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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

PETITIONER

Civil Penalty Proceeding

Docket No. NORT 78-337-P

A/O No. 44-02277-02004V

v.

Moss No. 3 Preparation Plant

CLINCHFIELD COAL COMPANY,

RESPONDENT

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Gary W. Callahan, Esq., The Pittston Company
Coal Group, Lebanon, Virginia, for Respondent

Before: Judge Charles C. Moore, Jr.

Inspector Daniel S. Graybeal, a surface mine inspector for MSHA, conducted a regular health and safety inspection at Clinchfield Coal Company's Moss. No. 3 Preparation Plant on November 29, 1977 (Tr. 8), and during the course of inspecting the plant's thermal drying system (Tr. 10), Inspector Graybeal found that the bypass relief gate for the No. 3 furnace was not working (Tr. 11). This particular plant had four furnaces, each with two dryers (Tr. 11).

Inspector Graybeal asked foreman Ernest Serber to have the furnace operator simulate an emergency shutdown. This is accomplished by stopping the dried coal transfer screw which stops all drying components except the exhaust fan.(FOOTNOTE)1 This was done, but the bypass gate did not open (Tr. 12). An emergency shutdown was simulated three more times and each time the bypass gate failed to open (Tr. 12). Inspector Graybeal then asked a local union representative to disconnect the air hose leading to the air motor that closes the bypass gate under pressure. The bypass gate still failed to open (Tr. 12). The protection door which normally allows heat from the furnace to rise into the dryers closed during the emergency shutdown, as it should (Tr. 23).

Although Inspector Graybeal did not have a clear line of vision to the furnace from his location on the feed and discharge screw platform next to the bypass gate, he could see smoke rising up from the area of the furnace during the shutdown. None of the other dryers were shut down at this point (Tr. 28).

The inspector issued an unwarrantable failure order. This order was terminated 1 hour and 10 minutes after it was issued (Tr. 45). Inspector Graybeal was called back to reinspect the bypass relief gate (Tr. 46). In checking the gate, he observed it would only open part way and he refused to terminate the order until the bypass gate would open completely (Tr. 46). Employees of Respondent tied a 15-pound metal weight to the arm of the bypass gate to give it more leverage so that it would open (TR. 46-47). The bypass gate then operated properly and the order was terminated.

The furnace operator on the day shift informed Inspector Graybeal that the bypass gate was last checked on November 21, 1977 (Tr. 43). Four other employees of Respondent did not know when the bypass gate had been most recently inspected (Tr. 75).

The last unwarrantable failure order issued to the Moss No. 3 Preparation Plant was written on October 12, 1976. During that 11-month interval, no complete health and safety inspections were conducted by MSHA at the plant to verify abatement of the unwarrantable failure citation, or for any other reason (Tr. 97).

A plant electrician was called to the No. 3 furnace to check the bypass gate after the order was issued and before it was abated. He testified that he unhooked the air hose to the bypass gate and found that the gate operated properly (Tr. 145). The electrician called one of the foremen and told him that he could not find anything wrong with the bypass gate (Tr. 45). He had watched the bypass gate open when he unhooked the air hose (Tr. 147).

Frank Hall, the plant superintendent, testified that no time had been lost due to a malfunctioning bypass gate during the week the citation was issued (Tr. 165).

There is no doubt that thermal dryers can be hazardous and that the chance of explosion or fire is greater during startup and shutdown than during normal operation of the dryer. Hot gases from the furnace enter the main part of the dryer where coal and coal dust is present and ignition of the coal dust sometimes occurs. It was explained that there is sometimes incomplete combustion in the furnace and thus some flammable gases reach areas where coal dust accumulates and that if an ignition occurs these gases would add to the severity of a coal dust ignition. It is not at all clear however, how the failure of the bypass gate could lead to an explosion in the dryer. The last page of Exhibit M-2 contains a schematic diagram of the thermal dryer involved in this case. The furnace portion of the dryer is constructed of an inner wall which is firebrick hung on a framework with no mortar and an outer wall which, although

mortared, nevertheless has substantial openings therein. When the system is operating the exhaust fans

cause air to be drawn in through the furnace openings and out of the furnace up past the protection door into the main part of the dryer. When the protection door is closed no gases from the furnace can be sucked up into the dryer, and the purpose of the bypass gate is to disburse the combustion products via a bypass stack leading to the outside rather than having these products exit the furnace through holes in the furnace itself. Even with the protection door closed (the bypass gate has no function unless the protection door is closed), I am unconvinced that an explosion hazard existed. I cannot accept the inspector's speculation that sufficient pressure might build up in the furnace to force open the protection door. According to the inspector, there were two 16-inch square openings at the top corners of the furnace (this is the outside wall of the furnace) and at the bottom some bricks were left out to provide an airflow (Tr. 70). With the protection door and the bypass gate closed, smoke could be forced through the furnace openings until the fire smothered itself. The smoke coming out of these openings may constitute a hazard, but not an explosion hazard.

