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SOL (MSHA) V. WESTERN FUELS-UTAH
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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. WEST 90-108 A.C. No. 05-03505-03572
v.	Deserado Mine
WESTERN FUELS-UTAH, INCORPORATED, RESPONDENT	

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Karl F. Anuta, Esq., Law Offices of Karl F. Anuta, Bolder, Colorado, for the Respondent.
Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a civil penalty for the alleged violation by the Operator (Respondent) of 30 C.F.R. 75.400. Pursuant to notice, the case was heard in Glenwood Spring, Colorado, on June 14, 1990. Ernesto L. Montoya and Clete R. Stephan testified for Petitioner. David Glenn Casey, Carl O'Neal, and Robert Newell Hanson testified for Respondent. Post hearing Proposed Findings of Fact and Brief were filed by Respondent on July 26, 1990, and by Petitioner on August 10, 1990.

Stipulations

1. The Administrative Law Judge does have jurisdiction to hear this Notice of Contest and Civil Penalty Proceeding under the Federal Mine Safety and Health Act of 1977.

2. The penalty proposed will not affect Western Fuels-Utah's ability to continue in business.

3. The operation -- the mine operator of Western Fuels-Utah -- is a medium to large-size mine operator producing approximately one million tons of coal per year at this mine.

4. Western Fuels-Utah showed good faith in correcting this cited condition that is in dispute.

5. It has been agreed that Government Exhibit No. 1 is an authentic document, an official government record of the previous history, the previous violation history of Western Fuels-Utah under the Mine Act.

Findings of Fact and Discussion

I.

On August 17, 1989, in connection with an AAA Inspection (regular inspection of entire mine), MSHA Inspector Ernesto L. Montoya issued an order, under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging a violation of Section 75.400, supra. In addition to contesting the alleged violation of 75.400, supra, Respondent argues that the Section 104(d)(2) Order was not properly issued, as there were intervening clean inspections between the underlying Section 104(d)(1) Withdrawal Order issued on June 5, 1989, and the subject 104(d)(2) Order issued on August 17, 1989. Specifically, as argued at the hearing, Respondent's position that there was an intervening cleaning inspection of the entire mine, is predicated upon reference to a combination of clean inspections.

According to the uncontradicted testimony of Montoya, that I accept, he checked the MSHA Records and did not find any evidence of clean inspections between the date of the underlying 104(d)(1) Order, and the date Order 104(d)(2) in question was issued. He indicated that the last complete inspection of the subject mine, prior to the date the 104(d)(2) Order in question was issued, was on May 15, 1989. Montoya indicated that he spoke to another MSHA Inspector, Ervin St. Louis, who informed him that between the underlying 104(d)(1) Order and the Order in question, there were only Section 103(i) Inspections. He concurred, on cross-examination, that these inspections occurred on June 12, 22, 26, July 18, 26, and August 3, and 10. Montoya indicated that in connection with the 103(i) Inspections that he made in the period in question, at different times he went from both portals to the face at the one longwall and three development sections. He indicated that he walked through the mine in this period once or twice and was able to observe ". . . conditions in the entry, the roadway that we go into, . . . " (Tr. 45). He indicated that although he did not

conduct an inspection on these occasions, he did not ignore violations and wrote what he found. According to Montoya each 103(i) Inspection in the period in question covered the same area and was intended to check for methane. According to Montoya, a 103(i) Inspection does not include belts, drives, belt entries, and electrical equipment unless the inspector walks by. In contrast, an AAA or regular inspection includes these items as well as escapeways and equipment at the face. Also, in a regular inspection, an inspector checks coal accumulations.

The Commission, in United States Steel Corporation 6 FMSHRC 1908 at 1911, (August 1984), set forth the requirements for the issuance of a Section 104(d)(2) Order as follows:

> "The plain language of section 104(d)(2) of the Mine Act (n. 2 supra) establishes three general prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard "similar to [the violation] that resulted in the issuance of the withdrawal order under [section 104(d)(1)];" and (3) the absence of an intervening "inspection of such mine disclos[ing] no similar violations.""

In Kitt Energy Corporation 6 FMSHRC 1596 (1984), the Commission rejected the argument of the Secretary that only a complete regular inspection is sufficient to satisfy the requirements of Section 104(d)(2). The Commission held that inspections other than "regular" inspections can be taken into account under Section 104(d)(2). In this connection, the Commission noted that it was the burden of the Secretary to establish that an intervening cleaning inspection has not occurred, and this burden could be met by demonstrating that when the Section 104(d)(2) Order was issued portions of the mine remained to be inspected. In this connection, the Commission interpreted Section 104(d)(2), supra, as requiring the inspection of a mine "in its entirety" (Kitt Energy Corporation, supra, at 1599.

