CCASE:
SOL (MSHA) V. EASTERN ASSOCIATED COAL
DDATE:
19900223
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 89-198 A. C. No. 46-01456-03826
v.	Docket No. WEVA 89-199 A. C. No. 46-01456-03824
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Glenn Loos, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, St. Louis, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. 75.400. Pursuant to notice, the cases were heard in Clarksburg, West Virginia, on December 12, 1989. Thomas David Doll, John Edward Palmer, Rick Milliron, Linda Byers, and James Merchant testified for Petitioner. Gary Marvin McHenry, William Salosky, Roger Boggess, David A. Tennant, and John Kucish testified for Respondent. Proposed Findings of Fact and Briefs were filed by Respondent and Petitioner on January 31 and February 1, 1990, respectively. A Reply Brief was filed by Respondent on February 12, 1990. Petitioner did not file a Reply Brief.

A. Docket No. WEVA 89-198

Findings of Fact and Discussion

I.

On February 8, 1989, Doll inspected the Three North Tipple at Respondent's Federal No. 2 Mine, and observed an accumulation of hydraulic oil under the hydraulic tub, and car spotter

(Tipple). He also observed a trench with up to 4 inches of oil in it. He indicated that the puddles of oil in front of the tub were approximately 3 feet by 4 feet, and measured to be 4 inches deep. He estimated that 20 to 25 gallons of oil had accumulated. He issued a section 104(d)(2) Order alleging a violation of 30 C.F.R. 75.400. At the hearing, Respondent conceded the fact of the violation. I find, based on the testimony of Doll, that Respondent herein did violate section 75.400, supra, as alleged in the Order.

II.

Doll listed ignition sources for the accumulation of oil, such as motors, wires, and cables. He indicated that the oil was flammable and that some ignition sources were "real close" (Tr. 153), and that the cables for the motor on the tub and the motor on the car spotter were "within inches" of the oil (Tr. 153). He indicated that the cables could have arced or sparked, and started a fire. Essentially he indicated that ignition of the oil was "highly likely" if the "situation was not taken care of" (Tr. 153). He indicated that in the event of a fire, a serious injury was quite likely in the nature of a possible burn or smoke inhalation. Essentially, based upon these factors, Doll concluded that the violation herein was significant and substantial.

Although, based on Doll's testimony, it can be concluded that ignition of the oil could have resulted, I find that it has not been established that such an event was reasonably likely to occur. Although Doll listed various ignition sources, such as a motor, wires, and cables, there is nothing in the record to indicate that this equipment was in such a condition as to make sparking or arcing an event reasonably likely to occur. Further, due to Roger Boggess' experience as a maintenance foreman, I place some weight on his opinion that a spark would not ignite the oil, and that a sustained fire would be needed. Further, John Kucish, who was the production foreman in charge of the section on February 8, indicated that the area in question was adequately rock-dusted. Also, he and Boggess indicated that there was a fire suppression system over the top of the power unit of the car spotter, and that there were various items to extinguish fires in the area. Taking all these factors into account, I conclude that it has not been established that the violation herein was significant and substantial, as that term was defined in Mathies Coal Company, 6 FMSHRC 1 (1984).

III.

James Merchant, a tipple man who has worked for Respondent for 21 years, testified that on and off for the last 2 to 3 years there have been problems keeping oil in the tipple. He indicated that he usually puts in 20 to 25 gallons of oil a shift. He testified that approximately 6 months prior to Doll's inspection on February 8, 1989, he attached belting to drain the oil that

