CCASE:
SOL (MSHA) v. EASTERN ASSOCIATED COAL
DDATE:
19910329
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-198 A. C. No. 46-01456-03826
v.	
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	Federal No. 2 Mine

DECISION ON REMAND

Before: Judge Weisberger

I.

On February 23, 1990, I issued a Decision in this case wherein I found, inter alia, that Respondent's violation of 30 C.F.R. 75.400 was not a result of its "unwarrantable failure." On February 7, 1991, the Commission, pursuant to the granting of Petitioner's Petition for Discretionary Review, issued a Decision remanding the issue of unwarrantability ". . . for further analysis and consideration" consistent with its Decision (Eastern Associated Coal Corp., 13 FMSHRC _____, Docket No. WEVA 89-198, slip op., February 7, 1991).

On February 19, 1991, in a telephone conference call initiated by the undersigned with Counsel for both Parties, the latter were granted until March 12, 1991, to file Briefs. Subsequently, pursuant to Respondent's request, which was not objected to by Petitioner, the date to file Briefs was extended to March 19, 1991. On March 14, 1991, Petitioner filed a Brief on Remand. Respondent filed a Brief on March 25, 1991.

II.

In its Decision, supra, slip op. at 10, the Commission noted as follows with regard to matters not addressed in my original Decision:

> Evidence seemingly unaddressed by the judge in his analysis is relevant in considering the question of unwarrantable failure. The judge appears to have found that a leak was the source of the problem. See 12 FMSHRC at 242. Thus, he apparently rejected the testimony of Eastern's witnesses that the most

plausible explanation for what occurred was either a spill or overfill. The judge, however, made no finding concerning how long the leak had continued unabated. If the leak had actually continued unabated from February 6, as Merchant testified, a lack of care on Eastern's part would appear to be present. Tr. 205-06. The area was fire-bossed daily and involved at least 12 to 15 inspections (preshift and onshift) by four or five different people over the period February 6-8. Tr. 209, 233, 235; R. Exh. 6. (Emphasis added.)

The rationale for the remand by the Commission in its Decision appears to be set forth as follows: "The fact that the judge did not reconcile his findings with respect to negligence and unwarrantable failure requires that we vacate his conclusion that no unwarrantable failure existed and remand this proceeding to the judge for further analysis and consideration." (Eastern Associated, supra, slip op., at 10.)

III.

I have considered the arguments set forth in Respondent's Brief. However, I have limited my analysis and decision to the issues raised by the Commission in its rationale for the remand, and in its discussion of the deficiencies in the original Decision as set forth, infra, p. 1-2.

Upon further analysis of the record, I find it establishes that Respondent was highly negligent with respect to the cited violations. The reasons for this conclusion are set forth in the original Decision (12 FMSHRC at 242). Additionally, I note that Merchant indicated that on the 2 days prior to February 8, the date of the Citation at issue, the tipple was not leaking less. Further, in this regard, Merchant, the tipple operator, testified as follows on direct examination:

> Q. The previous two days did you put in an amount that was equal to the normal amount you would put in a tipple that's running well?
>
> A. You would put three to five cans in, which is from 15 to 25 gallons in per shift (Tr. 206).

Respondent did not adduce any testimony regarding the leak at the tipple for the period February 6-8. Hence, based on the testimony of Merchant that was not rebutted or impeached, I conclude that the leak at the tipple continued unabated from February 6. Since, as noted by the Commission in its Decision, (slip op, supra, at 10), the area was fire bossed daily and involved at least 12 to 15 inspections by four or five people over the period February 6-8, I thus conclude that the evidence establishes a significant lack of care on Respondent's part in not detecting the leak.

For the above reasons, upon reconsideration, I conclude that Respondent's high level of negligence reached the level of aggravated conduct. As such, I find that the violation herein was the result of Respondent's unwarrantable failure (see, Emery Mining Corp., 9 FMSHRC 1997, 2004, (1987)); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987)).

ORDER

It is ORDERED that Citation No. 3100463 be converted to the original Section 104(d)(2) withdrawal Order.

Avram Weisberger
Administrative Law Judge