In U. S. Steel Corporation, supra, the Commission reiterated its holding in Kitt, supra, at 1914, that ". . . any combination of regular or other inspections that covers the entire mine can constitute an intervening clean inspection."

In the instant case, I find that the Secretary has presented a prima facie case of the absence of an intervening clean inspection of the entire mine. The only inspections of the subject mine in the period in question were those made pursuant to Section 103(i) of the Act. I find that these inspections,

according to the testimony of the inspector, took place over one day only, and were for all the same areas, i.e., the faces of the longwall and development sections and the return and intake entries. As explained by Montoya, these 103(i) Inspections do not cover the belt drives, belt entries, or electrical equipment. ". . . unless we happen to walk by" (Tr. 110). As such, I conclude that the Section 103(i) inspections, in combination, did not cover the entire mine. Therefore, I conclude that the Secretary has established its prima facie case that there has not been a clean inspection of the entire mine during the period in question.1 I find that Respondent did not rebut Petitioner's prima facie case.

II.

In essence, Montoya testified that at approximately 10:30 a.m., on August 17, 1989, he observed black coal dust in the second left entry of Third East between crosscuts 33 and 5.2

He indicated that the coal dust was on the floor, ribs, crib timber, rocks, and timbers. He scraped the coal at various points with gloves, his fingers, a pen, and his ID card in order to get to a level area. He indicated that the flow coal dust was in a layer on top of rock dust, and was "thick as a sheet of writing paper" (Tr. 57). He testified that he did not have any doubt as to the color of the coal, nor did he doubt that the material he observed was indeed coal dust. I found Montoya to be a credible witness. Further, Respondent did not offer the testimony of any witness to contradict, based upon their observations, the extent of the coal dust observed by Montoya on August 17, 1989.3 Thus, I accept Montoya's testimony in this regard. Hence, I conclude, based on Montoya's testimony with regard to the various locations in the entry, aside from the floor, where coal dust was observed, the fact that it was observed over 28 crosscuts,4 and due to the fact that it existed in a layer on top of the rock dust, I conclude that Respondent herein did violate 30 C.F.R. 75.400, as alleged in the order issued by Montoya, in that coal dust was ". . . permitted to accumulate . . . . "

III.

Montoya had indicated in the Order at issue that the violation herein was significant and substantial.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation 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. (6 FMSHRC, supra, at 3-4.)

In essence, Montoya opined that the accumulation of coal dust he observed contributed to the hazard of an explosion. In this connection, he concluded that there was a great potential for an explosion based upon the extent of the coal dust accumulation in combination with the presence of methane in the gob area.5 Montoya further noted that coal dust was found only five crosscuts from the face, a distance of approximately 600 feet, and that there were various energized electrical equipment in the face areas, such as electric motors, a shear, and a lighting system which could short circuit, thus causing sparks. On cross-examination it was elicited from Montoya that he did not observe any coal dust suspended in the air, and at the time he issued the order in question the longwall production had been shut down, and there were no diesel equipment present. Further, he conceded that the lighting at the face was explosion-proof and the shear motor has to be explosion-proof.

Montoya indicated that a roof fall could very possibly cause sparks, and that the panel in question had a roof fall next to the tailgate, but he did not know when this occurred relative to the date the order was issued. In this connection, Glenn Casey indicated that the entry did not have any history of sudden roof falls outby the face line. However, he indicated that on the date in question the tailgate had required additional cribbing.

David Glenn Casey, a fire boss employed by Respondent, indicated that when he observed the area in question on August 16, he did not feel that the area needed rock dusting, nor was he of the opinion that there was any hazard due to the presence of coal dust. In this connection, he indicated that the floor was wet. It was the testimony of Carl O'Neal, Respondent's safety trainer, that on August 17, the full length of the Second Left entry, alongside the coal seam, contained water that was approximately 6 to 12 inches wide and 2 to 3 inches deep. He said that approximately a third of the floor was wet. Also, although Casey indicated that he did not know the amount of methane present on August 17, he also indicated that "in the days around" August 17 (Tr. 275) in the area in question, there was "very minimal methane," which he indicated as .01, .02, and "occasionally" .03 (Tr. 276).