was leaking from the electrical motors. He also dug a sump hole to muck the oil. He indicated that more than a year ago, and "a number of times" (Tr. 202), he had told Boggess that he was out of oil in the middle of the shift. He also indicated that he had shown the leaking to Kucish. He indicated that when he told Kucish of the oil coming out of the tipple, on "a number of times" (Tr. 202), he was told by Kucish that it would be worked on over a week end. Merchant indicated that about a week before February 8, he reported the condition to Kucish. According to Kucish, in November 1988, Merchant had reported leaks to him, and he in turn called the evening and day shift people who informed him that the tipple "was being maintained in a workman-like manner" (Tr 245). Kucish testified that the afternoon and day shift men were taken off their jobs 2 weeks later, and when he observed the boom hole (tipple site) in December, it was in such an "unworkman like" condition that he shut it down. Kucish testified that when he was informed by Merchant of the leak on January 31, or February 1, 1989, he called Boggess. Boggess in turn informed a mechanic who subsequently told him that he did not find any substantial leaks (Tr. 251). David A. Tennant, the maintenance superintendent, indicated that on January 31, "some maintenance" was performed (Tr. 262). When Kucish was informed of a leak the week prior to February 8, he informed Boggess and subsequently, on a Saturday, February 4, cylinders or jacks were cleaned and repacked, an operation which Boggess termed to be "routine maintenance" (Tr. 251) He indicated that he had been told there had been a leak, and some oil was on the ground. No leak was found. The following day Kucish went to the areas in question, to make a visual examination, and indicated that were no "visual leaks" (Tr. 232).

According to Merchant, on February 6 and February 7, the tipple was not leaking any less, and he had to put in three to five gallon cans of oil each shift. Boggess indicated that he was not notified of any leaks on those days, and there is no evidence that Merchant notified Kucish of any leaks or oil accumulations on those days. Neither was such reported in any preshift examination on those dates.

On February 8, the accumulation of oil, observed by Doll, was estimated by him to be 20 to 25 gallons, and was measured by him in areas to be 4 inches deep. After the condition was cited by Doll, the area and equipment were cleaned, and "drips" were found (Tr. 242, 250). Kucish and Boggess opined that the drips were not sufficient to cause the spillage that was observed on February 8.1 The tipple was cleaned and looked at by Boggess, but he could not find any reason for the oil accumulation. Some plumbing was eliminated to correct the dripping.

At the conclusion of Petitioner's case, Respondent made a Motion for a Directed Verdict with regard to the issue of unwarrantable failure, and the Motion was denied. In order for it to be found that the violation herein was the result of Respondent's unwarrantable failure, it must be established that Respondent's conduct herein reached a level as to be considered to be "aggravated conduct." (Emery Mining Corp., 9 FMSHRC 1997 (1987)). Although, as established by Merchant, the equipment in question had been leaking off and on for 2 to 3 years, and had been reported to Kucish on "a number of times," I accept the testimony of Respondent's witnesses that twice within 8 days prior to February 8, maintenance work had been performed on the equipment in question. I accept the testimony of Kucish that when he observed the area on the day after the work had been performed on February 4, there were no "visual leaks". (sic). Although Merchant indicated that on February 6-7, 1989, the equipment was not leaking less, there is no evidence that the condition was reported to management on these days. I thus conclude, taking the above into account, that Respondent herein did not exhibit any aggravated conduct, and hence the violation herein did not result from its unwarrantable failure.

Inasmuch as Petitioner has not established that the condition of any equipment in the area was such as to have made it likely for the accumulation to have been ignited, I conclude that the gravity of the violation herein is to be considered moderate. Further, taking into account Merchant's testimony, that I accept, that the leak had existed on and off for 2 to 3 years, and was reported by him to Kucish on numerous times, and taking into account the large quantity of oil that was observed on February 8, I conclude that Respondent was highly negligent in not having taken steps to ensure that an accumulation would no longer occur. Although maintenance work was performed on February 4, and examined one day later by Kucish, and observed not to have any visible leaks, there is no evidence that Respondent examined the area on February 6-7, to ensure that its work on February 4 was successful, and there was no longer any accumulation of oil. For these reasons, I conclude that Respondent was highly negligent herein. I conclude that a penalty of $900 is proper for the violation found herein.

B. Docket No. WEVA 89-199

Findings of Fact and Discussion

I.

