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DRUMMOND COMPANY 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

DRUMMOND COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. SE 91-10-R
Citation No. 3020151; 10/4/90

Docket No. SE 91-11-R
Citation No. 3020153; 10/4/90

Mine I.D. 01-00821

DECISION ON REMAND

Before: Judge Weisberger

On January 14, 1991, I issued a Decision with regard to these consolidated cases and, with regard to Docket 91-10-R, found inter alia that the violation cited therein was not the result of Drummond's unwarrantable failure. On September 20, 1991, the Commission vacated the finding of no unwarrantable failure, and remanded the matter for reconsideration of the issue of Drummond's unwarrantable failure. (Drummond Company Incorporated, 13 FMSHRC _____, Docket Nos. SE 91-10-R and SE 91-11-R, slip op., September 21, 1991). On September 25, 1991, arrangements were made by the undersigned to convene a telephone conference call with counsel of both parties on October 2, 1991. On October 2, 1991, the telephone conference call was held, and the parties were given an opportunity to submit a brief with regard to the issues raise by the Commission's remand. Time was allowed until October 21, 1991, for the parties to submit their briefs. Each party filed its submission on October 21, 1991, and these were received by the Commission on October 24, 1991.

In vacating the finding of no unwarrantable failure that I made in my initial Decision, and remanding for reconsideration, the Commission provided as follows:

On remand, the judge, in determining whether the violation arose as a result of Drummond's unwarrantable failure, should weigh the evidence in light of Drummond's actions in the context that it had reason to know of the accumulations, not in the context of actual knowledge.

On remand the judge should also consider whether Drummond's mitigation efforts were sufficient to deal effectively with the accumulation problems given the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing, and whether the miner could have completed the necessary abatement in an expeditious manner. He should consider these efforts in light of his previous findings that Drummond lacked due diligence in inspecting for accumulations that accumulations remained during preshift examinations. (Drummond, supra, slip op., at 8)

In compliance with the directives of the Commission to reconsider Drummond's actions with regard to the issue of its unwarrantable failure, I note the Commission's finding, ". . . that Drummond knew or had reason to know of the accumulations." (Drummond, supra, slip op., at 7). Also, I take cognizance that in its directive to consider the sufficiency of Drummond's mitigation efforts to deal effectively with the accumulation problems, the Commission placed emphasis upon ". . . the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing," (Drummond, supra at 8) Further, the Commission directed consideration of "whether the miner could have completed the necessary abatement in an expeditious manner." (Drummond's supra slip op., at 8). Evidence adduced at the hearing, summarized in my initial Decision (13 FMSHRC at 74), established that Drummond made "some efforts to clean up the accumulation." (13 FMSHRC 74). In this connection Capps who was present at the time, indicated that a miner who had been assigned by Don Clark, the evening foreman, to shovel on the beltline started to do this work at the beginning of the shift on October 4. Capps also indicated that he (Capps) was involved in cleaning the accumulations, and that it took approximately 20 minutes to completely remove them. However, I note that the miner assigned to shovel cleaned areas under the belt, (Tr.234) but there is no evidence that any cleaning was performed under the drive and take-up rollers. In order to clean these area it is necessary first to shut off the belt, and remove certain guards. Neither of these actions had been taken prior to the issuance by Deason of the citation at issue. Further, Busby testified, in essence, that although Clark informed him that he (Clark) assigned a miner to shovel in the area, Clark told him that he ". . . turned him (the miner doing the shovelling) loose and let him go off the beltline to another area." (Tr. 328) Also, Busby, who was the evening shift safety inspector and was responsible for making daily inspections, indicated that normally he would have had the accumulation inside the guarded area corrected a few hours later during the owl shift (Tr. 377-378). Hence, the evidence indicates that it is doubtful that the miner could have completed the necessary abatement in an "expeditious

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manner". Also, as directed by the Commission, upon reconsideration the mitigation efforts by Drummond are reconsidered in light of my previous findings that ". . . Drummond lacked diligence in inspecting for accumulations and that accumulations remained during preshift examinations". (Drummond supra, slip op., at 8).

Therefore for all the above reasons, upon reconsideration, and following the directives of the Commission, I conclude that it has been established that the violation herein resulted from Drummond's unwarrantable failure.

Avram Weisberger
Administrative Law Judge