

CCASE:  
WYOMING FUEL V. MSHA  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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WYOMING FUEL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. WEST 91-598-R  
: Order No. 3244426; 7/28/91  
: SECRETARY OF LABOR, : Golden Eagle Mine  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Mine I.D. 05-02820  
Respondent :  
: SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 92-335  
Petitioner : A.C. No. 05-02820-03616  
: v. : Golden Eagle Mine  
: WYOMING FUEL COMPANY, :  
Respondent :

DECISION

Appearances: Charles W. Newcom, Esq., SHERMAN & HOWARD, Denver,  
Colorado,  
for Contestant;  
Margaret A. Miller, Esq., Office of the Solicitor  
U.S. Department of Labor, Denver, Colorado,  
for Respondent.

Before: Judge Morris

These cases arise under the Federal Mine Safety and Health  
Act of 1977, 30 U.S.C. 801, et seq. (the "Act").

In WEST 91-598-R Contestant Wyoming Fuel company ("WFC")  
challenged Order No. 3244426 issued by the Secretary of Labor  
under Section 104(d)(2) of the Act.

After notice to the parties, a hearing on the merits took  
place in Denver, Colorado, on December 10, 1991. The parties  
filed post-trial briefs.

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On June 30, 1992, by agreement of the parties, the contest proceedings were consolidated with the civil penalty proceedings, WEST 92-335.

WFC is charged with violating the regulatory standard at 30 C.F.R. 715.316.(Footnote 1)

The contested Order No. 324442 reads as follows:

The operator was not complying with the approved ventilation methane and dust control plan dated 11-15-90, p. 37, Item E, in that water ranging from 4" to 28" was allowed to accumulate in different locations in the #1 and #2 bleeder rooms starting at the exhaust air shaft to cross-cut #69 of the tailgate entries. In the #1 bleeder room starting at exhaust air shaft back to cross-cut #70 of the tailgate entries, there was no air pump installed in this area. Water was not being pumped on the #2 entry of headgate. Water accumulated between #73 and #74 cross-cut a distance of about 70 feet. In #3 entry of the headgate water accumulated from cross-cut #70 to cross-cut #75, all the conditions would prevent the fire boss from making a safe examination and to evaluate the performances of the bkeeder system.

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1 75.316 Ventilation system and methane and dust control plan.

[Statutory Provisions]

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, 1980. 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.

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WFC denies it violated the ventilation plan. If a violation is found, the operator contends it was not significant and substantial ("S&S"), nor was it a result of the operator's "unwarrantable failure."

The part of the ventilation plan, as contained in Exhibit S-2, provides that "[p]umps will be installed to remove water that accumulates in sufficient quantity or depth to present a hazard."

#### Brief Statement of the Evidence

On July 28, 1991, MSHA coal mine Inspector Melvin Shiveley inspected WFC's Golden Eagle Mine. He accompanied Gene Costello, (Footnote 2) WFC fire boss. He saw water accumulations at crosscut 73 and it was necessary to walk the rib line to avoid the water. (Tr. 20). Some of the water in the No. 2 bleeder was as high as his boots.

Mr. Shiveley followed Mr. Costello who was making his normal daily run. (Tr. 22, 23). On July 28 the depth of the water ranged from 4 to 28 inches. (Tr. 26). Mr. Costello walked in the 28-inch water after putting on hip waders. In some areas the water was up to Mr. Costello's "belly." (Tr. 27). It was unsafe to walk along the ribs.

Mr. Shiveley first observed the water on July 22, when Mr. Felthager was attempting to get the pumps operational. (Tr. 33, 34).

When Mr. Costello entered the No. 2 bleeder room from crosscut 68 to 69, he was knee-deep in water and wearing his waders. (Tr. 36). Mr. Shiveley considered the violation S&S. (Tr. 40).

On July 28 the pumps were not operating but Mr. Shiveley did not know if they were operating between July 22 and 28.

NED ZAMARRIPA inspected various parts of the mine on July 25. On that day the pumps were operating and no citations were written. Mr. Zamarripa believed there were slip, trip, and fall hazards when Mr. Shiveley wrote his order.

RONALD G. THOMPSON, WFC mining engineer, installed the equipment to pump out the water. Six hundred feet of pipe was laid and installed. Mr. Thompson did not believe he could have gotten the air pumps operational after MSHA's citations for electrical pumps. (Tr. 127).

