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U.S. STEEL MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

U.S. STEEL MINING CO., INC., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. PENN 86-305-R Order No. 2685834; 8/28/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Maple Creek Mine Mine I.D. 36Ä00970
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 87-241
v.	Maple Creek Mine
U.S. STEEL MINING CO., INC., RESPONDENT	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor; Billy M. Tennant, Esq., Pittsburgh, Pennsylvania, for U.S. Steel Mining Co., Inc.

Before: Judge Broderick

STATEMENT OF THE CASE

U.S. Steel filed a notice of contest, challenging an order of withdrawal issued on August 28, 1986, charging an unwarrantable failure violation of 30 C.F.R. 75.400. The order alleged that there were accumulations of loose, fine coal in certain locations in the subject mine. In the penalty proceeding, the Secretary seeks a civil penalty for the alleged violation. Because the two proceedings involved the same alleged violation, they were consolidated for the purposes of hearing and decision. Pursuant to notice the consolidated cases were called for hearing in Pittsburgh, Pennsylvania, on January 14, 1988. Inspector Francis Wehr testified for the Secretary; Paul Gaydos, Barry Kovell, and Robert Bryan testified on behalf of U.S. Steel.

Both parties have filed posthearing briefs. I have considered all the evidence and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

U.S. Steel was the owner and operator of the Maple Creek Mine, an underground coal mine located in Washington County, Pennsylvania. The mine is classified as a gassy mine, and liberates over one million cubic feet of methane in a 24 hour period. For this reason, it is subject to a 103(i) spot inspection every five days. U.S. Steel produces over 9 million tons of coal annually, and the subject mine produces almost 2 million tons annually. The subject mine was assessed for 571 violations in the 24 months immediately preceding the issuance of the order involved in this proceeding, of which 69 were violations of 30 C.F.R. 75.400.

On February 4, 1986, a 104(d) order (2683120) was issued to U.S. Steel charging a violation of 30 C.F.R. 75.400. The assessment for this violation was paid. On April 15, 1986, a 104(d)(2) order of withdrawal (2680602) was issued charging the same violation. There is no evidence in the record of any further 104(d) orders issued thereafter prior to the order contested in this proceeding. Between July 22, 1986 and August 26, 1986, Federal Mine Inspector Francis Wehr issued seven 104(a) citations alleging violations of 30 C.F.R. 75.400 in various locations at the subject mine. Inspector Wehr stated that during this period he discussed the mine's failure to clean up the loose coal with management representatives.

On August 28, 1986, Inspector Wehr was engaged in a regular safety and health inspection of the subject mine. He found accumulations of loose coal in nineteen different locations along the 7ÄFlat, 13ÄRoom belt conveyor. The accumulations varied in depth from 1 to 16 inches, in width 16 to 17 feet, and in length from 10 to 12 feet. The accumulations were for the most part wet, and some of them were actually under water. But in two locations (splits 8 and 10), the loose fine coal accumulations were dry. The bottom undulated, so that portions of the other accumulations extended above the water and were dry or drying. Because of this condition, Inspector Wehr issued the 104(d)(2) order involved in this proceeding. Witnesses for U.S. Steel disputed the testimony of Inspector Wehr that some of the accumulations were dry. I accept the testimony of Inspector Wehr which was supported by his contemporaneous notes (Govt's Ex. 2). The accumulations were of such an extent that they must have taken 3 to 4 months to occur. The areas involved had been rockdusted. The Inspector did not take a methane reading. At the time the order was issued, the belt conveyor was energized

and a power cable 5 to 6 feet above the accumulations of coal was hung on J hooks. Prior to the issuance of the order, the operator was in the process of cleaning up coal spilled at the "front end of the belt conveyor entry."

Inspector Wehr testified that the mine was on a "104(d)(2) chain." He stated that he checked the mine file prior to beginning the inspection to determine this. The mine is inspected quarterly, the first quarter being October, November and December. Inspector Wehr testified that he began his quarterly inspection during which the order here was issued on June 1, 1986. It appears, however, that in fact it began on July 1, 1986. He also testified that it took approximately 3 months to completely inspect the mine.

The condition was abated by miners shovelling the coal on to the belt and loading it out. The abatement took approximately four to six days. Because the accumulations were for the most part very wet, it was necessary to build dams on the belt with bags of rock dust to keep the coal from falling off. There is no evidence of any defects in the belt rollers or cable at the time the order was issued.