Thomas David Doll, an MSHA Inspector, inspected Respondent's Federal No. 2 Mine on February 1, 1989. He indicated that he observed oil running down the side of a shuttle car on the 17 Right 3 South Section, and that oil was leaking behind the

wheel unit of the shuttle car. He indicated that the grease from the wheel unit was "in spots" up to a-half inch thick (Tr. 24), and that there was a grease build-up in the cable reel which was probably a quarter to a-half inch in thickness. Doll indicated that the oil and grease was mixed with some coal dust, and that the oil is combustible when the water in it separates. He indicated that the wheel was saturated, and throwing grease against the shuttle car. He indicated that grease is combustible, and opined that the material that had accumulated was combustible. John Edward Palmer, who was the representative of the Mine Worker's Union, and accompanied Doll on the inspection, corroborated the latter's testimony by indicating that there was a "lot" of coal, grease, and oil around the cable reel components. Rick Milliron, who was the shuttle car operator on February 1, 1989, indicated that in general he does not clean behind the wheels of the unit. He indicated that, when Doll inspected the unit, there was grease and oil on the whole unit.

Gary Marvin McHenry, Respondent's safety supervisor, who accompanied Doll on the inspection, indicated that the only "accumulations" he found were behind the wheel unit (Tr. 85). He said there were "small amounts" of oil mixed with rock dust and dirt (Tr. 86). William Salosky, who was the section foreman on February 1, indicated that when he observed the shuttle car after the Order was issued, the only accumulations were behind the wheel. He described the condition as being "A small amount of grease, and mostly mud from the shuttle car road" (Tr. 110). Roger Boggess, Respondent's maintenance foreman, opined that the oil in question does not burn easily, and that a spark hitting it would not cause it to ignite. He termed the event of a fire occurring as being very unlikely, and indicated that to get the oil to burn, a person would have to hold a flame to it. However, he indicated on cross-examination that gear box oil is not fire resistant. David A. Tennant, Respondent's maintenance superintendent, indicated that the oil in question is flammable in a pure state, but that if it is mixed with water, mud or coal dust, its flash point is higher. He indicated that the oil in question had rock dust in it, and thus was not easy to ignite.

I reject Respondent's argument that an impermissible accumulation is limited to those accumulations that are extensive and significant, and that the latter term includes only accumulations that can lead to fires or explosions. I find that Respondent has not rebutted or contradicted Doll's testimony that, in essence, in some areas the grease was 1/2 inch thick. Accordingly, I conclude, based upon the above testimony of witnesses who observed the shuttle car on February 1, that there was an accumulation of oil and grease as set forth in the section 104(d)(2) Order issued by Doll on February 1. This Order alleges Respondent violated 30 C.F.R. 75.400. In essence, as pertinent, section 75.400,

supra, prohibits the accumulation inter alia of "combustible materials." The word "combustible," is defined in Webster's Third New International Dictionary, 1986 edition (Webster's), as "1. capable of undergoing combustion or of burning - used esp. of materials that catch fire and burn when subjected to fire. . . "

I accept the opinion of Doll that oil and grease are materials that are capable of burning. The testimony of Boggess that the oil in question does not burn easily, does not contradict Doll's opinion. Further, the balance of Respondent's witnesses, in essence, testified that the accumulations of oil and grease herein contained mud and rock dust, which raise its flash point, and makes it difficult to ignite. Hence, the testimony of Respondent's witnesses is not sufficient to predicate a finding that the materials in question were not capable of burning at some point. Inasmuch as the materials were nontheless capable of burning or catching fire when subjected to fire, I conclude that the accumulations of the materials in question were combustible as that term is defined in Webster's. Accordingly, I find that Respondent herein did violate section 75.400, supra.

II.

