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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 PROCEEDING

Docket No. WEVA 90-18
A.C. No. 46-01286-03713

v.

Windsor Mine

WINDSOR COAL COMPANY,
RESPONDENT

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
David Cohen, Esq., Windsor Coal Company,
Lancaster, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Windsor Coal Company (Windsor) with two violations of mandatory standards and proposing civil penalties \$1,900 for the violations alleged therein. The general issue before me is whether Windsor violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Order No. 3129208 issued pursuant to Section 104(d)(1) of the Act alleges a violation of the mandatory standard at 30 C.F.R. 75.1704 and charges as follows:

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The 3 south main intake escapeway is not being maintained in a safe condition for the evacuation of miners in the 2A, 3A, and 3 south faces sections. There are 7 locations where [sic] the roof is not adequately supported. These areas were shown to and marked by the company escort. (1) at 26 stopping top fell out around 3 roof bolts (2) Between 23 and 24 stopping top [sic] fell out around 8 roof bolts (3) 22 to 23 roof fell out around 2 roof bolts, (4) 21 to 22 roof fell out around 2 roof bolts (5) 18 to 19 stoppings roof has fell out around 18 roof bolts, (6) 17 to 18 stoppings roof fell out around 7 roof bolts (7) 17 stopping on out by corner top fell out around 5 roof bolts. Three of the seven areas were recorded in the approved book. The book was countersigned by Tom Moore mine foreman and Joe Matkovich superintendent. The areas recorded in the book were marked with tags where additional support is needed.

The cited standard, 30 C.F.R. 75.1704, provides in relevant part as follows:

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or

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slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [emphasis added]

Inspector Thomas Doll of the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at the Windsor Mine on August 9, 1989, when he allegedly observed the cited conditions in the 3 South Main intake escapeway. Doll noted that this was the primary escapeway for four active working areas. According to Doll, 45 bolts in an 800 foot area were not in safe condition because the top had fallen away leaving areas of unsupported roof. Doll observed that in one intersection alone 18 bolts were "destroyed" in this manner between the No. 18 and No. 19 stoppings. He subsequently explained that since the bolts were resin grouted there was no danger of the structural beam provided by the bolts failing but there nevertheless was a danger from the flaking of "golf ball" size to "basketball" size pieces of rock and falling and striking miners. He noted that the roof averaged 10 feet in height in the subject area and that a rock falling 8 feet to 10 feet could cause serious injuries.

The existence of the cited conditions does not appear to be in dispute. James Fodor, a safety assistant for Windsor, observed the cited conditions after the order had been issued and acknowledged that there was a lot of sloughage around the bolts. Donald Williams one of the timbermen who had been working to abate the cited conditions also acknowledged that there were "some gaps" above the bolts and Michael Roxby, the Windsor Safety Inspector, also agreed that there was a lot of sloughage in the cited area. While each of these Windsor witnesses claimed that these conditions were nevertheless not unsafe, I give these self-serving and unsupported conclusions but little weight. Clearly Inspector Doll's testimony is the more credible.

Under the circumstances it is clear that the violation is proven as charged and that it was "significant and substantial". It may reasonably be inferred from the credible evidence in conjunction with the fact that this area was the primary escapeway subject to inspections by Windsor employees and periodic inspections by government inspectors, that it was reasonably likely that reasonably serious injuries would be sustained as a result of the violation. See Mathies Coal Co., 6 FMSHRC 1 (1984).

I also conclude that the violation was the result of "unwarrantable failure" and high negligence. During his inspection on August 9, Inspector Doll examined the mine

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books retained for reporting weekly examinations of the escapeways. He observed in those books, entries dated August 2, 1989, reporting conditions in the cited area that had not been completely corrected as of his inspection on August 9, 1989. Even more significantly however, Doll found yellow caution tags still hanging in the cited area three of which were within the areas cited in the order at bar. Robert Jester a Windsor Safety Assistant who accompanied Inspector Doll during his inspection, confirmed the existence on August 9, of at least two yellow caution tags dated August 2, 1989, hanging in the cited area. He also confirmed that the area around the plates where the tags were hung was indeed "bad".

Inspector Doll reasonably concluded from the existence of these remaining caution tags that indeed the corrective work had not been completed in the cited area. Doll also opined that the problem with the large number of bolts around which sloughage had occurred could not reasonably have occurred over the short period of time between the alleged corrective work a few shifts before his inspection and the time of his inspection.

Windsor Safety Assistant, James Fodor, also corroborated Doll's testimony in significant respects. Fodor testified that he had attached yellow caution tags to bolts in the cited area and reported in the weekly examination books that corrective action was needed. He also issued a request for corrective work on August 7.

According to outby foreman, Charles Slopek, timbermen Don Williams and Brian Mulby were sent on August 7, during the 4 to 12 shift, to correct the conditions that had been reported by Fodor. On August 8, he again sent Williams and Mulby to the area to verify that the corrective work had been completed. Slopek did not check the area himself but relied upon the report from Williams and Mulby that the work had been completed.

Timberman Williams testified that he checked the area on August 8th, pursuant to Fodor's instructions and found that the work had been completed. According to Williams the yellow caution tags would have been removed by him upon the completion of corrective work but he claimed that he did not see any such tags on August 8th.

