconceivable that Phillips would mine a pillar without setting timbers knowing that McDaniel was on the premises. In view of the angle and size of the cut (38 inches in width), the Secretary has failed to meet his burden of establishing that this was a willful rather than a negligent act. Accordingly, I am removing the unwarrantable failure designation.

The integrity of the pillars prior to installation of pertinent timbers is fundamental to the roof support system. Therefore, I am affirming the significant and substantial characterization of this violation.

Accordingly, Order No. 3382964 is modified to a significant and substantial 104(a) citation with a

reduction in the degree of associated negligence from high to moderate. A civil penalty of $400.00 is assessed. (Tr. Vol. II, 56-58).

Order No. 3382962 (Gov. Ex. 14) was issued by McDaniel on July 22, 1992, for an alleged failure by the respondent to follow its approved roof-control plan in violation of section 75.220. The plan required the first pillar cut to be 13 feet wide. However, due to the dimension of the entries and the size of the continuous miner, the respondent's first cut was wider than the approved width. After the first cut, the respondent was able to maneuver the continuous miner to comply with the subsequent pillar cuts in its roof-control plan. (See tr. VOL. II, 66-68).

McDaniel has confirmed that there was an impossibility of performance with regard to the width of the first cut. However, it is incumbent on the operator to seek modification of its existing roof control plan if it cannot be followed. Any other approach would encourage the operator to ignore its approved roof-control plan if it finds that it is unwilling or unable to comply with it. Such unilateral action by the operator would render the roof control approval process meaningless. Significantly, the evidence reflects that the roof-control plan with respect to the first pillar cut has never been followed. Therefore, I am attributing this violation to the respondent's unwarrantable failure.

Turning to the issue of significant and substantial, the roof control-plan was ultimately modified to essentially conform to the respondent's method of initial pillar cut. Thus, I am unable to conclude that the respondent's mining in this instance was structurally unsound. Moreover, the evidence does not reflect that any personnel were exposed to unsupported roof. Therefore, I am deleting the significant and substantial designation.

The continued operation in violation of the roof support plan is a serious matter. Thus, I am affirming Order No. 3382962 as a 104(d) order and I am assessing a civil penalty of $2,100.00. (Vol. II, tr. 84-87).

Citation No. 3382967 (Gov. Ex. 2) was issued by McDaniel on August 10, 1992, for an alleged significant and substantial violation of section 75.1704 which requires maintenance of escapeway passages to ensure passage at all times. The citation noted mud and rock

from the portal inby to the No. 2 head drive in the main entry intake escapeway.

> McDaniel testified that the escapeway in the No. 3 Right Section had been recently cleared and was well maintained. (See Vol. II, tr. 119). The photographic evidence and the testimony support the respondent's contention that there was also a recent attempt to clear the main entry intake escapeway of mud and water. However, the attempted clearing was unsuccessful because the scoop became stuck in ruts in the mud. These ruts are clearly visible in the photographs proffered by the respondent. (Resp. ex. 12). Thus, I find that the respondent's effort to clear this area, as evidenced by these ruts, is a mitigating factor.
>
> However, consistent with the Commission's decision in Eagle Nest, Inc., 14 FMSHRC 1119 (July 1992), I conclude that mud and water in a primary escapeway creates a hazard that, when viewed in the context of continued mining operations, is reasonably likely to result in a slip and fall injury of a reasonably serious nature. Therefore, I am sustaining this 104(a) citation as significant and substantial and assessing a civil penalty of $75.00. (Tr. VOL. II, 119-122).

Approved Settlement Agreement

As noted above, the parties' motion to settle the seven remaining 104(d) orders in these proceedings was granted on the record. Order Nos. 3382920, 3382961 and 3382918 concern the respondent's bleeder system in its No. 3 Right Section. These orders concern the respondent's purported failure to comply with its approved ventilation plan; the respondent's failure to adequately ventilate the section; and the respondent's failure to perform weekly examinations for hazardous conditions in its bleeder system. McDaniels' significant and substantial designations with respect to these citations were retained. The settlement agreement, however, acknowledged that the respondent was in the process of mining through the 36th crosscut between the 7th and 8th entry at the time of the inspection. This operation ultimately cleared a blockage in the bleeder system which permitted the free flow of return air.

