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

RUSHTON MINNING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 86-44-R
Order No. 2404261; 11/5/85

Rushton Mine

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

v.

RUSHTON MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 86-92
A.C. No. 36-00856-03554

RUSHTON MINE

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsyl vania, for the Secretary of Labor.
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Rushton Mining Company.

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton Mining Company (Rushton) filed a Notice of Contest challenging the propriety of Order 2404261 issued under 104(d)(1) of the Federal Mine Safety and Health Act (Act) at its Rushton Mine. The Secretary of Labor (Secretary) has filed a petition for the assessment of a civil penalty for the violation alleged in the order. The penalty proceeding also involves five other alleged violations concerning which the parties have submitted a settlement motion which I am approving. Because the two cases involve the same withdrawal order, they were consolidated for the purposes of hearing and decision by order issued May 6, 1986. Pursuant to notice, the cases were heard in

State College, Pennsylvania, on November 18 and 19, 1986. Joseph E. Colton, Ralph Hamilton and Ronald J. Gossard testified on behalf of the Secretary. Daniel J. Kerfoot, Frank Petriskie, and Raymond G. Roeder testified on behalf of Rushton. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Rushton was the owner and operator of an underground coal mine in Centre County, Pennsylvania, known as the Rushton Mine. The mine has 260 employees, and produces approximately 660,000 tons of coal annually. It is a subsidiary of the Pennsylvania Mines Corporation. It is a large operator. During the 24 months prior to the violations being considered here, it had a history of 257 violations. This history is not such that penalties otherwise appropriate should be increased because of it. The alleged violative condition was promptly abated in good faith.

On November 5, 1985 at about 9:45 a.m., Federal Mine Inspector Joseph Colton issued a withdrawal order under 104(d)(1) of the Act charging a violation of 30 C.F.R. 75.1434(a)(2). The order alleged that the wire rope attached to a mantrip car had broken wires in one strand of one lay which exceeded 15 percent of the total number of wires in the strand. The rope was attached to a drum in the hoist house and was used to lower the mantrip, containing up to 34 miners, into the working section of the mine at the commencement of the shift, and to remove them at the conclusion of the shift. The hoist was operated by Frank Petriskie, an employee of Rushton for 21 years, and a hoist operator for more than 6 years. Mr. Petriskie is regarded as an extremely conscientious employee.

The rope runs from the drum in the hoist house to the bottom of the slope, a distance of approximately 700 feet. The grade is approximately 17 percent. The mantrip has electrical mechanical brakes with sensors which set the brakes automatically in the event of "an overspeed condition." The rope used in this operation is 1,100 feet long, 1 inch in diameter, and has a "breaking strength" of in excess of 50 tons. A fully loaded mantrip puts a load of about 5 tons on the rope. It is the policy at Rushton to change the rope every 6 months and more often if broken wires are discovered.

Prior to the issuance of the contested order on November 5, 1985, Petriskie examined the drum, the rope, the clamps attaching the rope to the brake car, and the other components of the hoisting system while the mantrip was being

lowered into the mine. He checked the rope by draping a rag over it to catch any breaks in the rope and by visually examining it. The examination was performed by Mr. Petriskie alone. He then recorded the results of his examination in the hoist examination record book at 8:35 a.m. The book was later countersigned by Andy Moriarity, a surface foreman.

The evidence is very clear and not contested by Rushton that at the time of Inspector Colton's examination the rope had more than the number of broken wires required to meet the "retirement criteria." Under Rushton's procedures, it was due to be changed November 9, 1985 (when it would have apparently been on the hoist for 6 months).

I find as a fact that the number of broken wires in one strand of the rope totalled seven. These were crown or surface wires and the breaks were visible. There were five broken wires in another area of the rope. In addition, a number of other areas had in excess of three broken wires. There are approximately nineteen wires to a strand and six strands in the rope. The seven broken wires represent 36.8 percent of the total number of wires in the strand.

Following the issuance of the order, the wire was promptly replaced, and the alleged violation abated. Some time after the order, Mr. Petriskie asked if he could have assistance in inspecting the rope. The request was granted and it is now inspected by two miners. Petriskie "checks it out" before 7:00 a.m. and with another person inspects it at about 7:45 a.m. when the mantrip is lowered into the mine.