According to Doll, in essence, he concluded that the violation herein was significant and substantial due to the presence of friction or cables as ignition sources, which led him to conclude that it was highly likely that a fire would occur if the violative condition was not corrected. He indicated that in the event of a fire, an injury would be highly likely due to smoke inhalation occasioned by the burning of grease, coal, and other toxic smokes from the burning of cable covers. He indicated that anyone in the face area, including the shuttle car operator, loader operator, miner operator, and bolters would be subject to the path of smoke from the resulting fire. In this connection, I note that Salosky conceded on cross-examination that grease and oil in the wheel compartment could become a fire hazard "at some point." (Tr. 113).

Although there certainly were potential ignition sources in the areas as testified to by Doll, there is insufficient evidence that the condition and location of these sources was such as to indicate that there was a reasonable likelihood of an ignition occurring. Further, I accept the reasoning of Respondent's witnesses that mud and coal dust present in the accumulation of grease and oil would decrease the combustibility of the accumulations. Thus I find that although the accumulations herein did contribute to a hazard of a fire, it has not been established that there was a reasonable likelihood of a fire occurring. I thus conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, supra).

III.

Doll indicated that he considered the violation herein to be the result of Respondent's unwarrantable failure, as it either knew or should have known that the violation existed. He indicated that the area in question is fire bossed daily on each of the three shifts, and in addition, persons are constantly in the area. He thus opined that inasmuch as the accumulated material was visible, it should have been observed and cleaned up. In addition, he indicated that on January 18, he issued two citations alleging violations of section 75.400, supra, concerning equipment on the section. He indicated that when he issued the citations, he discussed with Bill Lenley, the assistant foreman, that something had to be done to keep the section equipment cleaner. Thus, he concluded that Respondent was aware that it had a problem with cleaning various equipment.

Palmer corroborated Doll's testimony by indicating that the accumulation of grease and oil could have been seen "plain as day." (Tr. 64). Milliron indicated that on February 1, he sprayed the shuttle car in question with a cleaning substance, and washed it off. He indicated that he did not clean behind the wheels, and did not use any wedge, which he usually would use to scrape off material that is visible.

I find that Doll did not use the correct standard in concluding that the violation herein was the result of Respondent's unwarrantable failure. The proper standard has been set forth by the Commission in Emery Mining Corp., supra at 2004, as requiring the establishment of the existence of "aggravated conduct." Applying this test to the facts as set forth above, I conclude that it has not been established that there was any aggravated conduct on the part of Respondent. The fact that Doll had, 2 weeks prior to the date in question, issued a violation of section 75.400, supra, for equipment on the section, and told the foreman that something had to be done to keep the section cleaner, does not per se establish that there was aggravated conduct with regard to the specific violative condition herein. I find that Milliron's failure to clean behind the wheel was negligence, but not aggravated conduct. Accordingly, I conclude that the violation herein was not the result of Respondent's unwarrantable failure. Accordingly, Respondent's Motion for Directed Vardict, with regard to the issue of unwarrantable failure, which was made at the conclusion of Petitioner's case, is hereby GRANTED.

Taking into account the fact that it has not been established that there were ignition sources present in such a condition as to make it likely that the oil and grease would have been ignited, I conclude that the gravity herein of the violation was moderate. I accept the testimony of Petitioner's witnesses that the accumulations herein of oil and grease were readily visible. I conclude that Respondent should have known of the accumulations, and as such

was negligent herein to a significant degree. Considering the criteria of section 110(i) of the Act, I conclude that a penalty of $750 is appropriate for the violation found herein.

ORDER

It is ORDERED that Order Nos. 3100463 and 31004677 be AMENDED to section 104(a) Citations, and to reflect the fact that the violations therein were not significant and substantial, and were not the result of Respondent's unwarrantable failure. It is further ORDERED that Respondent herein shall pay $1,650, within 30 days of this Decision, as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

ÄÄ

FOOTNOTES START HERE

1. Tennant indicated that no cracks were found leaking oil, but there was a leak on one of the fittings that was part of the plumbing of the hydraulic system. He indicated that the leak was not sufficient to account for the oil accumulation.