

CCASE:
MSHA V. CONSOLIDATION COAL
DDATE:
19920423
TTEXT:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 91-301
Petitioner : A. C. No. 46-01455-03823
 :
v. : Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Charles Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington Virginia, for Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820.

Order No. 3314237 was issued under section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), for an alleged violation of 30 C.F.R. 75.303. A hearing was held on March 9, 1992 and the parties have filed post hearing briefs.

30 C.F.R. 75.303, which restates section 303(d)(1) of the Act, 30 U.S.C. 863(d)(1), provides in pertinent part:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground

area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall * * * *

* * * * *

examine and test the roof, face, and rib conditions in such working section * * * *

* * * * *

and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.

* * * * *

Such mine examiner shall place his initials and the date and time at all places he examines.

* * * * *

Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

(b) No person (other than certified persons designated under this 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this 75.303 has been made within 8 hours immediately preceding this entrance into such area.

30 C.F.R. 75.2(g)(4) which restates section 318(g)(4) of the Act, 30 U.S.C. 878(g)(4), defines "active workings" as follows:

Active workings means any place in a coal mine where miners are normally required to work or travel.

The subject Order No. 3314237, dated September 7, 1990, which is challenged herein, charged a violation for the following alleged condition or practice:

Preshift examinations are not being conducted along the travelway of 5 Butt tailgate entry. Citation 3314222, dated 8-27-90, was issued due to a water build up in this travelway, and according to mine management and miners persons have been traveling into this entry to install waterlines and hoses since this date. Preshift examinations books do not indicate that there have been examinations. No dates or initials can be found throughout the area to prove that examinations have been made. Citation 3314230 dated 9-5-90 was issued along this travelway citing the hazards of slip, trip, fall hazards. Citation 3314236 dated 9-07-90 was issued for hazards related to the fall of roof at spad 8770 along this travelway.

Three workers and a foreman were observed working along this travelway at approximately 1815 hours on 09-07-90. When questioned the foreman stated that he had not made a preshift examination of the area. While questioning other miners it was determined that at least 7 workers have been exposed to the above mentioned hazards without benefit of a preshift examination.

The inspector found that the violation was significant and substantial and that it resulted from an unwarrantable failure on the part of the operator.

As appears above, the challenged order is premised upon previously issued Citations Nos. 3314222, 3314230, and 3314236. Citation No. 3314222 dated August 27, 1990, charged an S&S violation of 30 C.F.R. 75.305 for the following condition:

The weekly examination for hazardous conditions for the longwall tailgate, 5 Butt section dated 8-21-90 is inadequate. All along this entry, approximately 5,000 feet long, there are slip, trip and fall hazards. Coal has sloughed into the walkway at several locations. Stopping No. 43, water has accumulated one to two feet deep for a distance approximately 100 feet inby and for a distance of approximately 300 feet outby. The water is one to one and half feet deep across the entry. At spad 868 the water is one to two feet deep for a distance of one to two feet deep and at spad 8626 one to two feet deep for approximately 200 feet. In the event of an emergency, rapid escape along this entry would be difficult. The inspection party took over 60 minutes to walk this entry.

Citation No. 3314230 dated September 5, 1990, charged an S&S violation of 30 C.F.R. 75.305 for the following condition:

Hazards exist in the 5 Butt longwall section tailgate entry that have not been corrected immediately. At marker number 42 + 80 there is a water hole rib to rib approximately 80 feet long and from 1 to 2 feet deep. The bottom is irregular with some mud and some coal sloughage. The bottom cannot be seen through the water and slip, trip, fall hazards exist. Weekly mine examiners travel this entry weekly.

Finally, Citation No. 3314236 dated September 7, 1990, charged an S&S violation of 30 C.F.R. 75.202(a) for the following condition:

The roof at spad 8770 and the 5 Butt section tailgate entry is not controlled to protect persons from the hazards related to falls of the roof. Loose drummy top has fallen out on both sides of the crib provided exposing loose drummy roof. The boards provided with roof bolts have been bent from the weight of the roof. Persons are working out by this area and indications are that they travel under this roof en-route to work.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 3-4):

- (1) The operator is the owner and operator of the subject mine;
- (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;
- (3) I have jurisdiction in this case;
- (4) the inspector who issued the subject order was a duly authorized representative of the Secretary;
- (5) a true and correct copy of the subject order was properly served upon the operator;
- (6) a copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing issuance but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein;
- (7) payment of any penalty will not affect the operator's ability to continue in business;
- (8) the operator demonstrated good faith abatement;

- (9) the operator has an average history of prior violations for a mine operator of its size;
- (10) a section 104(d) chain has been established and is not in issue;
- (11) Citation Nos. 3314222, 3314236 and 3314230 were not contested by the operator. They have been paid and are final with respect to all matters contained therein.