Although there is some question about it, I am going to assume that the thermal dryer operator used the proper emergency shutdown procedures. According to the note at the bottom of page 4 of the emergency shutdown procedures (Exhibit M-2), stopping the dried coal screw will stop the complete system in sequence except for the exhaust fan. Respondent's superintendent however, testified that the note was erroneous and that the other steps listed on the same page would have to be taken in order to shut down the system in sequence. Inasmuch as the inspector asked the dryer operator to simulate an emergency shutdown and observed that the bypass gate did not close and that smoke was coming from the bottom of the furnace (indicating the protection door had closed), he established a prima face case that the bypass gate was not working properly. If the dryer operator acted improperly, it was the burden of Respondent to rebut the prima face case by showing that some step in the shutdown procedure was omitted. It has failed to make such a showing. I therefore find that there was a violation of the safety standard.

The inspector issued the unwarrantable failure order because four tries were made to simulate the emergency shutdown and in each case the bypass gate would not open. It is clear that I do not have any authority to review the unwarrantability finding or the order during a civil penalty proceeding. In Zeigler Coal, 2 IBMA 216 (1973), the Board of Mine Operations Appeals decided that the validity of a withdrawal order is not an issue in a civil penalty proceeding. Subsequent cases under the 1969 Act decided by both the Board and the Commission unerringly follow Zeigler (Wolf Creek, PIKE 78-70-P, March 26, 1979; Pontiki, 1 FMSHRC 1476 (October 1979); Jewell Ridge, 3 IBMA 376 (1974); Plateau Mining, 2 IBMA 303 (1973); Buffalo Mining, 2 IBMA 327 (1973); North American Coal, 3 IBMA 93 (1974), cf. Freeman Coal, 2 IBMA 197 (1973)). This is the rule whether the improperly considered order was an unwarrantable failure order (Wolf Creek, supra; Jewell Ridge, supra; Pontiki, supra; North American Coal, supra), or an imminent danger withdrawal order (Zeigler Coal,

supra; Plateau Mining, supra; Buffalo Mining, supra; cf. Freeman
Coal, supra).

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I think a distinction should have been made between orders that depend on a violation of a health and safety standard, such as unwarrantable failure orders, and imminent danger orders which need not be supported by any violation of a health and safety standard. An imminent danger can exist when there is no violation, but the idea of there being an unwarrantable violation but no violation is self-contradictory. If I had found that there was no violation proved in this case, the effect of that finding would be to show the invalidity of the order but I could not vacate that order. Assuming my decision was affirmed, there would be a final legal determination that no violation had occurred and at the same time, an equally final and valid order stating that an unwarrantable failure violation had occurred.

In the instant case, I have found that a violation occurred and while I cannot review the unwarrantability of the violation I can find and do find that Petitioner has not proved negligence in this case. (FOOTNOTE 2) The bypass stack has to open in both emergency and normal shutdowns and there was no evidence that prior to the date of the inspection this bypass stack had failed to operate properly. The fact that in four separate tries the inspector and dryer operator could not get the bypass stack to open, shows that there was something wrong with it but it does not prove that Respondent knew or should have known that something was wrong with it. Respondent is a large company and has a substantial history of violations and it abated the violation promptly and in good faith. I find the evidence establishes a low order of gravity and that a penalty of \$300 is appropriate.

ORDER

IT IS THEREFORE ORDERED that Respondent pay to MSHA, within 30 days of the issuance of this decision, a civil penalty in the amount of \$300.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE 1

There is a dispute as to this statement which will be discussed later.

~FOOTNOTE 2

This makes it unnecessary for me to consider Respondent's contention that it was prevented from escaping the unwarrantable chain by MESA's failure to conduct a complete inspection for 11 months.