Despite Montoya's admissions on cross-examination, and the testimony of Casey and O'Neal referred to above, I conclude, for the reasons that follow, that it has been established that the violation herein was significant and substantial. In resolving the issues presented herein, I place considerable weight upon the testimony of Clete R. Stephan, a senior mining engineer employed by MSHA, due to his expertise and the fact that his testimony was largely unrebutted or contradicted by Respondent. Stephan testified, and elaborated upon in Government Exhibit 9, that without coal dust, which he termed fuel in suspension, an explosion would not occur. Although Montoya did not observe any coal dust in suspension, he nontheless observed coal on the ribs. As explained by Stephan, because coal dust on the ribs is positioned above the floor level, it is easy for it to go into suspension when hit by a blast of air resulting from a roof fall or occurring as a consequence of machinery being involved in an accident. The coal dust from the ribs would also be placed in suspension if a vehicle would knock out a rib. In addition, Stephan noted that the coal at the subject mine is considered to be in the high range of volatile bituminous coal, and in general, bituminous coal is considered explosive. Further, I find, based on the uncontradicted testimony of Montoya, that the coal dust existed in layers on top of the rock dust.6

According to Stephan, an ignition at the face would cause pressure waves which would place into suspension dust that had accumulated. In this connection, he noted that if the coal dust was in a layer on top of the rock dust, then most of the suspension would be coal dust. It is significant to note, as commented upon by Stephan, that an ignition at the face would have to travel only 600 feet7 in order to propagate an explosion of the coal dust located at crosscut 33, only 5 crosscuts outby the face. In such an event, according to Stephan, a flame would continue to propagate as it pushes forward any dust that is in suspension. Also, to be considered is the fact that, according to Montoya and not contradicted by Respondent's witnesses, the mine in question liberates a million cubic feet of methane per 24 hours. In this context, Stephan provided a foundation for Montoya's conclusion that there was a great potential for an explosion, based on the extent of the coal dust and the fact that methane was being liberated from the gob. Stephan, in this connection, indicated that coal dust, even in small amounts, has the effect of making methane explosive where it exists in concentrations below the range normally considered explosive. Hence, as explained by Stephan, the larger the amount of coal dust present the greater the resultant hazard. Here, it is noted, that the coal dust had accumulated in the entry in question between crosscuts 5 and 33, a distance of over 3000 feet. As testified to by O'Neal, there was water on the floor of the entry on the date in question. However, according to Stephan, the amount of moisture must "increase to pretty significant levels before they really affect the explosion itself" (sic) (Tr. 155). According to O'Neal, there was water on the floor of the entry in question. He testified that the water was 2 to 3 inches deep, 6 to 12 inches wide. (The floor was 18 feet wide.) I accept this specific testimony from O'Neal as to the extent of the water, rather than his general comment that a third of the floor was wet. Inasmuch as coal dust had accumulated on the timbers and ribs, as well as the floor, and Stephan had indicated that the dust from the ribs could easily be placed in suspension, I conclude that the extent of water herein in the entry was not significant enough to effect an explosion.

Based on all of the above, in combination, I conclude that not only has it been established that a hazard of an explosion was contributed to by the accumulation of dust, but that it has been established that there was a "reasonable likelihood that the

hazard contributed to will result in an event in which there is an injury." (U. S. Steel Mining Company, Inc., 6 FMSHRC 1834 at 1836 (1984). Further, it was the uncontradicted testimony of Montoya that, should an explosion occur, persons present in the section would be expected to be hurt, some fatally. I thus conclude that it has been established by Petitioner that the violation herein was significant and substantial. (See, Mathies, supra; U. S. Steel, supra).

IV.

In order to sustain the Section 104(d)(2) Order, Petitioner must establish that the violation herein was as a result of the Respondent's unwarrantable failure, which has been defined by the Commission as aggravated conduct, more than mere negligence. (Emery Mining Corp. 9 FMSHRC 1997 (1987)). In this connection, Montoya testified that the day prior to the issuance of the Order in question, he had been to the same entry in connection with a 103(i) Inspection, and cited Respondent for having an accumulation of black coal dust on the timbers, floor, and ribs, between crosscuts 32 and 38. According to Montoya, on April 16, he informed O'Neal and Robert Hanson, Respondent's safety director, that the return entry (Two Left) had to be entirely dusted and they both agreed. O'Neal did not specifically contradict Montoya's version, as he indicated that sometimes he does not hear what Montoya says. He also stated that he did not recall if Montoya had said, on August 16, that crosscuts 5 to 33 needed dusting. Thus, his testimony is insufficient to rebut Montoya's testimony that in fact he had told O'Neal, and O'Neal had agreed that the entire entry had to be dusted. In the same fashion, Hanson indicated that he did not recall any discussion with Montoya on August 16, with regard to the Citation. Hence, his testimony does not rebut Montoya's version. Accordingly, I accept the version testified to by Montoya.

Montoya also indicated that O'Neal, in his presence, had told David Prosser, the longwall foreman, that the entire entry had to be rock dusted. O'Neal, on the other hand, testified that Montoya had told him that crosscuts 32 to 38 needed dusting, as he was going to cite those areas, but that he (O'Neal) did not tell Prosser to dust. O'Neal testified he called the section foreman, Brad Jones, and told him the crosscuts that were cited, i.e. 32 to 38 needed to be dusted. He also testified that he told Prosser that the areas specified by Montoya i.e. crosscuts 38 to 32 needed to be rock dusted, but did not tell him to get it dusted.

