CCASE:
LION MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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LION MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 94-71-R
v.	:	Citation No. 3711869; 11/17/93
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Grove No. 1 Mine
	:	Mine ID 36-02398
	:	

DECISION

Appearances: Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania for Contestant;
Richard T. Buchanan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent.

Before: Judge Hodgdon

This case is before me on a notice of contest filed by Lion Mining Company against the Secretary of Labor pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815. The company contests the issuance of Citation No. 371186 to it on November 17, 1993. For the reasons set forth below, I affirm the citation as modified herein.

The case was heard on January 13, 1994, in Somerset, Pennsylvania. Mine Safety and Health Administration Inspector Kenneth J. Fetsko testified on behalf of the Respondent. Mr. George Sosnak, Mr. Hiram Ribblett, Mr. Arthur B. Jones and Mr. Ted Marines testified for the Contestant. The parties have also filed post hearing briefs which I have considered in my disposition of this case.

FINDINGS OF FACT

This case arose as a result of Inspector Fetsko's inspection of Lion Mining's Grove No. 1 mine on November 17, 1993. During his inspection of the four and one-half right section of the mine, he observed a shuttle car being loaded with coal by a continuous miner in the roadway between Pillar Blocks 37 and 38.

Because of his location between Pillar Blocks 37 and 44, Inspector Fetsko could not see the front of the continuous miner to determine from where the coal was coming. At this vantage point, the inspector observed the miner load three or four shuttle cars.

While watching the shuttle cars, Mr. Fetsko noticed that roadway posts had not been placed in the crosscut between Pillar Blocks 38 and 39 as he believed was called for in Lion Mining's roof control plan. He also saw Mr. Jones, the Mine Superintendent, and Mr. Marines, the Section Foreman, standing in the crosscut. The inspector then went over to the crosscut and watched the continuous miner load a shuttle car from a notch it cut from Pillar Block 37.(Footnote 1)

At this point, Inspector Fetsko issued Citation No. 3711869 pursuant to Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1).(Footnote 2) He cited the operator for a violation of Section 75.220(a)(1) of the Secretary's Regulations, 30 C.F.R. 75.220(a)(1), because Lion Mining did not comply with Note No. 6 to Drawing A of its tentatively approved roof control plan for pillar recovery by installing roadway posts in the crosscut between Pillar Blocks 38 and 39 to limit the roadway width to 18 feet. The violation was abated 30 minutes later when roadway posts were installed in the crosscut. On December 9, 1993, the inspector modified the citation to indicate that Note No. 7 of Lion Mining's roof control plan, rather than Note No. 6, had been violated (Govt. Ex. 1).

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1 While there was disagreement as to how many shuttle cars were loaded from the notch in Pillar Block 37, the parties were in agreement as to the approximate size of the notch itself (Tr. 88, 105, Jt. Ex. 1).

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2 Section 104(d)(1) provides, in pertinent part:

> 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.

In its brief, Lion Mining "concedes that a violation existed when it failed to install several additional posts across the crosscut between blocks 38 and 39 prior to mining . . . from block 37" (Cont. Br. 6). It argues, however, that the violation was not "significant and substantial" and was not the result of it's "unwarrantable failure" to comply with the Secretary's Regulations. On the other hand, the Secretary is of the opinion that the violation was both "significant and substantial" and the result of Lion Mining's "unwarrantable failure."

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.220(a)(1) of the Regulations provides:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons is unusual hazards are encountered.

Lion Mining's proposed pillar recovery roof control plan for its Grove No. 1 mine was tentatively approved by the District Manager on May 6, 1993. Note 7 to Drawing A of the plan provides, in pertinent part, that "[r]oadway posts installed in roof bolted entries, rooms, and crosscuts shall be installed to limit the roadway width to 18 feet" (Govt. Ex. 2).

Fact of Violation

As noted above, Lion Mining concedes that it violated Section 75.220(a)(1) by not following its approved roof control plan and installing roadway posts in the crosscut between Pillar Blocks 38 and 39. Accordingly, I conclude that Lion Mining's failure to install the roadway posts was a violation of the Regulation as alleged.

Significant and Substantial

On the citation, Inspector Fetsko designated the violation as being "significant and substantial" (Govt. Ex. 1). A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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."

A violation is properly designated S&S "if, based upon the particular facts surrounding that 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:

> 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 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.

As happens in most cases involving an S&S designation, the point of contention in this case concerns the third element of the Mathies test. In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission clarified this element 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).

This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

In its brief, Lion Mining argues that the likelihood of an injury resulting from the failure to install the roadway posts was very remote because: (1) the area had been completely roof bolted, (2) Pillar Block 37 was almost totally intact, (3) two rows of breaker posts and six radius turn posts had already been installed in the immediate vicinity of the continuous miner, (4) the missing roadway posts were not in the area where coal was being extracted, and (5) no more coal was, or would have been, extracted before the posts were installed (Cont. Br. 9-10).

The Contestant notes that Inspector Fetsko was of the opinion that using the continuous miner to clean-up loose coal in the roadway between Pillar Blocks 37 and 38 would not have required installation of the roadway posts (Tr. 87). Thus, it contends that "[t]he likelihood of an injury occurring did not immediately raise (sic) from none to a reasonable likelihood as the result of the extraction of one quarter of a shuttle car of coal from the block" (Cont. Br. 9).

In opposition, the Secretary asserts that the purpose of installing roadway posts is to guard against roof falls while natural roof support is removed. He argues that there was a reasonable likelihood that a roof fall would occur because the roadway posts were not installed and that this is demonstrated by the fact that "the rib was rolling" between Pillar Blocks 38 and 39, i.e. pieces of the rib were breaking off, which indicates pressure from the roof, and that there was a history of roof falls in the four and one-half section (Resp. Br. 16-18).