Within this framework of evidence I conclude that indeed at least some of the conditions cited in the order at bar on August 9, 1989, had existed at least since August 2, 1989, and at least in the areas where yellow caution tags were posted. It may reasonably be inferred that at least some of the conditions reported as needing corrective action on August 2, 1989, and tagged with yellow caution tags had not

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as of the date of the inspection on August 9, 1989, been corrected. The testimony of Timberman Donald Williams who was charged with the responsibility of correcting those conditions and verifying on August 8, that they were indeed corrected, is particularly significant. Although Williams reported that the conditions had been corrected after examining the area on August 8th, he saw no caution tags at that time. However both Inspector Doll and the company official accompanying Doll on the August 9, inspection, Robert Jester, found at least two yellow tags dated August 2nd, 1989, still hanging around plates within the cited area. It may be further inferred from this evidence that not only had the conditions reported on August 2nd, not been corrected as of August 9, but that it had been falsely reported that they had been corrected when they had not been. Under the circumstances I conclude that the violation herein was the result of such aggravated conduct, omissions and gross negligence that it was the result of "unwarrantable failure". See Emery Mining Co., 9 FMSHRC 1997 (1987).

Order No. 3129172, also issued pursuant to section 104(d)(1) alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.1105 and charges as follows:

The battery charging station for the 2A 3 South Scoop car located at survey station 53 á 50 where the scoop battery was on charge was not Vented directly into the return. A chemical smoke cloud was dispersed over the batteries and the air current was directing the battery fumes up number three track entry into the face area. The same violation was issued on 8/8/89 on the charging station in the 3 South face section and management was made aware of the acceptable way to vent the charging stations.

The cited standard, 30 C.F.R. 75.1105, provides in relevant part as follows:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return.

MSHA inspector Joseph Moffitt was inspecting the Windsor Mine on August 16, 1989, in the 2A 3 South area along with the Windsor Safety Inspector Robert Jester and a United Mine Workers representative when he noted that in the Number 3 Track Entry several hundred feet from the face area there was

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a battery charging station extending out of the crosscut. According to Moffitt the station was ventilated through a hole created by the absence of one 8 inch by 16 inch cinder block. Releasing smoke from a smoke tube over a battery that was being charged he observed that most of the smoke proceeded down the Number 3 Track Entry into the working places. He did not see any of the smoke pass into the return.

According to Moffitt these conditions created a serious fire and smoke hazard. He noted that hydrogen gas emanated from the batteries while being charged, that unattended electrical equipment in itself has a potential for a fire hazard from shorting-out, that there was a 550 volt cable to the AC charger, and the battery itself is a fire hazard. He concluded under the circumstances that it was reasonably likely for the men working at the face to suffer from smoke inhalation which could result in asphyxiation and death.

Inspector Doll was also present during the smoke tube test and he confirmed that the smoke released over the batteries first swirled, then proceeded directly toward the working faces. Within this framework of evidence it is clear that the violation is proven as charged and was clearly "significantly and substantial". See Mathies Coal Co. supra. In reaching this conclusion I have not disregarded the testimony of Windsor's witnesses that a fire extinguisher and rock dust were immediately available to douse any fires and that dust from the sleeve of one of the persons present when released at a position adjacent to the ventilation hole proceeded through the hole. However this evidence is not sufficient to overcome the Secretary's case.

I do not, however, find that the violation was the result of "unwarrantable failure" or high negligence. It is not disputed that the ventilation at that charging station was checked around 8 that same morning by Michael Shreve a section foreman. According to Shreve, he checked the air movement at the ventilation hole by knocking dust off his sleeve and observed that the air did in fact proceed through the ventilation hole. Shreve followed a procedure he had seen inspectors use on prior inspections. Indeed, even Inspector Moffitt had, according to Shreve previously used this method to check ventilation.

The procedures followed by Shreve were verified by Robert Jester the Windsor Safety Inspector and by Safety Director Michael Roxby. They confirmed that before this inspection the MSHA inspectors had tested near the ventilation hole and not over the battery chargers.

Within this framework of evidence I conclude Windsor personnel were following testing procedures that had been found acceptable and indeed had been previously followed by MSHA inspectors themselves in testing for the ventilation of battery charging stations. It is not disputed that when dust was released at the ventilation hole it proceeded into the return from the battery charging station.

The fact that smoke released from a smoke tube over the battery being charged in the station flowed mostly toward the working faces proves however the existence of a "significant and substantial" violation. However since Windsor was using a testing procedure consistent with that which had previously been approved I cannot conclude that Windsor is chargeable with a high degree of negligence or "unwarrantable failure". Inasmuch as the line curtain was indeed negligently hung and most of the ventilating air was proceeding to the working areas there was at least some negligence. Order No. 3129172 must accordingly be modified to a citation under section 104(a) of the Act.

Considering all of the criteria under Section 110(i) of the Act I find that civil penalties of \$1,000 and \$200 are appropriate respectively for the violations charged in Order No. 3129208 and Citation No. 3129172.

ORDER

Order No. 3129172 is hereby modified to a citation under section 104(a) of the Act and Windsor Coal Company is directed to pay civil penalties of \$200 for the violation charged therein. Order No. 3129208 is affirmed and Windsor Coal Company is directed to pay a civil penalty of \$1,000 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 104(d)(1) provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to

be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.