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2 Misspelled as "Caustillo" in transcript.

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RONALD G. THOMPSON, WFC mining engineer, installed the equipment to pump out the water. Six hundred feet of pipe was laid and installed. Mr. Thompson did not believe he could have gotten the air pumps operational after MSHA's citations for electrical pumps. (Tr. 127).

During the weekend of July 22, the water went down 21 inches. Two additional pumps were installed on July 29.

In addition to Ron Thompson, Daniel McClain and Gene Costello testified for WFC. WILLIAM REITZE, MSHA's mining engineer, testified primarily concerning the hazards from an excessive water accumulation.

#### Discussion and Further Findings

The initial issue is whether WFC violated its ventilation control plan. The issue framed by the record is whether there was an accumulation of water of a sufficient quantity or depth to present a hazard.

I credit Inspector Shiveley's testimony. On July 28 he followed Mr. Costello as the fire boss inspected the bleeder system. There was water throughout the bleeder stem but it is necessary to ascertain whether areas of water accumulation presented a hazard.

Accumulations that presented a hazard were: in the area of crosscut 73 it was necessary for the men to walk the rib line and some of the water in the #2 bleeder room was boot high. On July 28 the depth of the water ranged from 4 to 28 inches in different locations. When Mr. Costello entered the #2 bleeder room from crosscut 68 to 69, he was waist deep in water. Mr. Costello walked through the 28-inch deep water to do the bleeder evaluation.

The use of waders by Mr. Costello is particularly persuasive on the issue of excessive water that presented a hazard in the bleeder system. Waders are hardly standard issue in an underground coal mine. Water up to Mr. Costello's belly would be of a sufficient depth to cause a hazard.

In sum, I agree with the uncontroverted statement by Mr. Shiveley to Mr. Costello that there was "quite a bit" of water. Mr. Costello agreed with the statement.

I further credit the testimony of Messrs. Shiveley, Zamarripa, and Reitze concerning the hazards caused by the accumulated water in the bleeder system. The hazards are numerous: unstable footing in unclear water, possible weak ribs, the necessity of walking the rib line, the possibility of drowning, as well as the

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hazard of stepping into a large sump hole. The record fairly establishes the accumulation of water was of a sufficient depth so as to present a hazard.

The Judge is aware of WFC's witnesses - Ron Thompson, Daniel McClair, and Gene Costello. However, on the issue of water accumulations and related hazards, their testimony is not persuasive.

Mr. Thompson testified principally as to the installation and operation of the air pumps. His testimony on the air pumps principally related to the unwarrantable failure issue, infra. Mr. Thompson's testimony as to the bleeder system is not persuasive since he indicates he did not walk every area in the bleeder system. (Tr. 136, 138).

In contrast, Mr. Shiveley indicated he walked all of the bleeder system (marked in blue on Exhibit S-3).

DANIEL McCLAIN, safety director for WFC, testified the company received a 107(a) order around Monday, July 15. The order required that electric pumps be replaced with air pumps. (Tr. 162). Mr. McClain was involved with Mr. Shiveley's inspection on July 22. (Tr. 164). No citations were written on July 22. Between July 22 and July 29 the water dropped 10 to 12 inches. (Tr. 166).

Mr. McClain further testified that Mr. Zamarripa did not write any citations on the 24th or 27th for the water accumulation. (Tr. 169). The witness also expressed certain legal opinions in connection with issues in the case. (Tr. 170-176).

Mr. McClain agreed there was 24 inches of water in the headgate corner but he differed as to whether it was a hazardous condition. However, he agreed a person could slip or fall on dry ground. (Tr. 181).

As previously noted on the hazard issue, I credit MSHA's witnesses. In addition, MSHA's witnesses are confirmed by WFC's preshift mine examiner's reports from July 21, through July 28. They describe water in the bleeders as a "hazardous condition." (Ex. WF-2).

EUGENE COSTELLO is a diesel mechanic for WFC. On July 28, 1991, he was fire boss and pumper. The pumps were working on that day. Mr. Costello met Mr. Shiveley at the bottom of the mine. He checked some pumps on the way into the bleeders. Mr. Costello put on his waders that morning so he wouldn't get wet.

There was water in the bleeder that morning but he didn't feel it presented a hazard in firebossing the area. Water has

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never bothered Mr. Costello. Even if the water is several inches deep, you can see the bottom.

