FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 17, 1997

LAUREL RUN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestants	:	
	:	Docket No. WEVA 94-347-R
v.	:	Citation No. 3964761; 8/1/94
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 94-348-R
MINE SAFETY AND HEALTH	:	Order No. 3964762; 8/1/94
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 94-349-R
	:	Order No. 3964763; 8/1/94
	:	
	:	Docket No. WEVA 94-350-R
	:	Order No. 3964764; 8/1/94
	:	
	:	Holden 20-DB Mine
	:	Mine ID No. 46-07770
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-177
Petitioner	:	A. C. No. 46-07770-03575
	:	
v.	:	Holden 20-DB Mine
	:	
LAUREL RUN MINING COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-176
Petitioner	:	A. C. No. 46-07770-03576A
	:	
v.	:	Holden 20-DB Mine
	:	
ERNIE WOODS, Employed by	:	
Laurel Run Mining Co.,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; David J. Hardy, Esq., William Miller, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings concern a petition for assessment of civil penalties filed by the Secretary of Labor against Laurel Run Mining Company (Laurel Run) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). In these matters, the Secretary also sought, pursuant to section 110(c) of the Act, 30 U.S.C. ' 820(c), to impose personal liability on Ernie Woods, Laurel Run=s foreman, alleging that Woods, by his conduct, "knowingly authorized, ordered or carried out" a violation of Laurel Run=s approved roof control plan.

The hearing in these matters was conducted in Charleston, West Virginia in June and September 1997. The hearing was scheduled to reconvene on December 9, 1997. Shortly before reconvening, the parties informed me they had agreed to settle all matters in issue. At the time of their settlement, the Secretary had not completed presentation of her direct case. Consistent with their agreement, before me for consideration is the Secretary=s December 11, 1997, Motion for Approval of Settlement.

I. Background

Briefly stated, these proceedings involve citations issued as a consequence of MSHA=s investigation following a fatal roof fall that occurred at Laurel Run=s Holden 20-DB Mine on Monday, July 25, 1995. The 20-DB site is a hilltop, or outcrop, mine. Hilltop mines are underground mines that are located relatively close to the surface. The roof of a hilltop mine is prone to surface cracks, also called mud seams. Surface cracks are geological phenomenon in rock formations that run from the earth=s surface through the rock to the mine roof below. As a general rule, surface cracks are exposed in the mine roof as the coal seam is removed. Surface cracks are commonly identified by their orange-rust color. This discoloration is caused by mineral deposits that, over the course of time, have filtered through the surface cracks in water originating on the earth=s surface.

Unlike surface cracks, which are longstanding geological formations, stress cracks are acute cracks caused by pressure brought to bear on the mine roof during the mining process. Stress cracks can normally be distinguished from surface cracks by their lack of mineral deposit color. Although any crack in a mine roof can be hazardous, surface cracks are particularly hazardous because they run down from the earth=s surface.

Surface cracks are random and can run in any direction in the mine roof. Surface cracks that travel across entries or crosscuts (perpendicular to ribs) in the same direction as the roof bolted straps are less hazardous than surface cracks that run in the same direction as entries and

crosscuts (parallel to entries or crosscuts). This is because a perpendicular surface crack only compromises the roof area between the surface crack and the closest roof strap. By contrast a parallel surface crack, running in an entry parallel to a rib, removes that rib as a means of roof support. Two parallel surface cracks, running parallel to each other in the direction of an entry, are extremely hazardous because they separate the ribs on each side of that entry from the roof of that entry, leaving the roof essentially unsupported. Under the roof control plan in effect at the time of the fatality, two or more surface cracks, running parallel to each other in the direction of an entry, required supplemental roof supports through cribbing or metal beams.

The thrust of MSHA=s case is that its investigation following the fatal accident revealed sets of two or more parallel surface cracks running in the same direction as entries and crosscuts in the vicinity of the fatality and in outby areas, that were not supported by supplemental roof supports. Essentially, in their defense, the respondents assert the cracks observed after the fatal roof fall were not visible prior to the accident, arguing these cracks were stress cracks rather than surface cracks. The respondents also dispute the direction of the cited cracks contending the cracks were running across entries rather than in the same direction as entries. Thus, the respondents argue that, even if the cracks were properly characterized as surface cracks and visible prior to the fatal roof fall, supplemental support was not required under the operable roof control plan provisions.

II. Settlement Terms

A. Civil Penalty Liability

1. Citation No. 3964761, issued pursuant to section 104(d)(1) of the Act, alleges a violation of 30 C.F.R. ' 75.220(a), because the respondents failed to comply with the approved roof control plan with respect to installation of supplemental support in instances of two or more parallel surface cracks running in the direction of entries or crosscuts. It was determined that the cited condition contributed to the fatal accident. Thus, the violation was designated as significant and substantial (S&S). Based on MSHA=s initial investigation findings, it concluded the cited condition was the result of the Laurel Run=s reckless disregard of the perceived hazard and, thus, constituted aggravated conduct. Consequently, MSHA initially proposed a maximum civil penalty of $50,000.

