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MATHIES COAL 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

MATHIES COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. PENN 88-36-R
v.	Order No. 2936667; 10/6/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Mathies Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 88-154 A.C. No. 36-00963-03684
v.	Mathies Mine
MATHIES COAL COMPANY, RESPONDENT	

DECISION

Appearances: Anne Gwynne, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary;
Joseph Mack, III, Esq., Thorp, Reed & Armstrong, Pittsburgh, Pennsylvania, for Mathies Coal Co.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Mathies Coal Company (Mathies) has filed a notice of contest challenging the issuance of Order No. 2936667 at its Mathies Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $1100 for the violation charged in the above contested order as well as another violation charged in Citation No. 2939096 which was not separately contested, but which violation is generally denied by Mathies.

Pursuant to notice, the cases were heard in Washington, Pennsylvania on July 21, 1988. Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties stipulated to the following which I accepted (Tr. 5-8):

1. This Administrative Law Judge has jurisdiction over this proceeding.

2. The Mathies Mine and Mathies Coal Company are owned and operated by the National Mine Corporation.

3. The Mathies Mine and Mathies Coal Company and National Mine Corporation are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. Citation Number 2939096 and Order Number 2936667 were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated therein.

5. Copies of Citation Number 2939096 and Order Number 2936667 are authentic and may be admitted into evidence for establishing issuance.

6. The assessment of a Civil Penalty in this proceeding will not affect the Respondent's ability to continue in business.

7. The annual coal production of Mathies Mine in 1986 was 116,521 tons.

8. There was no intervening clean inspection between June 15, 1987, when Order Number 2940594 was issued and October 6, 1987, when Order Number 2936667 was issued.

9. The printout of the Assessed Violations History Report is a true and accurate history for the Mathies Mine and admissible in the hearing in this matter.

10. There were approximately 686 inspection days at the Mathies Mine in the twenty-four month period prior to the issuance of Order Number 2936667 and Citation Number 2939096.

ISSUES

The general issues before me concerning these cases are whether the order at bar was properly issued, whether there were violations of the cited standards, and in the case of the order, whether that violation, if it existed, was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as appropriate

civil penalties to be assessed for the violations, should either or both be found.

I. Citation No. 2939096

Citation No. 2939096, issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. 50.20 and charges as follows: "The operator failed to report the accident that occurred to John Cherok on May 1, 1986 on MSHA Form 7000-1."

30 C.F.R. 50.20 requires operators to report, inter alia, each occupational injury which occurs at the mine on a Form 7000-1 within ten (10) working days after such an accident resulting in an "occupational injury" to a miner occurs. "Occupational injury" is defined in 30 C.F.R. 50.2(e) as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job."

The operator does not contest the fact that Mr. Cherok was injured, but disputes whether that injury occurred "at the mine". The point being if he incurred the injury elsewhere, it is not a reportable injury.

The only direct evidence of when, where and how the injury occurred comes from Mr. John Cherok, himself. He testified that on May 1, 1986, while working as a motorman in the supply yard of the Mathies mine, his right foot slipped as he stepped up onto the motor. His right shoe must have had some oil or grease on it he assumes and when he stepped up with his right foot, he slipped off the smooth, metal step and came down off to the left of the motor where his left knee hit the rail. He experienced an immediate sharp pain, but by the time he came out of the mine, it was gradually easing. This injury occurred shortly before Cherok left the mine and he did not report it to anyone prior to his departure. He explains this by stating that because he was working overtime, his shift foreman was already gone and the midnight shift foreman was already inside the mine.

Cherok was not scheduled to work the next day, May 2, and while his knee bothered him somewhat, he did not yet consult a physician. On May 3, the pain increased as the day wore on. By May 4, he could hardly walk and that evening for the first time, he consulted a physician at the Mon Valley Hospital. He was referred to his family physician from there.

Sometime late in the evening of May 4, Cherok for the first time notified the mine operator of the injury to his knee and of the circumstances of its occurrence.

On May 5, 1986, Cherok went to see his family physician and was referred on to a Dr. Frame, an orthopedic specialist. Dr. Frame diagnosed Cherok's injury as a torn collateral ligament with a contusion and sent him to a Dr. Bradley for whirlpool treatments which he received over the following five week period.

Also on May 5, Cherok stopped by the mine and told Tom Hudson, Manager of the Industrial Relations Department that his knee injury had occurred at the mine on May 1 and that he would be off for a while on doctor's orders until his knee healed.

"Medical treatment", which if administered, renders an injury an "occupational injury" and thus reportable to MSHA, is distinguished from "first aid" by 30 C.F.R. 50.20-3(a) and specifically includes whirlpool treatments.

It is undisputed that Cherok lost work time due to his injury between May 5 and June 6 of 1986. It is also undisputed that Cherok received medical treatment for his injury. Therefore, the only question that remains is whether that injury occurred at the mine. If it did, it is acknowledged that Mathies did not file the required Form 7000-1 within ten (10) working days of the injury as required by the cited regulation.

