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QUARTO MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

QUARTO MINING COMPANY, APPLICANT	Contest of Order Docket No. LAKE 80-44-R
v.	Order No. 0824549
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	September 20, 1979 Powhatan No. 4 Mine
UNITED MINE WORKERS OF AMERICA, RESPONDENT	

DECISION

Appearances: David R. Case, Esq., John T. Scott, Esq., Crowell & Moring, Washington, D.C., for Applicant Linda Leasure, Esq., Office of the Solicitor, Department of Labor, for Respondent, MSHA

Before: Administrative Law Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et seq., upon the application of the Quarto Mining Company (Quarto) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act. A hearing was held in Wheeling, West Virginia, on January 22, 1980, at which the parties appeared and presented evidence.

MSHA inspector William A. McGilton issued the withdrawal order at bar on September 20, 1979, charging Quarto under 30 C.F.R. 75.200, with failing to comply with its approved roof control plan.

Section 104(d)(2) of the Act, under which this order was issued, provides in relevant part as follows:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secetary who finds upon any subsequent inspection the existence in such mine of violations similar

to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

There is no dispute that a valid precedent section 104(d)(1) order existed, that the violation underlying the order at bar did in fact occur and that the violation was "significant and substantial" and did not constitute an "imminent danger." The specific issue then is whether the violation cited in the section 104(d)(2) order was the result of an "unwarrantable failure." If it was then the violation was "similar" to that resulting in the issuance of the precedent section 104(d)(1) order and the order at bar is valid. Eastern Associated Coal Corp., 3 IBMA 331 (1974).

Unwarrantable failure has been defined as the failure by an operator to abate a condition that he knew or should have known existed, or the failure to abate because of indifference or lack of due diligence or reasonable care. A high degree of negligence need not be found to support the issuance of an unwarrantable failure order but the issuance must be reasonable and made pursuant to a thorough investigation by the inspector. Ziegler Coal Company, 7 IBMA 280 (1977).

I find, for the reasons that follow, that Quarto failed to abate the admitted violation which it should have known existed. The essential facts of the case are not in dispute. The violation occurred in the 9 right off 1 north-No. 67 room where nine temporary roof supports (metal jacks) were installed in violation of the roof-control plan. All nine were set with more than the allowable number of capblocks (also known as header blocks) and several were also set on centers in excess of 5 feet and on loose footing. When foreman Henry Wiley conducted his preshift inspection of the No. 67 room at 5:26 a.m. the violations did not exist. Wiley admitted that he did not return to the No. 67 room during the remainder of the shift, which ended at 7 a.m., explaining that he was busy cleaning up an accumulation of combustible material elsewhere in the mine. He complained that he was short on workers and thus felt compelled to personally shovel away the accumulation.

The two miners, who set the improper roof supports, Edward Richards and Keith Jones, testified that they began looking for Wiley sometime after 6 a.m. When they found him two entries back they told him they had finished mining and reported that the roof was too high in the No. 67 room to set jacks. Wiley told them to used header blocks. Jones admitted that it was not common practice to ask the foreman for permission to use only two blocks with the jacks (which was permissible under the roof-control plan) and implied that Wiley should have known that more than two capblocks would have to be used by the nature of his unusual inquiry. The two miners thereafter returned to the No. 67 room and, using an excessive number of blocks, proceeded to improperly set the temporary supports.

I find that when Wiley was told by Jones and Richards of the unusually high roof in the No. 67 room he was placed on sufficient notice to obligate him as a reasonably prudent mine foreman to personally check that area before the end of his shift. I find that he failed to exercise reasonable care in not doing so. This constitutes "unwarrantable failure". The notice here was especially clear because of the unusual nature of two miners requesting permission to perform a procedure they would ordinarily follow without permission if it were done properly.

I also find that Wiley failed to exercise reasonable care in failing to have conducted required methane tests in the vicinity of the No. 67 room. Wiley should have known, even if he did not actually know, that such tests had to be conducted every 20 minutes during the shift (30 C.F.R. 75.307) and that he was the only one in that section who had the approved methane detector to conduce such tests. Wiley in fact took no methane readings in that area after 5:26 a.m. If he had not acted negligently in this regard I find that he would have been in a position to have seen the excessively high roof and improper roof supports in the No. 67 room. For this additional reason then Wiley should have known of the violations.

The negligence of foreman Wiley is imputed to Quarto. The Valley Camp Coal Co., 3 IBMA 463 (1974). Under the circumstances I find that the failure to abate the roof-control violation which Quarto should have known existed was the result of "unwarrantable failure." Order of Withdrawal No. 824549 is therefore valid and this case is dismissed.

Gary Melick
Administrative Law Judge