The size of the operator was inadvertently overlooked at the hearing. In a post-hearing telephone conference call on April 13, 1992, counsel for both parties agreed the operator's size is large.

At the hearing the inspector described the conditions which caused him to issue the three citations prior to the 104(d)(2) order which is the subject of this action. He testified that on August 27 he found several water holes in the tailgate entry as described in the citation of that date (Tr. 31-33). Although the tailgate entry was not a designated primary or alternate escape-way, the inspector said it was an escape route off the longwall face in the event of a fire somewhere along the face which made it impossible for miners to exit through the headgate (Tr. 34-36). The water condition continued after August 27 (Tr. 36). On September 5, as set forth in the second citation, the inspector again found a violation due to a water hole, irregular bottom and coal sloughage in the entry (Tr. 36-37). The water condition changed at the various times and the area of water was smaller on the 5th than it had been on the 27th (Tr. 61-62). Finally, on September 7 the inspector issued a third citation which was for bad roof and inadequate roof support (Tr. 58-59). As appears in Stipulation No. 11, supra, these three citations were not contested and therefore, the conditions cited therein and the fact that they were significant and substantial are accepted as true for purposes of this case.

The inspector testified that he issued the subject citation because he concluded that pre-shift examinations were not being made in the tailgate entry where persons had been working installing waterlines and pumping (Tr. 38). He cited the operator for the times persons were sent into the tailgate entry to pump water without the benefit of a pre-shift examination (Tr. 65). The water conditions on the 7th when he issued the subject order were similar to what they had been on the 5th (Tr. 62). He believed the miners were subject to danger from both the bad roof and from slipping and falling because the pre-shift examination pursuant to which these hazards would have been observed and reported, was not performed (Tr. 60-61).

Section 75.303, quoted supra, requires that there be a pre-shift examination in "active workings" of a mine. Section 75.2(g)(4) also quoted above, defines "active workings" as any place in a coal mine where men are normally required to work or travel. The inspector took the position that the entire tailgate entry was "active workings" because extensive water in that entry which had existed for several days, created a substantial job for workers who went in there to install pumps and waterlines, pump water and move the compressor (Tr. 82-83). According to the inspector this work, which mine management knew needed to be done, had to be performed not just on an intermittent basis (Tr. 83). On the day the inspector issued the order people were in the area working, pumping water or moving waterlines and pumps (Tr. 66).

In the same vein is the testimony of a miner whose regular job at the time was pumper (Tr. 120-131). He stated he had been working in the area since the original violation for water was issued on August 27 (Tr. 124). He was on the afternoon shift and every day that he was present, he worked in that area and had numerous conversations, almost on a daily basis, with the mine foreman about the water condition (Tr. 124-125, 127). He said there was an average of two to five people pumping water and moving pumps and lines (Tr. 125). He had never seen evidence of a pre-shift examination (Tr. 130).

The mine foreman testified that he recalled putting men to work in the area to abate the water condition but did not remember specific shifts or assignments (Tr. 182). He stated men were not working on that problem every shift every day, but that men were there off and on at different times (Tr. 193). The only shift he could guess when they worked there regularly was the midnight shift (Tr. 193). He could not say men were not down there on occasion during other shifts (Tr. 194).

Based upon the foregoing, I find that the tailgate entry in this case constituted "active workings" of the mine. As the testimony of the inspector and the pumper makes clear, correction of a long-standing water problem required miners to normally work and travel in the area. In addition, although the operator's mine foreman did not think men were in the area on every shift and although he differed with the pumper with respect to which shift was involved, his testimony, like that of the others, demonstrates that miners were in the tailgate entry on a regular basis to eliminate the water. In order for miners to normally work or travel in an area they need not be there all the time. I agree with the inspector that a pre-shift examination was necessary to warn the miners before they entered the mine and went to the area where there were slipping, falling and tripping hazards created by the water (Tr. 65). In sum therefore, I decide that where there is an ongoing condition of several days duration which is known to the operator and which poses dangers to miners

who are normally working and travelling in the area in order to abate the condition, the area is "active workings" which must be pre-shifted pursuant to 30 C.F.R. 75.303.