In addition, the respondent was operating in an area of poor roof conditions which interfered with weekly hazard examinations. In view of these mitigating circumstances, the terms of the settlement removed the unwarrantable failure findings with

respect to these violations. Therefore, these orders were modified to reflect 104(a) citations. Consequently, the Secretary moved to substantially reduce the civil penalties for these citations.

The parties settlement agreement did not disturb the significant and substantial or unwarrantable failure designations for Order Nos. 3382915, 3382916 and 3382917. These orders concern violations of the respondent's approved roof-control plan and pillar mining methods that exposed the continuous miner operator to unsupported roof.

Finally, the Secretary moved to vacate Order No. 3382914. This order involved an alleged violation of the respondent's approved roof control-plan with respect to pillar No. 38. However, due to poor roof conditions, McDaniel was unable to position himself to clearly observe the condition of this pillar. Therefore, the Secretary has concluded that there is insufficient evidence to support the fact of the cited violation.

As a final matter, there appears to be an animus between MSHA inspectors and the respondent's personnel. Both McDaniel and Smith advised me that it is not uncommon for the respondent's employees to disagree with the objective observations of the inspectors. For example, in these proceedings, the respondent has denied McDaniels' testimony concerning missing timbers. However, there is no evidence that McDaniels was ever advised by the respondent at the inspection of its belief that the subject timbers were in fact present.

Therefore, I have urged the parties to initiate a voluntary procedure whereby any dispute concerning the objective findings of the inspectors should be conveyed in writing by the respondent's personnel to the inspector. If a disagreement remains, in the spirit of good faith and cooperation, the inspector should initial and date the written objection which should be retained by the respondent. This written objection will serve to document and preserve the respondent's position in the event of subsequent litigation. McDaniel and Smith, the respondent's president, have both indicated that this procedure would be helpful. (See vol. II, tr. 172-184).

ORDER

Consistent with the above bench rulings, IT IS ORDERED that:

1. Order No. 3382919 IS MODIFIED to a 104(a) citation, thus reducing the degree of associated negligence from high to

moderate. In addition, the significant and substantial designation is deleted. The civil penalty assessed for this citation is $200.00.

2. Order No. 3382964 IS MODIFIED to a 104(a) citation, thus reducing the degree of underlying negligence from high to moderate. The civil penalty assessed for this citation is $400.00.

3. Order No. 3382962 IS MODIFIED to remove the significant and substantial designation and is affirmed as modified. A civil penalty of $2,100.00 is assessed for this order.

4. Citation No. 3382967 IS AFFIRMED. The respondent shall pay a civil penalty of $75.00.

Consistent with my approval of the parties' settlement agreement, IT IS FURTHER ORDERED that:

5. Order No. 3382920 IS MODIFIED to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of $400.00.

6. Order No. 3382961 IS MODIFIED to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of $400.00.

7. Order No. 3382918 IS MODIFIED to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of $1,200.00.

8. Order No. 3382915 IS AFFIRMED. The respondent has agreed to pay a civil penalty of $2,500.00.

9. Order No. 3382916 IS AFFIRMED. The respondent has agreed to pay a civil penalty of $2,500.00.

10. Order No. 3382917 IS AFFIRMED. The respondent has agreed to pay a civil penalty of $1,000.00.

11. Order No. 3382914 IS VACATED.

IT IS FURTHER ORDERED that the respondent shall pay, within 30 days of the date of this decision, a total civil penalty of

$10,775.00 in satisfaction of the above citations and orders.(Footnote 2) Upon receipt of payment, these cases ARE DISMISSED.

JEROLD FELDMAN
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Imogene A. King, Esq., Frantz, McConnel & Seymour, P.O. Box 39, Knoxville, TN 37901 (Certified Mail)

/ll

_____

2 The $10,775.00 total civil penalty assessed in these cases represents: a $75.00 penalty assessed in Docket No. SE 93-9 for Citation No. 3382967; a $1,400.00 penalty assessed in Docket No. SE 93-10 for modified Citation Nos. 3382919, 3382920, 3382961 and 3382964; and a $9,300.00 penalty assessed in Docket No. 93-98 for Order Nos. 3382915, 3382916, 3382917 and modified Citation No. 3382918.