Inasmuch as I have accepted Montoya's version, that O'Neal had agreed with him that the entire second Left entry had to be rock dusted, I thus find more credible Montoya's testimony that O'Neal did tell Prosser to dust the entire entry. The critical point, however, is that Montoya did tell both O'Neal and Hanson, on August 16, that the entire Left entry had to be rock dusted. Given that specific knowledge by O'Neal and Hanson, I conclude that the cited violation of an accumulation, observed by Montoya on the next day, August 17, in crosscuts 5 to 33, was as the result of Respondent's unwarrantable failure. In this connection, I note that according to Montoya, on August 17, Hanson was upset and he stated that he did not understand why only a specific area of the second Left entry was rock dusted, and the rest of the entry was not rock dusted. Hanson's testimony that he did not recall saying anything on August 17, when he received an order from Montoya, is not sufficient to contradict the specific testimony of Montoya, as to what Hanson did say.

Based on the statutory factors set forth in 110(i) of the Act, and considering the degree of Respondent's negligence, for the reason essentially set forth above, (infra, IV), and considering the high gravity of the violation herein, based on the extent and location of the coal dust, and the fact that it was layered on top of the rock dust, I conclude that a penalty herein of $950 is proper.

ORDER

Respondent shall, within 30 days of this Decision, pay $950 as civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. (c.f., C F & I Steel Corporation, 2 FMSHRC 3459 (1980), (The Commission affirmed the finding of the trial judge that an intervening clean inspection of the entire mine had not been established by the Secretary where the record indicated, inter alia, that 30 inspection days, which were part of two regular inspections, took place in the period between the underline order and the Section 104(2)(d) Order.); c.f. U. S. Steel, supra, (The Commission found that testimony of the inspector, inter alia, that in the intervening period "I have covered the entire facility, yes. . . . the entire ID Number 820, yes," and "well, that's possible I went through there.", did not afford substantial evidentiary support to the finding of the trial judge that there was an absence of an intervening clean inspection.) (U. S. Steel, supra, at 1914).

2. In essence, Respondent in its Brief argues that Petitioner has not established that the cited area, i.e, the Second Left entry Third East is within the purview of Section 75.400, supra. I do not find merit to Respondent's position. Section 75.400 is violated if there is an accumulation of coal in

"active workings." 30 C.F.R. 75.2(g)(4) defines this term as ". . . any place in a coal mine where miners are normally required to work or travel." It appears from the map of the subject mine (Operator's Exhibit 1) that, aside from the belt entry, the First Left or Second Left entries are the only pathways for miners to travel from the portals to work at the longwall face. I note in this connection that David Glenn Casey, a fire-boss employed by Respondent, testified that on August 14, 1989, he walked up the First Left and Second Left entries.

3. I find that the opinion of O'Neal that, based on his observations, the entry in question did not have to be rock dusted on August 14, 1989, is not sufficient to rebut the testimony of Montoya, as to his observations 3 days later on August 17. Further, due to the expertise and experience of Clete R. Stephan, I place considerable weight upon his testimony that, in evaluating the hazard of coal dust, its color is not important, but rather the critical criteria is whether there is dust on the surface. In this connection, he testified that dust in a layer as thin as a piece of paper does present an explosion hazard. As such, I conclude that a determination of the color of the accumulation is not critical to a disposition of this case. Accordingly, I do not place much weight on the testimony of Carl O'Neil (Respondent's safety trainer, who was with Montoya during the inspection) that the dust in question was grey, and not black, as testified to by Montoya.

4. Inasmuch as the distance between the center of each crosscut was approximately 120 feet, the coal dust thus extended over a distance of more than 3000 feet.

5. In this connection, I accept the uncontradicted testimony of Montoya that the mine in question was found to be liberating more than a million cubic feet of methane per 24 hours, and as such is subject to special inspections for methane pursuant to Section 103(i) of the Act).

6. Casey testified that the material in question in the area cited by Montoya was grey. He indicated that in general, rock dust is darker if wet, and that the stak rock above the seam in question is gray. He also indicated that Montoya had said that the material in crosscuts 1 to 27 was getting darker and was grey at crosscut 27. I find this testimony inadequate to rebut Montoya's testimony, based upon his personal observation, that the specific material in question consisted of coal dust in a layer on top of the rock dust. I observed the witness' demeanor and I conclude that Montoya was more credible in his testimony that he had no doubts that the material in question was coal dust.

7. It is significant that Stephan indicated that 600 feet is only a very short distance for an explosion to be propagated, as an explosion travels at a rate of 1,000 feet per second.