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MSHA V. CONSOLIDATION COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-2034 A. C. No. 46-01452-03795
v.	:	Arkwright No. 1 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. 3308056 was issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), for an alleged violation of 30 C.F.R. 75.316. A hearing was held on March 10, 1992, the transcript was received and by April 20, 1992, the parties filed their post hearing briefs.

30 C.F.R. 75.316, which restates section 303(o) of the Act, 30 U.S.C. 863(o), provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Order No. 3308056, dated October 18, 1990, and challenged herein, charges a violation for the following alleged condition or practice:

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Measurements made with a magnehelic and pitot tube in the second tube outby the face of the left crosscut off No. 4 entry (2 Right Section) revealed that only 4930 CFM of air was present at that location and a slider tube is used to keep within 10 feet of the deepest point of penetration, which results in even less air at the end of the tube. The approved ventilation methane and dust control plan requires that a minimum of 6000 CFM of air be provided at a working face. 16 tubes and 4 fittings were in place with numerous leaks.

The inspector marked the citation significant and substantial and found that it was the result of unwarrantable failure on the part of the operator.

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 can be admitted into evidence for the purpose of establishing its 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) the operator is large in size.

The inspector testified that when he inspected the mine on

the morning of October 18, 1990, he measured only 4,930 CFM of air at the face (Tr. 26). He cited a violation of 30 C.F.R. 75.316 because the operator's ventilation plan required 6,00 CFM (Exh. R-2). The inspector also found the violation was significant and substantial, and that it resulted from high negligence on the part of the operator (Gov't. Exh. No. 2). Equating high negligence with unwarrantable failure, the inspector issued an order under section 104(d)(2) of the Act.

In a post-hearing letter dated April 7, 1992, the operator admitted the existence of the violation and that it was significant and substantial. The only issue remaining is whether the operator was guilty of unwarrantable failure.

According to the inspector, the continuous mining machine which was in the No. 4 entry was cutting left into the crosscut going from the No. 4 to the No. 3 entry (Tr. 12; Exh. R-1). The mining machine was approximately 20 feet into the crosscut and the inspector believed the turn into the crosscut had been made late on the preceding midnight shift (Tr. 70-71). Tubing ran along the right hand side of the miner, high against the mine roof and over against the coal rib (Tr. 27). This tubing extended from the face outby down the No. 4 entry to the next crosscut where it turned right into the auxiliary exhaust fan (Tr. 13). The inby end of the tubing was approximately 10 feet from the face (Tr. 18-19). The purpose of the tubing and the fan was to pull dusty or gassy polluted air away from the face (Tr. 14-15). By carrying contaminated air away from the face, fresh air coming up the No. 4 entry was allowed to come into the working place and go across the continuous mining machine replacing the exhausted air (Tr. 21-22).

On the morning in question, the inspector found that several tubes were damaged with smashed areas or holes in them (Tr. 19). There were a dozen holes which had up to a maximum diameter of 1 inch (Tr. 20, 61). Also the joints between the sections of tubing were not wrapped (Tr. 24). In the inspector's view, the damaged tubing decreased the air flow provided by the fan. The reduced air flow from the tubes was due half to the damaged areas (holes) and half to the joints (Tr. 61).

The inspector believed the operator was guilty of unwarrantable failure because the midnight shift foreman had not tested for air and the day shift foreman was going to begin mining without the requisite 6,000 CFM of air (Tr. 45-46). He stated that the condition of the tubing and the decreased air flow was obvious (Tr. 45). He thought the continuous mining machine had made its left turn late on the midnight shift and possibly could have bumped the tubing at that time (Tr. 57, 69-70, 71). However, since the damage was located all along the tubing he found it unlikely that it all happened at the end of the midnight shift (Tr. 71). He did not know when or how the conditions occurred

during the midnight shift, but felt that the midnight shift had been in compliance for at least a portion of the time (Tr. 73-74).

The section foreman for the day shift who was not the regular section foreman, admitted he had the power put on the machinery, but did not remember whether he attempted to check the air flow (Tr. 133-134). The mine foreman said inadequate air at the face could be felt when it hit the back of the neck and in this way the inspector could have determined that there was inadequate air when he came on the section (Tr. 118, 119). In the mine foreman's opinion the person in charge on the section should have sought out the cause of the inadequate air (Tr. 122, 123).