Mr. Costello described how he took his readings. He could not remember being in water up to his belly that day. (Tr. 197). The deepest part would be when he was going out to move or check a pump.

Mr. Costello did not contradict MSHA's witnesses in the critical area of whether the water depth presented a hazard.

For the foregoing reasons, Order No. 3244426 should be affirmed.

#### Significant and Substantial

WFC contends the violation was not S&S and accordingly such special findings should be stricken.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "Significant and Substantial" 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 injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-1575 (July 1984). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc. 10 FMSHRC 498, 500-501 (April 1988). Youghiogeny and Ohio Coal Co., 9 FMSHRC 2007, 2011-12 (December 1987).

The record here establishes that WFC violated its ventilation plan. Such a plan has the force and effect of a mandatory regulation. Accordingly, the first criteria is established.

The second facet, a discrete safety hazard, is established by the evidence.

In connection with the third feature, I agree with Inspector Shiveley that the violation was S&S. (Tr. 40, 43). In particular, the insecure footing would be an obvious contribution to the hazard. Waders by themselves can cause the wearer to slip, particularly where the mine bottom is neither apparent nor easily seen.

I further concur with MSHA's witnesses that it is reasonably likely that the injury in question will be of a reasonably serious nature. Drowning, misstepping in the bleeder system, the possibility of pulling down a loose rib, all appear to be factors that could reasonably cause a serious injury.

WFC argues no S&S violation existed and in support thereof cites Eagle Nest, Incorporated, 13 FMSHRC 843, May 1991.

In Eagle Nest there were accumulations of murky water to the top of the Inspector's 16-inch boots. The water extended 20 feet across the entry and outby as far as the Inspector could see. Anyone walking in the area would be exposed to slipping hazards. Given the described scenario, Judge Weisberger held the hazard



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"can be mitigated by walking cautiously to feel for submerged objects so they may be avoided." 13 FMSHRC at 847.

On July 28, 1992, after WFC's brief was filed, the Commission reversed the holding in Eagle Nest, 14` FMSHRC 1119. Specifically, the Commission noted that the "exercise of caution" is not an element in determining whether a violation rises to the level of S&S, 14 FMSHRC at 1124.

The S&S designation is within the criteria of the Commission's rulings and said allegations should be affirmed.

#### Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2000-2004 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that while negligence is conduct that is "inadvertent", "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

The testimony by WFC's witness Ronald G. Thompson indicates WFC was attempting to comply with MSHA's order. Mr. Thompson's testimony (supra), describes these efforts. I credit his testimony since he was the "hands on" engineer in charge of the effort.

The Secretary's post-trial brief relies on the sequence of events that occurred in the two weeks before Mr. Shiveley issued MSHA's order.

I am not persuaded by MSHA's view. Mr. Shiveley had no recollection of the water depth on July 22. (Tr. 50). Further, he is hardly in a position to refute WFC's efforts at pumping since he had "no idea" of the extent to which the pumps were operating between July 22 and July 28. (Tr. 49, 50).

Given the circumstances involved here, I conclude WFC made a reasonable effort to comply and the allegations of unwarrantable failure should be stricken.

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Pursuant to the stipulation of the parties filed on May 19, 1992, the decision should address all issues presented in WEST 91-598-R as well as the penalty case, WEST 92-335.

#### CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty.

According to the Secretary's proposed assessment, WFC is a large company, as indicated by its 19,539,257 production tons. The size of the Golden Eagle Mine itself is 675,916 production tons. The penalty in this order is appropriate in relation to the size of the company and is should not affect the operator's ability to continue in business.

By way of prior history: Exhibit S-1 shows WFC was assessed 19 violations in the period from June 1, 1991, to September 24, 1991. In the period before June 1, 1991, no violations were assessed.

The operator's negligence was moderate. While the accumulated water was extensive, as noted on Exhibit S-3, such accumulations were not always a sufficient depth to present a hazard.

The gravity of the violations was high for the reasons previously discussed.

WFC demonstrated good faith in attempting to achieve prompt abatements.

For the reasons stated herein, I enter the following:

#### ORDER

In WEST 91-598-R

1. The allegations of unwarrantable failure in Order No. 3244426 are STRICKEN.

2. The contest of Order No. 3244426 is DISMISSED.

In WEST 92-335

3. Order No. 3244426 is AFFIRMED.

4. A civil penalty of \$200 is ASSESSED.

John J. Morris  
Administrative Law Judge

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