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SOL (MSHA) V. MULLINS AND SONS COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 92-669 A.C. No. 15-11855-03560
v.	:	
	:	No. 6 Mine
MULLINS AND SONS COAL COMPANY, INCORPORATED, Respondent	: : :	

DECISION

Appearances: Anne T. Knauff, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
Dale Mullins, Vice President, Mullins and Sons Coal Company, Inc., Kimper, Kentucky, for Respondent

Before: Judge Feldman

This case is before me for consideration as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act). This case was heard in Prestonsburg, Kentucky, on April 14, 1993. Dale Mullins, the respondent's Vice President, represented the respondent in this matter and testified in its behalf. The Secretary, represented by counsel, called Mine Safety and Health Administration (MSHA) Inspector Donald Milburn as his only witness. At the hearing, the parties stipulated to my jurisdiction in this matter and to the pertinent facts associated with the civil penalty criteria contained in Section 110(i) of the Act. At the conclusion of the hearing, the parties elected to make closing statements in lieu of filing posthearing briefs. After the closing presentations, I issued a bench ruling which is formalized in this decision.

This proceeding concerns 104(d)(1) Citation No. 3809162, which was issued to the respondent by Inspector Milburn, at 10:00 a.m., on Monday, June 17, 1991, for an impermissible accumulation of combustible coal dust in contravention of the mandatory health and safety standard contained in

Section 75.400, 30 C.F.R. 75.400.(Footnote 1) Shortly thereafter, Milburn issued 104(d)(1) Order No. 3809164 for violation of the mandatory standard in Section 75.402, 30 C.F.R. 75.402, which requires combustible coal dust to be roc dusted within 40 feet of all working faces.(Footnote 2) At trial, Mullins stipulated to the fact of occurrence of these violations and to their significant and substantial nature (Tr.12-13, 64-65). There- fore, the only issue for resolution is whether these violations occurred as a result of the respondent's unwarrantable failure.

The essential facts are not in dispute and can be briefly summarized. On the morning of June 17, 1991, Milburn arrived at the respondent's No. 6 Mine in order to perform a routine inspection. Prior to performing the inspection, Milburn participated in a pre-inspection conference with Tony Mullins, the mine superintendent and nephew of Dale Mullins, and Stoney Mullins, the business partner and brother of Dale Mullins. At this conference, Milburn examined the pre-shift examination log which contained the examiner's remarks concerning coal dust accumulations in the No. 2 Section with an additional notation that rock dust application was behind in the section in the No. 1 through No. 6 entries. Milburn's contemporaneous notes reflect that both Tony Mullins and Stoney Mullins told him that they were behind in cleaning and rock dusting the section because the scoop was out of service since the Friday shift (See Government Ex. 1). Milburn proceeded to inspect the No. 2 Section where he confirmed loose coal, coal dust and float dust accumulations ranging from three to six inches in depth starting at the No. 2 belt conveyor feeder and contin- uing inby for a distance of approximately 180 feet in the first through sixth entries. Milburn determined the depth of the accumulations by using a folded wooden ruler. Milburn described these accumulations as black in color with no evidence of significant rock dust content (Tr.98).

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Section 75.400 provides as follows:

"Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

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Section 75.403, 30 C.F.R. 75.403, contains the standard for application of rock dust. This regulation requires that the combined content of coal and rock dust must contain at least 65 percent incombustible content in intake and neutral entries, and, at least 80 percent incombustible content in return entries. Milburn took three samples which confirmed the cited violation. The lab results of the samples reflected only 29 percent and 55 percent incombustible material in an intake and neutral entry, respectively, and only 35 percent incombustible material in a return entry. (Tr.110-113).