It is clear from the foregoing that the acting day shift section foreman committed a serious error in failing to realize that the volume of air at the face was inadequate and to take appropriate action. However, every error of judgment or omission of duty does not constitute unwarrantable failure. The Commission has established a significant threshold for a finding of unwarrantability. It has held that unwarrantable failure is conduct that is not justifiable, is inexcusable and is 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 (Dec. 1987).

In this case the facts do not support an unwarrantable finding. The section foreman on the day in question was not the regular section foreman but a fill-in (Tr. 113, 130). Although this circumstance does not excuse his failure to apprehend the situation, it indicates an absence of reckless disregard or willful intent or other such factors which could be considered suggestive of aggravated conduct.

The length of time a violative condition exists before issuance of a citation or order is relevant in determining whether there is unwarrantable failure. Emergy Mining Corporation, supra; Quinland Coals Inc., 10 FMSHRC 705 (June 1988). Here, by the inspector's own estimate, the operator had fallen out of compliance with respect to the tubing sometime during the prior shift. This relatively short period does not support a finding of unwarrantability. We do not have here a situation where the operator conducted normal operations shift after shift despite inadequate air.

In addition, facts which existed before the order was issued, but came to light only after it was abated, further demonstrate there was no unwarrantable failure. Upon arriving at the scene after the order had been issued, the mine foreman immediately ordered the loading machine operator and his partner

to take apart the auxiliary exhaust fan to find out what was causing the lack of air (Tr. 80, 111, 127). Because the fan was new and powerful the mine foreman believed the inadequate air was caused by more than just the damaged tubing (Tr. 80, 127, 128). When the fan was examined, a rock dust bag was found up against its screen and blower (Tr. 81, 112). The loading machine operator and the mine foreman expressed the opinion that instead of properly disposing of the bag, a miner who was rock dusting at the inby end of the tubing could have thrown the bag into the tubing where it was sucked up against the fan (Tr. 82, 112). The bag greatly affected the operation of the fan and when it was removed the change in ventilation was significant and there was an enormous current of air at the face (Tr. 82, 88). Obviously, the rock dust bag was a contributing, if not the major, cause of the inadequate air which the inspector found. The force of the fan which was the most powerful one the loading machine operator had ever seen, was such that the operator had never had to wrap the holes in the tubing in order to establish sufficient air at the face (Tr. 80, 88).

The existence of the rock dust bag casts no adverse reflection upon the inspector's finding of a violation. He found inadequate air and properly cited it. However, the operator is entitled to have the charge of unwarrantability evaluated in light of the entire situation as it actually existed. For purposes of determining the existence of unwarrantability it is relevant to note that neither the loading machine operator nor the mine foreman, nor anyone else for that matter, could say for sure how the bag got into the fan (Tr. 81, 112). There is no evidence that the bag had been against the fan for any appreciable period of time. Indeed, the great force of the fan when it was operating properly, militates against such a conclusion.

In sum therefore, the evidence fails to establish that either the defective tubing or the misplaced rock dust bag had existed for a length of time sufficient to charge the operator with aggravated conduct. The operator committed only ordinary negligence. Accordingly, the finding of unwarrantability must be vacated and the 104(d)(2) order modified to a 104(a) citation.

One final note. Running through this case is an undercurrent of dissatisfaction by MSHA with how the operator checks for adequate air velocity at the face. If the operator is violating a mandatory standard by how and when it checks such air velocity, MSHA should so charge the operator and if necessary, have the matter adjudicated before this Commission. If, on the other hand, the mandatory standards are not clear or do not require what MSHA wants, the standards should be amended through rulemaking. Otherwise MSHA should desist. What cannot be countenanced is an attempt by MSHA to raise the issue in an oblique manner by citing the operator under a different standard and charging it with unwarrantable failure.

As stated previously, the operator admitted that the violation was significant and substantial. The remaining criteria with respect to the amount of the civil penalty to be assessed have been stipulated to by the parties. Accordingly, I find that a penalty of $750 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.

ORDER

It is ORDERED that the finding of unwarrantable failure for Order No. 3308056 be VACATED.

It is further ORDERED that Order No. 3308056 be MODIFIED to a 104(a) citation.

It is further ORDERED that a penalty of $750 be ASSESSED and that the OPERATOR PAY $750 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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