This determination is consistent with the Commission's decision in Southern Ohio Coal Company, 12 FMSHRC 1498 (August 1990). In that case it was held that an accumulation of loose coal existed in "active workings" when it was located at the intersection of the longwall face and the tailgate entry and extended 18 feet down the tailgate. The Commission noted that the tailgate entry was required to be examined weekly and that because the entry was a designated escapeway it was in fact, checked more often. Accepting evidence that miners did not normally work in the area, the Commission pointed out that the definition of "active workings" also applies to areas where miners were required to travel. In this connection the presence of a ventilation curtain maintained at the outby end of the accumulation was deemed relevant because men were normally required to travel in the area to move the curtain as the face advanced. The evidence in the instant case is even stronger than in Southern Ohio in support of a finding that the tailgate entry was an "active workings". Here miners were not only required to engage in normal travel in the entry, but in addition it was necessary for them to work there on a continuous basis to abate the water condition.

A different conclusion, however, obtains with respect to the roof condition concerning which the inspector also decided a pre-shift examination was required. Although this violation also occurred in the tailgate "active workings", the time frame applicable to it does not support the conclusion that a pre-shift examination should have been done. The roof condition was cited for the first time just 30 minutes before the subject 104(d)(2) order was issued. The inspector testified that the roof condition he saw usually develops over a day or two, but he did not see it when he was in the area two days previously on September 5 (Tr. 102, 118). The inspector admitted he did not know when the roof became bad or how long it existed before he saw it (Tr. 103-104). It could have occurred in an hour or two and it was even possible it occurred between the time the pre-shift would have been done and the time the inspector saw it (Tr. 117-118). Citing the operator for not performing a pre-shift with respect to the roof condition was therefore, not warranted and that part of the order concerning failure to pre-shift for the roof condition must be vacated.

Turning again to the water condition, it next must be determined whether the required pre-shift was performed in the tailgate entry with respect to that condition. The mine foreman testified that he walked the tailgate toward the end of the shift during the time a pre-shift would be performed (Tr. 184). However, the purpose of his walk was not to pre-shift, but to see

~597

what was needed to abate the water condition in a specific location (Tr. 185, 187-188). As set forth, supra, one of the requirements of 75.303 is that upon completing his examination, the pre-shift examiner report out the results of his examination to a person on the surface designated to receive such a report before the oncoming shift enters the mine. The foreman admitted he did not call out the results of his examination (Tr. 188). His entry in the pre-shift book was made about 5 or 5:30 p.m., after the next shift had begun and after the inspector had looked in the book and gone underground (Tr. 188-190). Therefore, the mine foreman's actions cannot be accepted as a pre-shift within the purview of 75.303.

Another requirement of 75.303 is that the pre-shift examiner place his initials and the date and time at all places he examines. The foreman testified that he placed dates, times and initials at different locations along the tailgate entry, but he could not remember where (Tr. 195-196). I reject the foreman's account, because I find far more persuasive the statements of both the inspector and the miner representative that they looked for dates, times and initials, throughout the entry but found none (Tr. 64, 139). The inspector described how he looked on crib blocks, headers and other evident places (Tr. 55-56). He said that although he was accompanied by an operator escort and met the longwall foreman, no one showed him any dates, times or initials to prove the entry had been examined (Tr. 107). Most telling was the detailed account of the miner representative. He accompanied the inspector and related that he and the operator escort checked around one side of the crib while the inspector checked the other side. They also looked in between the cribs without finding any dates, times and initials for the day they were looking (Tr. 140, 145-146). I also accept the miner representative's statement that it was standard practice for everyone to look for dates, times and initials and that the operator escort also was looking (Tr. 141). The operator escort's allegation that he did not remember whether or not he looked is far less direct and convincing than the recollections of the miner representative (Tr. 154). The operator escort knew the inspector was looking for dates, times and initials and he must have realized that in order to avoid a violation they would have to be found. Consequently, it makes sense that, as the miner representative said, the operator escort looked for the dates, times and initials along with the others. In accordance with the great weight of the evidence, therefore, I find that there were no dates, times and initials for the pre-shift on September 7 and that for this reason also the mine foreman's walk through the entry also failed to satisfy 75.303.