REGULATION

30 C.F.R. 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electrical equipment therein.

ISSUES

1. Did the violation charged in the contested order occur? Specifically, did the cited accumulations consist of combustible material?

2. Did the Secretary show that there was no "clean inspection" of the mine between the time of the last 104(d) order and the order contested herein?

3. If a violation is established, was it the result of the operator's unwarrantable failure to comply with the standard?

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

5. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

The existence of the accumulations in the areas cited in the contested order is not seriously disputed. U.S. Steel contends, however, that they were not combustible because of the water in the area. But I have found as a fact that in at least two areas, the accumulations were dry. Further, even wet accumulations of loose coal are combustible. The Commission directly addressed this issue in Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (1985):

> Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire.

I conclude that the accumulations here were combustible, and that a violation of 30 C.F.R. 75.400 is established.

INTERVENING CLEAN INSPECTION

Section 104(d)(2) of the Act requires that after a withdrawal order has been issued under section 104(d)(1), another withdrawal order be issued for "similar violations" found on a subsequent inspection, "until such time as an inspection of such mine discloses no similar violations." The burden of proof is placed on the Secretary to establish that all areas of the mine were not inspected for all hazards during the time period in question, in this case, between April 15, 1986 and August 28, 1986. Kitt Energy Corp., 6 FMSHRC 1596 (1984), aff'd sub nom. UMWA v. FMSHRC, 768 F.2d 1477 (D.C.Cir.1985); U.S. Steel Corp., 6 FMSHRC 1908 (1984). The Secretary introduced evidence that MSHA's records indicated that the subject mine was on a "104(d)(2) chain," but failed to show that a "clean inspection" had not occurred during the four month period from April 15 to August 28, 1986. The Commission and the Court of Appeals ruled that an intervening clean inspection is not limited to a regular quarterly inspection so long as the entire mine is inspected for all hazards. Inspector Wehr testified that it takes approximately three months to inspect the entire mine. I conclude therefore that the Secretary failed to establish in this case that a clean inspection did not occur between April 15 and August 28, 1986. Therefore 104(d)(2) order was improperly issued.

The underlying violation, however, survives the vacation of a 104(d) withdrawal order. Kitt Energy, supra.

UNWARRANTABLE FAILURE

In Emery Mining Corp., 9 FMSHRC 1977 (1987), the Commission stated that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." The inspector in this proceeding cited the violation as unwarrantable because the same violation had been cited a number of times in other areas of the mine, and the operator had been instructed to clean up accumulations. These other areas (5ÄFlat and 9ÄFlat), however, were both dry sections. The area cited here (7ÄFlat) was extremely wet, and water continued to come in from the bottom, ribs and roof. The operator believed (erroneously) that because the accumulations were wet, and cleaning them up was extremely difficult, it was not required to clean them up. The condition resulted therefore not from negligence but from the operator's willful conduct. This is not to say that it willfully violated the standard, but that it willfully failed to clean up the accumulations which it was aware of but "didn't consider . . . enough of a hazard to clean up." (Tr. 98.) I conclude that the violation resulted from the unwarrantable failure to comply with the standard.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly cited as significant and substantial if it contributes to a safety hazard reasonably likely to result in serious injury. Mathies Coal Co., 6 FMSHRC 1 (1984). The accumulations here were substantial, but were largely extremely wet. Although they were combustible, they were not reasonably likely to contribute to the hazard of a mine fire. Although the mine is gassy, there is no evidence of methane present, and no evidence of any defect in the cable or other electrical equipment. I conclude that the violation was not shown to be significant and substantial under the Mathies test.

PENALTY

Although the violation was not shown to be significant and substantial, it was moderately serious because of the extent of the accumulations, the gassy condition of the mine, and the presence of energy sources. It was caused by the operator's willful conduct. The operator is a large operator, with a significant history of prior violations. The violation was abated in good faith. Based on all of the above findings, and considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $600.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

(1) Order of Withdrawal 2685834 issued August 28, 1986, is MODIFIED to a 104(a) citation;

(2) Within 30 days of the date of this decision, U.S. Steel Mining Company shall pay the sum of $600 as a civil penalty for the violation of 30 C.F.R. 75.400 found in this decision.

James A. Broderick
Administrative Law Judge