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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. KENT 88-11
A.C. No. 15-16109-03501

v.

Greenwood No. 12 Mine

SHAMROCK COAL COMPANY,
RESPONDENT

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petition;
Neville Smith, Esq., Smith & Smith, Manchester,
KY, for Respondent;

Before: Judge Fauver

This civil penalty proceeding was brought by the Secretary
of Labor under 110(a) of the Federal Mine Safety and Health Act
of 1977, 30 U.S.C. 801 et seq.

Based upon the hearing evidence and the record as a whole, I
find that a preponderance of the substantial, reliable, and
probative evidence establishes the following:

FINDINGS OF FACT

1. Shamrock Coal Company's Greenwood #11 and #12 Mines,
located in MSHA's District 7, are physically separate,
underground coal mines. They are one mile apart, and access into
the mines is gained through separate entries. There are no
innerconnections between the mines and one cannot travel
underground from one mine to the other. The mines have separate
MSHA identification numbers.

2. Before 1985, Shamrock had operated a different mine with
several sections that were five or six miles apart, under one
MSHA identification number. Under the policy in force in District
7 at that time, one set of mine plans would suffice for the
entire mine.

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3. Since 1985, however, MSHA District 7 has required a separate mine identification and separate mine plans for each physically separate and distinct mine.

4. On May 13, 1987, Gordon Couch, Safety Director of Shamrock, submitted one set of plans seeking to cover Mines #11 and #12 as one mine, called the "Clinton Mine." The plans called for Mines #11 and #12 to be identified as sections 001 and 002 of the Clinton Mine. H. R. Boston, an MSHA Supervisory inspector, advised Shamrock's representative that the proposed "Sections 001 and 002 would have to be treated as two separate mines" (Tr. 50).

5. About the same date, May 13, 1987, Jimmy Sams, an engineering assistant in Shamrock's Manchester office, advised Mr. Couch that MSHA required two separate ventilation plans for Mines #11 and #12.

6. Also on May 13, 1987, John Pyles, an MSHA staff assistant in District 7, advised Mr. Couch that two separate sets of plans were required for Mines #11 and #12.

7. Respondent started developing the Mine #11 coalbed in late June, 1987, with approved plans for that mine. It started developing the coalbed in Mine #12 during the first or second week of July, 1987, without approved plans for Mine #12.

8. On July 23, 1987, MSHA received an undated legal identity form from Shamrock for Mine #12.

9. On July 27, 1987, Inspector Elmer G. Keen inspected Mine #12 and found that Shamrock was developing the coalbed without approved mine plans. The approved plans for Mine #11 did not cover Mine #12 either as a section of Mine #11 or as a separate mine.

10. At 11:00 a.m. (first shift) on July 27, 1987, Inspector Keen issued Citation 2797706 at Mine #12, charging a violation of 30 C. F. R. 75.1721, for developing the coalbed without approved plans for the mine.

11. The inspector terminated the citation on the same shift on July 27, 1987, based upon the company's representations that the miners would be pulled from the mine, production would stop and would not resume until the required plans for Mine #12 were submitted and approved.

12. Shamrock employees left Mine #12 on July 27, 1987, as observed by Inspector Keen, but they stayed out only for

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the remainder of the first shift. The mine resumed operations that night.

13. A few days later, on July 30, 1987, MSHA Inspector Don McDaniel discovered that Mine #12 was still operating without approved plans and issued Citation 3004642, charging a violation of 30 C.F.R. 75.1721(a), which states in relevant part: "[T]he operator shall not develop any part of the coalbed in such mine unless and until all preliminary plans have been approved." The required preliminary plans are identified in subsection (b) of that section.

14. Inspector McDaniel set an abatement time of one hour for Respondent to produce approved plans for Mine #12 if they existed. Inspector McDaniel decided that if Shamrock had the plans, one hour was a reasonable time for the plans to be produced. Respondent's representative, Mr. Hacker, contacted Elmer "Rick" Couch, the Mine Superintendent. When Mr. Couch could not produce the plans for Mine #12, he told Inspector McDaniel, "they just messed up at the (Shamrock) main office by not submitting them" (Tr. 45). Based on a failure to abate the violation, Inspector McDaniel issued Order 3004643 at 11:45 a.m. on July 30, 1987, to stop coal production until all required preliminary plans were approved for Mine #12.

15. On July 31, 1987, MSHA approved the Mine #12 program for searching miners for smoking materials required by 30 C.F.R. 75.1721(b)(9). On August 3, 1987, MSHA approved the Mine #12 roof control and training plans required by 30 C.F.R. 75.1721(b)(6) and (c)(1) and (2), respectively. These were the last of the plans required by 30 C.F.R. 75.1721.

DISCUSSION WITH FURTHER FINDINGS

Citation 3004642

MSHA advised Respondent on many occasions before July 30, 1987, that it would have to have separate approved plans for Mines #11 and #12 before it could start developing their coalbeds, under 30 C.F.R. 1721. On July 27, 1987, an MSHA inspector had issued a citation because Respondent was developing the coalbed at Mine #12 without approved plans for that mine. The inspector could have issued a follow-up 104(b) withdrawal order on that date, but, instead, he terminated the citation based upon Respondent's representations that it was withdrawing the miners and would not resume development work until all the required plans were submitted and approved for Mine #12. Respondent did not

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abide by that agreement, but later resumed mining without the approved plans.

The new violation was discovered on July 30, 1987, when another inspector found that Respondent was still mining without approved plans. He therefore issued the citation and order that are the subject of this proceeding.

I find that Respondent violated 30 C.F.R. 1721(a) on July 30, 1987, as alleged in Citation 3004642, and that this violation was due to gross negligence on the part of the operator.

I also find that this violation was "significant and substantial" within the meaning of 104 of the Act. The plans required by 1721 are crucial to the safety and health protection of miners.

Considering all of the criteria for a civil penalty in 110(i) of the Act, I assess a civil penalty of \$500 for the above violation.

Order 3004643

The Secretary charges a separate violation of 75.1721(a) based upon Order 3004643, which alleges that "approved plans could not be provided at the mine site" (Jt. Exh. 4). That section does not state that the required plans must be available at the mine site. It does not imply such a duty with sufficient clarity to hold an operator liable for a civil penalty for a separate violation of 1721(a). The focus of 1721(a) is the duty to have "all preliminary plans . . . approved" before the operator begins to develop the coalbed. Although some of the plans may be required by other sections of Title 30, C.F.R., to be available at the mine, 1721(a) does not in itself impose such a duty.

Order 3004643 therefore does not support a charge of violating 1721(a) by failure to have the required plans available at the mine site. The order, nonetheless, is a valid exercise of the Secretary's authority under 104(b) of the Act because the violation cited in Citation 3004642 had not been abated in the time allowed.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated 30 C.F.R. 1721(a) as charged in Citation 3004642.

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3. The allegation in Order 3004643 that "approved plans could not be provided at the mine site" does not state a violation of 30 C.F.R. 1721(a), but the order is valid as an exercise of the Secretary's authority under 104(b) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 3004642 and Order 3004643 are AFFIRMED.
2. Respondent shall pay a civil penalty of \$500 within 30 days of this Decision for the violation of 30 C.F.R. 1721 (a) alleged in Citation 3004642 and found above.
3. The Secretary's petition for an additional civil penalty for a violation of 30 C.F.R. 1721(a) based upon Order 3004643 is DISMISSED.

William Fauver
Administrative Law Judge