It is my impression that management at Mathies simply did not believe and does not believe Cherok's version of how he came to be injured. Mr. Dunbar, Mathie's Manager of Safety, opined that based upon his experience with and examination of the type of locomotive which Cherok was operating, the injury to Cherok's knee could not have happened as Cherok claims because of the relative positions of the locomotive's step and the rail upon which Cherok claimed to have fallen.

As Cherok was alone at the time he alleges he was injured, there were no witnesses called by either side to directly corroborate or refute his version of the accident. Therefore, the issue of Cherok's credibility becomes paramount to the critical findings of fact in this case. To begin with, there is no countervailing explanation of how he injured his knee although Mathies seems to suggest that the long weekend of May 2-4 provided ample opportunity for him to do just that. However, there is no evidence to that effect. Furthermore, I do not find Mr. Dunbar's opinion that the accident as described by Cherok was "practically impossible" to be persuasive. I do find that Mr. Cherok's testimony hangs together well and I do credit it. I also find that his actions during the May 1-5, 1986 period were

reasonable with regard to the timing of reporting the situation to Mathies as well as his seeking out medical assistance as the injury became increasingly painful.

Based on the foregoing findings and conclusions, I find that the Secretary has established a violation of 30 C.F.R. 50.20, as alleged.

Mathies' notion that this citation was issued prematurely in September of 1987 for a May 1, 1986 injury because the operator was initially waiting for the results of a worker's compensation case and after the decision was issued in the claimant's favor, the citation was then issued one day before the time for appealing that ruling had expired is rejected.

I also concur in the "high" negligence finding made by the inspector in this instance. Mathies had all the salient facts available as early as May 5, 1986 had they chosen to believe Mr. Cherok. This was well within the ten working days stipulated by the regulation. But even more telling in this case is the fact they did not report the injury even after receiving the unfavorable workmen's compensation decision in August of 1987, essentially affirming Cherok's version of the accident.

On cross-examination, Mr. Dunbar admitted that the operator has never had any evidence that Mr. Cherok injured his knee in any other way than in the manner in which he described it. That being the case, the operator proceeded at its peril by not filing the required form within the 10 working days time limit prescribed in the regulation should their position not ultimately be upheld.

II. Order No. 2936667

Order No. 2936667, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. 75.400 and charges as follows:

> The operator failed to comply with the clean-up program in the 1LT of 2 West Section MMV 065. As there was accumulation of float coal dust black in color allowed to accumulate in the following locations: (1) From section loading point at 5 + 99 in the No. 1 Entry Return Escapeway extending outby for approximately 600 feet. (2) From 5 + 99 No. 1 Entry entending inby for approximately 600 feet. (3) Also in No. 1 Entry the bleeder entry around the 1LT Section from surveyor station 31 + 20 to 35 + 26. (4) Also in No. 10 Entry bleeder entry from surveyor station 36 + 47 to 41 + 28. The float coal dust was deposited on a rock-dusted

surface of the mine floor for the width of the entry in all locations.

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 electric equipment therein.

MSHA Inspector Francis Wehr issued the instant order during an inspection of the Mathies mine on October 6, 1987. He was accompanied at the time by Ray Kocik, a Mathies safety inspector and Joseph Delisio, a union safety committeeman.

He observed an accumulation of dry float coal dust in the No. 1 Entry Left Return Escapeway, which is a return escapeway for the 1 Left 2S Section, black in color on the mine floor, approximately 600 feet in length covering the entire width of the entry. In the inspector's opinion, based on his training and experience in the mining industry, this condition would have taken anywhere from 1-3 days to accumulate. The inspector also testified that this area was an active working part of the mine and required a preshift examination for hazardous conditions and violations of the mandatory health and safety standards.

A second area of dry float coal dust accumulation from Surveyor Station 7 + 80 to 5 + 99 in the No. 1 Entry Left Return Escapeway was observed for approximately 200 feet in an active working part of the mine for the width of the entry. This area as well required a preshift examination. In Mr. Delisio's opinion, based on his experience as a preshift examiner himself and his service as a safety committeeman, he estimates this accumulation had existed for a minimum of two days.

The inspector observed a third area of black float coal dust accumulation in the bleeder travel entry from Surveyor Station 31 + 20 to 35 + 26, approximately 400 feet in length and as wide as the entry. The inspector estimated that float dust would have taken a matter of days to accumulate. This particular area requires a weekly examination for methane buildup and to check the bleeder system.

A similiar accumulation of float coal dust was present according to the inspector in the bleeder entry from Surveyor Station 36 + 47 to 41 + 28. The float dust in this area had accumulated in the entire width of the entry and was approximately 500 feet in length. Once again, the inspector

opined it had taken several days to accumulate to that extent and he also testified that this was a weekly examination area.