The Secretary has not established that a serious injury was reasonably likely to have resulted from Lion Mining's failure to install the roadway posts in this case. In the first place, according to the Dictionary of Mining, Mineral, and Related Terms 931 (1968), roadway supports, which include roadway posts, serve two functions, to: "(1) ensure safety by preventing falls of ground, and (2) maintain the maximum possible roadway size by resisting the tendency of the roadway to contract and distort." It is not at all clear from Lion Mining's roof control plan that the sole, or even the primary, function of the roadway posts in this case was to serve as roof support.(Footnote 3)

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3 Significantly, Section 75.207 of the Regulations, which governs pillar recovery and which Lion Mining's roof control plan closely follows, does not require the installation of roadway posts until "mining is started on a final stump." 30 C.F.R. 75.207(c).
That was not occurring in this case (Tr. 83-85). The Regulation does require the installation of "breaker posts" and "roadside-radius (turn) posts" prior to beginning mining in a pillar, 30 C.F.R. 75.207 (b), but there is apparently no dispute that Lion Mining had installed those.

In the second place, and most importantly, even without the roadway posts, Lion Mining had several other means of preventing a roof fall in place at the time the notch was taken out of Pillar Block 37. As noted in the citation, as well as Contestant's Brief, the area was completely roof bolted. In addition, breaker posts and radius (turn) posts had been installed. Finally, contrary to what the inspector believed at the time he issued the citation, Pillar Block 37 had not had any coal extracted from it prior to the extraction in question.(Footnote 4)

Based on this evidence, I conclude that while the failure to install the roadway posts before coal was mined from the notch on Pillar Block 37 (Jt. Ex. 1) may have slightly increased the possibility of a roof fall in the area, it did not increase it to a level where the failure to install the posts would contribute to a reasonable likelihood that there would be a roof fall in the area. Accordingly, the violation was not "significant and substantial" and the citation will be modified as indicated in the order at the end of this decision.

Unwarrantable Failure

The inspector also found that the failure to install the roadway posts resulted from Lion Mining's "unwarrantable failure" to comply with the Secretary's safety and health standards. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

In Emery Mining, supra at 2001, the Commission stated that:

> "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

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4 Inspector Fetsko testified that he assumed that half of Pillar Block 37 had already been pillared at the time of the violation because of the location of breaker posts and a line curtain between Pillar Blocks 37 and 44 which prevented him from seeing the back half of Pillar Block 37 (Tr. 86, 92-3, 101). In fact, none of Pillar Block 37 had been mined (Tr. 105).

> Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

The Secretary's case that Lion Mining's failure to install the roadway posts is not justifiable and inexcusable is based on the fact that the Mine Superintendent and the Section Foreman were present when the violation occurred and that citations for violation of the roof control plan had previously been issued to the company. These factors are not sufficient to establish an "unwarrantable failure" in this case.

First, as the Contestant points out, although Lion Mining had previously been cited for violating various sections of its roof control plan, it had never been cited for failing to install roadway posts. Secondly, the evidence in this case is insufficient to demonstrate that either the Mine Superintendent or the Section Foreman deliberately and consciously failed to act or engaged in aggravated conduct.

Mr. Jones, the Superintendent, testified that he did not know about the provisions of the roof control plan concerning roadway posts and was not required to know all of the provisions of the roof control plan (Tr. 124). However, even if it is assumed that he did have a duty to know and breached that duty, that breach is not necessarily an "unwarrantable failure." Virginia Crews Coal Company, 15 FMSHRC 2103, 2107 (October 1993).

The Section Foreman, Mr. Marines, testified that he observed the continuous miner operator cleaning up the roadway between Pillar Blocks 37 and 38, that he left area for a short time to check on something else and that when he returned the last shuttle car was being loaded, including coal from the notch. He stated that he told the shuttle car operator to return with timber to install the roadway posts, although no one, specifically including Inspector Fetsko, had reminded him that the posts should be installed (Tr.133-34). This testimony was unrebutted.

Based on this evidence, it is clear that further mining of Pillar Block 37 would not have taken place until after the roadway posts were installed. It is equally clear that the failure to install the roadway posts prior to cutting the notch, under the facts in this case and particularly in view of the roof control measures which were in effect, was not conduct which could be called "reckless disregard," "intentional misconduct,"

"indifference" or a "serious lack or reasonable care." Emery Mining at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).(Footnote 5)

Therefore, I conclude that this violation did not result from an "unwarrantable failure" to comply with the Regulations on Lion Mining's part. Reassessing the violation in light of the evidence, I find that Lion Mining demonstrated moderate negligence in this case. The citation will be modified accordingly.

ORDER

Citation No. 3711869 is MODIFIED by deleting the "significant and substantial" and "unwarrantable failure" designations, reducing the negligence to "moderate" and changing it from a Section 104(d)(1) citation to a Section 104(a), 30 U.S.C. 814(a), citation. The citation as modified is AFFIRMED.

T. Todd Hodgdon
Administrative Law Judge

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5 Although the Contestant has conceded that a violation occurred in this case, I have also considered the fact that Note 7 of the roof control plan does not specifically state that roadway posts must be installed prior to beginning mining in a pillar block as a factor against finding the violation to be an "unwarrantable failure." Compare Note 7 with Note 6 which states "[r]ooms and crosscuts shall be fully bolted before pillaring is started" (Govt. Ex. 2).