

CCASE:  
YOUGHIOGHENY & OHIO COAL V. SOL  
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FMSHRC-FCV  
JUNE 14, 1988

YOUGHIOGHENY & OHIO COAL  
COMPANY,  
Contestant  
v.

CONTEST PROCEEDING  
Docket No. LAKE 86-121-R  
Order No. 2828634; 8/5/86

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

Nelms No. 2 Mine

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

CIVIL PENALTY PROCEEDING  
Docket No. LAKE 87-9  
A. C. No. 33-00968-03650

v.

Nelms No. 2 Mine

YOUGHIOGHENY & OHIO COAL  
COMPANY,  
Respondent

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Cleveland, Ohio for the  
Secretary of Labor; Robert C. Kota, Esq., St. Clairsville,  
Ohio, for Youghioghenny & Ohio Coal Company.

Before: Judge Melick

These cases are before me upon remand by the Commission on May 13, 1988, to determine the validity of the order at bar issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". More specifically the issue on remand is whether the admitted violation of 30 C.F.R. § 75.1710-1(a)(2) charged in the order was the result of the mine operator's unwarrantable failure to comply. The Commission has also directed that the penalty assessment be reexamined in light of the determination on unwarrantability.

Unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997

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(1987), petition for review filed 88-1019 (DC Cir. January 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987). In these cases the Commission compared ordinary negligence, as conduct that is "inadvertent," "thoughtless," or "inattentive," with conduct constituting an unwarrantable failure, i.e. conduct that is "not justifiable" or "inexcusable".

In this case the evidence is undisputed that on August 1, 1986, Youghiogheny and Ohio Coal Company (Y & O) section foreman John Slates directed one of his miners, David Parrish, to operate a scoop tractor not equipped with a canopy in the last open crosscut in the main north section of the Nelms No. 2 mine. Because of the mining height the operation of the scoop in this area without a cab or canopy was acknowledged to be a violation of the cited standard.

David Parrish testified that Slates told him to operate the scoop in the violative manner. Moreover Slates himself admitted to Inspector Ervin Dean of the Federal Mine Safety and Health Administration (MSHA), in the presence of Y & O mine superintendent Charlie Wurschum and Y & O safety director John Woods, that "they had used the scoop in and inby that area, inby the last open break," and that "it didn't have a canopy on it," and that "he knew that it was supposed to." (Tr. 13-14 and 16-17). Slates also acknowledged to Inspector Dean that he had ordered the scoop tractor to be operated without a canopy in the last open crosscut and that he knew it was a violation (Tr. 13 and 28).

Under cross examination by counsel for Y & O, Inspector Dean thought that Slates "might have said something to the effect I wasn't thinking", but he was not sure that was said. In addition on further cross examination of Dean the following colloquy occurred:

Q. [By Y & O Counsel] You said he [Foreman John Slates] wasn't have made a mistake?

A. [By Inspector Dean] I don't have a doubt that he made a mistake.

Q. I mean as opposed to intentionally breaking the law?

A. Yes. And again, I said he may have said that. I don't really remember what was said.

Q. Wouldn't that be very important to you to know why he Operated that piece of equipment like that?

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A. Yes.

Q. But you didn't -- you just thought he might have said it -- that he wasn't thinking at the time?

A. Yes, I guess so. [Tr. 28-29].

Y & O has suggested that the above testimonial exchange proves that Section Foreman Slates did not intentionally direct the scoop tractor to be operated without a canopy in the last open crosscut and that his conduct or failure to act was therefore the result of mere inattention or inadvertence. However since a necessary premise underlying the questions propounded by Y & O counsel was never established (Dean could not "really remember" what Slates had said) the testimonial conclusion (that Slates was not intentionally breaking the law) based on that premise must be disregarded. Indeed the testimony of Inspector Dean is so equivocal, uncertain and ambiguous on this point as to be without probative value.

In addition I can give but little weight to the answer of the scoop operator, David Parrish, to the ambiguous and speculative question under cross examination by Y&O counsel that he did not think his section foreman was intentionally placing him in a position where he might be hurt. The response is particularly inconsequential in the context of unwarrantability since the violation has not been found to be "significant and substantial" or serious. Parrish was also asked to speculate in the following exchange:

Q. [By Y & O Counsel] In your estimation do you think that possibly the section foreman may have gotten mixed up on where this scoop was being operated?

A. I don't believe that he got mixed up, with his experience, but I believe that in the confusion of stuff and nor loading any coal -- he didn't mean to have it done, as far as that. John Slates is a safe man. He's a safe boss to work for as far as that (Tr.35).

Again however such a speculative, ambiguous and conflicting response has no probative value to the issue at hand.

I also give but little weight to the speculation of Don Statler, the Y & O Safety Director who, although not present either at the time of the violation or at the later interview of Statler, suggested that Foreman Slates could have been confused in ordering his employee to operate the scoop in the manner described. There is insufficient probative evidence in the record before me that Slates was in fact confused and there is no evidence that he in fact told Statler that he was confused. In sum there is essentially nothing but vague speculation to support Y & O's contentions in this record.

Moreover the one person who could have answered the question at issue, Section Foreman Slates, was not even called as a witness by Y & O. It is a well established rule of evidence that if a party knows of the existence of an available witness on a material issue and such witness is within its power to produce and, if, without satisfactory explanation it fails to call him, an inference may be drawn that the testimony of the witness would not have been favorable to such party. 2 Wigmore, Evidence § 285 (Chadbourn rev. 1979); Jones on Evidence, Presumptions and Inferences § 3.91. It may indeed reasonably be inferred in this case by the unexplained failure of Y & O to have called this most essential witness who was one of its own employees, that his testimony would not have been favorable to Y & O. The same inferences can be drawn from the unexplained failure of Y & O to have called Wurschum and Woods, two of its other employees who were present at the meeting at which Slates made his critical admissions to Inspector Dean.

Under the circumstances Y & O's claim that Slates' commission of the violation herein was merely the result of inadvertence, thoughtlessness or inattention is without credible or probative evidentiary support. In light of the strong affirmative evidence that Slates directed Parrish to perform work in violation of the standard and that he knew it was a violation to do so, I find that his conduct was aggravated and neither justifiable nor excusable. This constitutes "unwarrantable failure" and the section 104(d)(1) order is accordingly affirmed. This evidence also supports a finding that this was an intentional violation and the \$400 penalty previously ordered in this case is accordingly warranted.

ORDER

Order No. 2828634 is affirmed and the contest of that order is denied. Youghioghney & Ohio Coal Company is directed to pay a civil penalty of \$400 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

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