At the time the subject order was issued, there was a loading crew of eight or nine men preparing to load coal in the 2 West Section MMV 065, and there was electrical equipment in the section as well as a non-permissible coal feeder at 5 + 99. This equipment was as close as 60 or 70 feet away from the left return, although there was no electrical equipment actually in the return.

Mr. Delisio, the union safety committeeman, testified at some length and essentially corroborated Inspector Wehr's testimony on every major point. Specifically, his testimony tracked the inspector's with regard to the extent and color (black) of the float coal dust and the fact that it was dry in most places. He also agreed with the inspector that the violations were obvious.

The operator's main contention and defense in this case is that the float dust accumulations in the four aforementioned cited areas were not black. They were gray and it was not as dangerous a condition as Wehr and Delisio allege it to be. However, as correctly pointed out by the Secretary, the only company witness who observed the first two of the above four areas, the two in the return escapeway prior to the commencement of abatement was Mr. Kocik, and much of his testimony focused on the fact that he felt Inspector Wehr had included both the right and left return escapeways in his closure order. The fact is the right return escapeway was not included in the order and I find the whole point of the testimony largely irrelevant to the inquiry at hand.

No other witnesses saw the two areas in the return escapeway prior to partial abatement of the conditions because as soon as the order was issued, miners began dragging the return entry. It was only after the return entry had been dragged that Messrs. Karaysia and Dunbar observed the conditions extant there, and Mr. Karaysia allowed as how there may have been a violation in the left return entry.

In finding a violation herein of the cited standard, I am making a credibility choice in favor of the testimony of Inspector Wehr and Mr. Delisio over that of Mr. Kocik. I observed the demeanor of these three witnesses at the trial and I believe that all three believe in the truthfulness of their testimony and the justness of their point of view. I also believe, however, that Mr. Kocik has taken the issuance of this particular order as a personal affront and his admitted anger over it has clouded his judgment. In any event, I find the

testimony of the inspector, which is corroborated on every important point by that of Mr. Delisio, to be cogent and credible and I do credit it entirely on the issue of the violation itself.

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designed significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reaonsably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d) (1), it is the contribution of a violation to the cause and effect of a hazard that Mining Company, Inc., 6 FMSHRC 1573, 1573, 1574-75 (July 1984).

To begin with, it is necessary to differentiate between the two areas in the return escapeway which I conclude represent a "significant and substantial" (S & S) violation of the mandatory standard and the two cited areas in the bleeder which I conclude are not S & S.

Inspector Wehr himself testified that reasonable people might even disagree that a violation existed in the third area of the bleeder (#3 on JX-1) because it was wet in places and not as black as the other three areas. On cross-examination, when asked about ignition sources for the bleeder areas, the following exchange took place at Tr. 123:

> Q. What was the closest electrical equipment or other sources of ignition from the bleeder areas that were cited?
>
> A. Clear back here (Indicating).
>
> Q. At the face?
>
> A. Yes.
>
> Q. So, was there any significant chance that anything in the bleeder would have been ignited by anything at the working face?
>
> A. Not at that particular time.

Based on the entire record herein, I therefore conclude that the violative conditions in the bleeder areas are not S & S violations.

Conversely, with regard to the two areas in the return escapeway, I find that it was reasonably likely that a spark from the electrical equipment which was at one point only 60 or 70 feet away from the left return could have caused a fire or explosion which in turn could readily have spread to the return escapeway. The accumulated float coal dust in the escapeway would have greatly intensified the fire and it is axiomatic that a wide-spread fire or explosion would lead to a likelihood of serious or even fatal injuries in the mine.

I therefore concur with the opinions of Inspector Wehr and Mr. Delisio that the violation in those two areas was "significant and substantial "and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable

> failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

There is extensive testimony in the record concerning the amount of time the float coal dust would have taken to accumulate and the additional time the float dust must have been present because mining had not been performed for several shifts at the time the instant order was issued and the fact that the company was required to perform preshift examinations in the two cited areas in the return escapeway and therefore should be chargeable with knowledge of the violative conditions, at the least. Inspector Wehr estimated that the amount of float coal dust he observed in the return escapeway would have taken one to three days to accumulate. This estimate was concurred in by Mr. Delisio. Both Wehr and Delisio also testified to the obviousness of the conditions. As the examinations were mandatory and the conditions were obvious and had been in existence for an extended period of time, Mathies demonstrated aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Accordingly, I conclude that this violation was caused by the operator's "unwarrantable failure" to comply with the cited mandatory standard.

CIVIL PENALTY ASSESSMENT AND ORDER

In assessing civil penalties in these cases, I have considered all of the foregoing findings and conclusions and the entire record, as well as the requirements of section 110(i) of the Act, including the fact that the operator is large in size and has a substantial history of violations. Under these circumstances, I find that a civil penalty of $300 for the

violation cited in Citation No. 2939096 and $700 for the violation cited in Order No. 2936667 are appropriate.

Citation No. 2939096 and Order No. 2936667 ARE AFFIRMED and the Mathies Coal Company is hereby directed to pay a civil penalty of $1000 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge