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SOL (MSHA) v. JEWELL COAL
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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. VA 80-77 A.O. No. 44-02690-03017 V
v.	Jewell 18, Lower Jewell Mine
JEWELL RIDGE COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Catherine M. Oliver, Esq., Office of the Solicitor, U.S Department of Labor, Philadelphia, Pennsylvania, for Petitioner
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging one violation of a safety regulation. The general issue is whether the Jewell Ridge Coal Corporation (Jewell Ridge) has violated the cited regulation and, if so, the appropriate civil penalty to be paid for the violation. An evidentiary hearing was held in Abington, Virginia, on November 5, 1980.

The citation at issue (No. 696012) charges one violation of the standard at 30 C.F.R. 75.400. That standard requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. The citation here states that Jewell Ridge permitted dry, loose coal and coal dust to accumulate in the No. 1 return entry on the No. 1 section. The size of the "accumulation", described as approximately 38 feet long, 4 feet high and 20 feet wide, is not disputed. Moreover, from the admissions of Respondent's own witnesses including the general mine foreman Ralph Miller, it is clear that the cited "accumulation" was intentionally created as part of a cleanup process on the day shift 5 days before that condition was cited.

Jewell Ridge first seems to claim that MSHA did not prove that the "accumulation" consisted of combustible materials. MSHA inspector Harold Burnett testified however, based on his visual observations, that the "accumulation" indeed consisted of loose coal and coal dust of such a nature as to

be combustible. The particles ranged in size from dust to the size of his fist, were black and dry and contained no perceptible inert material such as rock, stone, cement, or rock dust. This testimony is not directly contradicted. I find Burnett's visual observations of the combustible nature of the "accumulation" to be sufficient to support the violation cited. Coal Processing Corporation, 2 IBMA 336 at pages 345-346. Under the circumstances there is no need to determine the weight, if any, to be given to the analysis of the coal samples collected by Inspector Burnett and the laboratory test results purportedly obtained therefrom.

Jewell Ridge next seems to contend that extenuating circumstances existed to justify the presence of the cited "accumulation" for a period of more than 4 days. Mine foreman Miller explained that he directed section foreman Blankenship to clean up the No. 1 entry by having the excess loose coal scooped up into the face during the day shift on August 16th in anticipation that the continuous miner would, in the course of the mining cycle, later clean it up. For reasons unexplained however the "accumulation" was not cleaned up during that day shift nor on the following night shift on August 16th. Miller explained that the pile was not cleaned up on the 17th because the mine was idle "for lack of railroad cars or something" and that it was not cleaned up on the 18th or 19th because that was a weekend during which the miners did not ordinarily work. He offered no reason why it was not cleaned up before 1 p.m. on Monday the 20th but explained that at that time bad roof conditions were discovered in the haulway which then provided the only access to the "accumulation". Crib blocks used to support that roof thereafter obstructed passage of equipment needed for the cleanup. Miller argued that until the evening shift of August 20th when the No. 1 entry was cut through from another direction it was therefore impossible to remove that "accumulation". Miller admitted however that although the "accumulation" was reported in the preshift examination book before the day shift began on the 21st no cleanup work was performed until the condition was cited by Inspector Burnett at 10:15 that morning.

Miller's various excuses for his failure to have the "accumulation" cleaned up for more than 4 days do not provide an acceptable defense to the cited violation. The mere existence of an "accumulation" of combustibles is sufficient to support a violation of 30 C.F.R. 75.400. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (December 1979); Secretary v. Old Ben Coal Company, 2 FMSHRC 2806 (October 1980). Miller's testimony does however, to the contrary, support a finding of gross negligence for his failure to have the accumulation cleaned up for the several days before the roof deteriorated. The foreman's gross negligence is imputed to the operator. Under the circumstances I have no difficulty in concluding that the vast pile of loose coal and coal dust found by Inspector Burnett in this case constituted an "accumulation" within the meaning of the cited standard, Old Ben Coal Company, 1 FMSHRC 1954, supra, and that the loose coal and coal dust constituted combustible materials which could cause

or propagate a fire or explosion if an ignition source were present. Old Ben Coal Company, 2 FMSHRC 2806, supra.

In determining the amount of penalty that is appropriate in this case I have already determined that gross negligence existed. Evidence that there were only insignificant amounts of methane present in the section of the mine cited, that no ignition sources were discovered by Inspector Burnett as a result of his inspection that day and testimony from Burnett that the likelihood of an explosion or fire under the circumstances was "improbable" do mitigate the gravity of the hazard. I observe however, that even though no ignition source may have been discovered by Burnett during his inspection, there is always the risk of such an ignition source developing at any time. In this regard Burnett testified that it was not uncommon for electric trailing cables to become damaged from moving equipment and for the creation of sparks from ripper heads striking rock. The hazard from fire or explosion was also increased here by the fact that oil and explosives were stored nearby.

While the cited accumulation was indeed cleaned up within the time specified for abatement it is apparent that under the circumstances Jewell Ridge had little choice but to clean up the accumulation if it wished to continue in operation. It has been stipulated that any penalty imposed in this case would not affect the operator's ability to continue in business. The specific mine at issue is medium in size with production of slightly over 96,000 tons in a recent year. The operator is large in size with a production of over 6 million tons in a recent year. It is difficult to determine the precise history of violations from the computer print-out offered by MSHA in evidence so that I have neither increased nor decreased the penalty I am imposing in this case as a result. Under all the circumstances I conclude that a penalty of $1,500 is appropriate.

ORDER

WHEREFORE, the Jewell Ridge Coal Corporation is ordered to pay a penalty of $1,500 within 30 days of this order.

Gary Melick
Administrative Law Judge