In support of their settlement agreement, the Secretary now agrees there are mitigating circumstances that reduce the degree of Laurel Run=s negligence. In this regard, the Secretary notes that Laurel Run=s witnesses would testify that surface cracks were not visible prior to the fatal roof fall. Moreover, although the Secretary continues to believe there were at least two parallel surface cracks in the vicinity of the fatality that required additional support under the roof control plan, the Secretary acknowledges that her own witness characterized one of the surface cracks as Ahairline.@ Thus, the Secretary concedes there was a basis for Laurel Run=s mistaken belief that the surface crack was a stress induced crack that did not invoke the cited roof control provision.

Although the settlement terms provide that Citation No. 3964761 shall remain as a 104(d)(1) citation involving an unwarrantable failure, the parties have agreed to a reduction in the degree of negligence, from reckless disregard to high, that is attributable to Laurel Run. Consequently, the parties have agreed to a reduced civil penalty of $25,000.00 for Citation No. 3964761.

2. 104(d)(1) Order No. 3964762 alleges a violation of 30 C.F.R. ' 75.360(a) because Laurel Run failed to conduct an adequate preshift examination, in that it failed to detect and correct the hazardous roof conditions cited in Citation No. 3964761. MSHA initially determined the violation was S&S and attributable to Laurel Run=s unwarrantable failure. A civil penalty of $25,000 was proposed.

As discussed above, the uncertainty surrounding the nature and extent of the hazardous roof conditions prior to the massive fatal roof fall precludes the Secretary=s continued assertion of aggravated conduct indicative of an unwarrantable failure. Accordingly, the Secretary has agreed to modify 104(d)(1) Order No. 3964762 to a 104(a) citation. The parties have agreed to a reduced civil penalty of $6,000 for this citation.

3. 104(d)(1) Order No. 3964763 alleges a violation of 30 C.F.R. ' 75.362(a)(1) due to Laurel Run=s failure to perform an adequate onshift examination. Consistent with the discussion above concerning the preshift violation, MSHA concluded the violation was S&S and attributable to Laurel Run=s unwarrantable failure. However, in view of the uncertainty concerning the degree of visibility of the underlying hazardous roof condition, the parties have agreed to remove the unwarrantable failure charge and, thus, modify 104(d)(1) Order No. 3964763 to a 104(a) citation. Consequently, the parties have agreed to a reduced civil penalty of $6,000 for this citation.

4. 104(d)(2) Order No. 3964764 alleges a violation of 30 C.F.R. ' 75.202(a) because Laurel Run failed to adequately support coal ribs at various locations in the No. 2 section that were sloughing and not firmly attached to the roof. The Order alleged the cited condition was S&S and attributable to Laurel Run=s unwarrantable failure. A civil penalty of $8,000 was initially proposed.

The Secretary anticipates that Laurel Run=s witnesses would testify that poor rib conditions were not observable prior to the fatal roof control fall. Since the Secretary cannot present evidence concerning the rib conditions prior to the accident, the Secretary has agreed to reduce Laurel Run=s degree of negligence to low, thus removing the unwarrantable failure allegation.

Accordingly, 104(d)(2) Order No. 3964764 is modified to a 104(a) citation. In view of the significant reduction in the degree of Laurel Run=s negligence, the parties have agreed to a reduced civil penalty of $500 for this citation.

B. Section 110(c) Liability

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to individual liability. In Docket No. WEVA 96-176, the Secretary sought to impose personal liability on Ernie Woods for Aknowingly@ failing to comply with Laurel Run=s approved roof control plan in violation of the mandatory regulatory safety standard in section 75.220(a). Specifically, the Secretary charged Woods with failing to ensure that supplemental support was installed for hazardous surface cracks as required by the roof control plan provisions.

The Commission, in *Fort Scott Fertilizer*, 19 FMSHRC 1511 (September 1997), recently summarized the standard of proof in a 110(c) proceeding. The Commission stated:

> To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int=l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is Ain a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.@ *Kenny Richardson*, 3 FMSHRC at 16. *Section 110(c) liability is predicated on aggravated conduct* constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992) (emphasis added). 19 FMSHRC at 1517.

Woods was charged with knowingly violating the roof control plan provisions by failing to ensure that hazardous surface cracks were properly supported. This violative condition was the subject of Citation No. 3964761. However, the settlement terms concerning this citation noted the unsupported surface cracks were not obvious enough to warrant a finding of aggravated conduct. Consequently, the settlement terms fail to state a 110(c) cause of action against Woods. As a result, as part of the settlement agreement, the Secretary moves to dismiss the 110(c) action brought against Woods in Docket No. WEVA 96-176.

ORDER

In view of the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED,** and **IT IS ORDERED** that Laurel Run Mining Company pay a total civil penalty of $37,500 in satisfaction of the four citations in issue within 30 days of the date of this order, and, upon receipt of timely payment, the civil penalty case in Docket No. WEVA 96-177 **IS DISMISSED**.

IT IS FURTHER ORDERED that the related contest proceedings in Docket Nos. WEVA 94-347-R, WEVA 94-348-R, WEVA 94-349-R and WEVA 94-350-R, **ARE DISMISSED**.

IT IS ALSO ORDERED that the 110(c) proceeding concerning Ernie Woods in Docket No. WEVA 96-176 **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

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