The onshift records indicated that the inby portion of the tailgate extending approximately 200 feet from the end of the

~598

longwall face to the check curtain was regularly examined during the period when a pre-shift would have been performed (Op. Exh. No. 1, "B" to "H"; Op. Exh. No. 2; Tr. 159-160). Cf. Southern Ohio Coal Company, supra. The inspector acknowledged that examinations in this limited portion of the tailgate were made during the time a pre-shift would have been conducted (Tr. 210-211). But here again, the requirements of 75.303 were not met because, as set forth above, there were no dates, times and initials entered anywhere in the entry. Also there was no calling out of the report to the surface in accordance with 75.303

Nor did the onshift activities of the section foreman satisfy the requirements of 75.303. He described how he walked down the tailgate to the waterhole, made a couple of methane checks, and checked the top (Tr. 174). He then went back up the tailgate and the men started bringing the necessary supplies across the longwall face down the tailgate to the waterhole (Tr. 175). The foreman himself admitted his activities did not constitute a pre-shift because in order to do a pre-shift he would have had to have been on the preceding day shift (Tr. 176-177). Also, it is evident that the principal purpose of the section foreman's onshift was to determine what equipment and supplies were necessary to work on the water at the specific location rather than to warn and protect the men in advance from hazards present along the tailgate.

In light of the foregoing, I conclude that the operator violated 30 C.F.R. 75.303 by failing to conduct a pre-shift in accordance with the requirements of that mandatory standard with respect to the water conditions in the tailgate entry. Quinland Coals Inc., 9 FMSHRC 1614, 1619 (1987).

The next issue is whether the violation was "significant and substantial" as that term has been defined by the Commission. Mathies Coal Company, 6 FMSHRC 1 (January 1984). As already noted, the findings in the prior citations that the water conditions presented a significant and substantial risk of slipping, falling and tripping, are final and conclusive. I conclude that the failure to find, record and report these conditions pursuant to a valid pre-shift examination also presented a reasonable likelihood of serious injury. I again find relevant the inspector's testimony that because there had been no pre-shift the miners were not warned of the slipping, falling and tripping hazards presented by the water (Tr. 65). The continual presence of miners in the area to repair the situation and the changing nature of the water conditions from hour to hour created a reasonable likelihood of serious injury if the miners were not informed before they went underground of the perils that awaited them there. I further conclude that the activities of the mine foreman and the section foreman in the entry cannot serve to reduce gravity below the level of significant and substantial.

~599

As described above, the intent and scope of those activities were limited and in no way provided the level of protection afforded by a pre-shift under 75.303. The inspector's finding of significant and substantial must be affirmed and the violation is found to be very serious.

The final question is whether the violation resulted from unwarrantable failure on the part of the operator. The Commission has defined unwarrantable failure as conduct not justifiable and inexcusable and the result of more than inadvertence, thoughtlessness, or inattention. The term is construed to mean aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987). As set forth above, the water condition had existed for several days and was known to the operator during the entire period. Nevertheless, the operator persistently sent miners to work in the affected area without affording them the protection and security of pre-shift examinations. Because of the long duration of time involved and the repeated instances where the operator's failure to pre-shift knowingly exposed its men to danger, I find that the operator's cited delinquency on September 7 was aggravated within the meaning of Commission precedent and that, therefore, the operator was guilty of unwarrantable failure.

The remaining criteria with respect to the amount of the civil penalty to be assessed have been stipulated to by the parties. I find that a penalty of \$1,250 is appropriate.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDERS

It is ORDERED that Order No. 3314237 be MODIFIED in that the finding of a violation be VACATED with respect to the failure to pre-shift for the roof condition and AFFIRMED for all the remaining aspects of the conditions cited.

It is further ORDERED that the findings of significant and substantial and unwarrantable failure be AFFIRMED.

~600

It is further ORDERED that a penalty of \$1,250 be ASSESSED and that the operator PAY \$1,250 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Charles M. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203
(Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/gl