REGULATION

30 C.F.R. 75.1434 provides in part:

> Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:
>
> > (1) The number of broken wires within a rope lay length, excluding filler wires, exceeds either¬
> >
> > **********
> >
> > (2) Fifteen percent of the total number of wires within any strand;
> >
> > **********

ISSUES

1. Does the evidence show a violation of a mandatory safety standard?

2. If a violation is established, did it result from Rushton's unwarrantable failure to comply within the regulation?

3. If a violation is established, was it significant and substantial?

4. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

Rushton contends that the standard is violated only if it is shown that it knew or should have known of the defective condition in the rope and failed to retire it. It thus would require a finding of negligence before a violation could be found. The situation is likened to cases involving methane liberation under 30 C.F.R. 75.308 where it has been held that the presence of excessive methane does not constitute a violation, but rather the failure to take appropriate steps to reduce or eliminate it. See MidÄContinent Coal and Coke Co., 1 IBMA 250 (1972); Youghiogheny and Ohio Coal Co., 5 FMSHRC 1581 (1983), vacated 7 FMSHRC 200 (1985). The analogy is not apt. Methane is liberated in the cutting of coal, and excess methane can suddenly and unexpectedly appear, in spite of an operator's care in following appropriate ventilation requirements. For this reason constant examinations for methane are mandated by the Act. When excess methane is detected, remedial steps must be taken immediately. The violation charged here, however, involves defects in equipment which occur through usage over time. I conclude that the existence of defects in a wire rope sufficient to require its retirement in itself constitutes a violation of the standard if the operator continues to use the rope, regardless of whether he knew or should have known of the defects.

UNWARRANTABLE FAILURE

In the United States Steel Corporation case, 6 FMSHRC 1423, 1437 (1984), the Commission stated that "an unwarrantable failure . . . may be proved by a showing that the violative condition . . . was not corrected or remedied, prior to the issuance of a citation or order because of indifference, willful intent or a serious lack of reasonable care."

Because a mantrip car is involved, the hoisting equipment is required to be examined daily. 30 C.F.R. 75.1400(d). This is in addition to the requirement that the wire rope be examined at least every 14 calendar days. 30 C.F.R. 75.1433(a).

I have found that prior to the order issued here, Rushton examined the rope daily. It examined it only little more than an hour prior to the issuance of the order on November 5, 1985. On the basis of these findings, I conclude that the failure to correct the violative condition here did not result from indifference or willful intent. The question remains whether it resulted from a serious lack of reasonable care.

I have found that Petriskie examined the rope on November 5 and failed to see the defects. I have further found that the defects were substantial and clearly visible on careful examination. Petriskie was a conscientious employee. I can account for his failure to find the broken wires only by finding that the method of examination was seriously inadequate: he examined the wire alone while lowering the mantrip car, with up to 34 miners on board, to the working section. He was asked to perform alone too many tasks in a limited time, and was forced to neglect the inspection task. The inadequacy was recognized by Rushton after the order when it assigned a person to help Petriskie perform the rope examination. I conclude that the evidence shows a serious lack of reasonable care on Rushton's part. I am not concluding that Petriskie's examination was inadequate and that Rushton should have known this. Rather, I am concluding that the procedure for examining the rope was seriously flawed and that Rushton was responsible for this. The violation was caused by Rushton's unwarantable failure to comply with the regulation.

SIGNIFICANT AND SUBSTANTIAL

The Commission stated in Mathies Coal Co., 6 FMSHRC 1 (1984), that to establish a significant and substantial violation the Secretary must show that the violation contributed to a hazard, and that the hazard contributed to would, with reasonable likelihood, result in an injury of a reasonably serious nature. The inspector was of the opinion that the hazard contributed to here was the failure of the rope which would subject the persons in the mantrip to injuries from derailment of the car or from attempts to evacuate the car. However, the evidence does not establish that the defects found in the rope would be likely to cause it to break. Respondent's general maintenance supervisor testified that the rope had a "reserve strength" of 31 percent of its original capacity, that is, if all the crown wires were worn out, the core would have 31 percent of its original capacity.

The original capacity was 50 tons, and a fully loaded mantrip car was 5 tons. Therefore, I could not conclude that the failure of the rope was reasonably likely in view of the limited number of broken wires cited. Furthermore, the Inspector did not address the effect the automatic braking system would have on the likelihood of injury should the rope fail. I conclude that the Secretary has not established that the violation was significant and substantial.

PENALTY

Although I concluded that the violation was not significant and substantial under the Mathies test, nevertheless, I believe it was moderately serious: the safety of 34 people was involved each time the mantrip was lowered. A defective rope to some degree put that safety at risk. The violation resulted from Rushton's negligence. Considering the criteria in 110(i) of the Act, I conclude that an appropriate penalty for the violation is $400.

ORDER

Based on the above findings of fact and conclusions of law, and on the Secretary's motion to approve settlement, IT IS ORDERED:

1. Order 2404261 is AFFIRMED, including the special findings that it was caused by unwarrantable failure. The order is MODIFIED to delete the special finding of significant and substantial. The Notice of Contest is thus DENIED in part and GRANTED in part.

2. Citation 2404251 charging a violation of 30 C.F.R. 75.516 is VACATED.

3. Citation 2404252 charging a violation of 30 C.F.R. 75.1103Ä4(a) is VACATED.

4. Citation 2404253 charging a violation of 30 C.F.R. 75.326 is VACATED.

5. Rushton shall within 30 days of the date of this decision pay the following civil penalties:

CITATION/ORDER	PENALTY
2404227	$ 58.00
2547350	98.00
2404261	400.00
Total	$556.00

James A. Broderick
Administrative Law Judge