Milburn testified that the shift began at 7:00 a.m. Therefore, he considered the violation to be of three hours duration, although he indicated that it may have existed since the previous Friday when the scoop went out of service (Tr. 24). Milburn stated that he observed that the section scoop was being charged. He also testified that there was no other scoop available that could be used as an alternative means of cleaning the accumulations (Tr.93-94)(Footnote 3)

Milburn opined that the notation concerning the accumulations in the pre-shift examiner's book was a significant, if not determining, factor in his conclusion that the respondent's conduct constituted an unwarrantable failure. In this regard, Milburn stated that the respondent's conduct would not constitute an unwarrantable failure if the accumulations existed but were not noted in the pre-shift log (See Tr.100-108). As noted below in my bench decision, contrary to Milburn's opinion, an appropriate notation acknowledging coal dust accumulations in the pre-shift examination book is a mitigating factor in assessing the degree of negligence provided that the notation is not ignored. Consequently, I issued the following bench decision, with non-substantive edits, removing inspector Milburn's unwarrantable failure findings from the citations in issue.

> I wish to note, for the record, that Mr. Mullins has stipulated to the occurrence of the violations, and, to the significant and substantial nature of these violations. Therefore, the outstanding issue to be resolved is whether these violations were the result of the respondent's unwarrantable failure.
>
> Unwarrantable failure is a term that is used to connote gross negligence. The Commission's leading cases which distinguish unwarrantable failure (gross negligence) from ordinary negligence are Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In essence, these cases state that ordinary negligence is manifested by inadvertence, thoughtlessness or inattention, whereas unwarrantable failure is conduct that is not justifiable, or, conduct that is inexcusable. Therefore, a finding of unwarrantable failure requires evidence of a disregard or an indifference to a hazardous condition.

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3 Mullins pointed out that, given the length of involvement in each entry (180-feet), cleaning the accumulations by manual shoveling was not feasible. (Tr.87-89).

I wish to distinguish this case from my recent decision in Consolidation Coal Company, 15 FMSHRC 263 (February 1993) where I affirmed an unwarrantable failure finding for coal dust accumulations in a preparation plant facility. In that case, the accumulations were determined to have existed for approximately three weeks. These accumulations were on motors and inside electrical boxes. Moreover, the operator took no action to remove the accumulations despite complaints by the safety committee. Finally, the condition was not noted in the pre-shift examination book.

Turning to the facts of this case, we have accumulations of three hours duration. We also have a notation in the pre-shift examination book which insulates, to a certain degree, the operator from an unwarrantable failure charge because it shows a recognition of the hazard created by the accumulations. Having noted the accumulations in the examination book, if the operator proceeds to ignore the accumulations, such conduct would constitute an unwarrantable failure. However, in this case, Milburn was informed that the scoop was out of service during the pre-inspection conference. Milburn's subsequent inspection confirmed that the scoop was out of order. Moreover, Milburn testified that he did not know of any alternative scoops that could be used to clean the working section.

Thus, the issue of unwarrantable failure must be viewed in the context of whether there are any mitigating circumstances. The accumulations were duly noted. These accumulations were only three hours old when cited by the inspector. The scoop was inoperative with no alternative means of cleaning up the accumulations. The scoop was being charged so as to place it in operation. Under these circumstances, viewing the evidence in its entirety, there is no adequate basis for concluding that there was inexcusable neglect on the part of the respondent. Although I have concluded that the respondent's conduct was not indicative of an unwarrantable failure, I do not wish to minimize the seriousness of this violation. The respondent's continued operation, three hours after the condition was noted in the examination book, contributes to the serious gravity of the underlying violation and is relevant to the issue of the appropriate civil penalty to be assessed. I am, therefore, reducing the degree of negligence associated with Citation No. 3809162 from high to moderate. Thus, this citation is modified from

a 104(d)(1) citation to a 104(a) citation. Given the serious gravity of this violation, I am assessing a $600 civil penalty.

With respect to remaining 104(d) Order No. 3809164 for failure to rock dust, I find, consistent with the respondent's stipulation, that the violation was significant and substantial in nature. As rock dusting is an alternative method of neutralizing combustible accumulations that are not removed with a scoop, I find it difficult to conclude that this violation occurred as a result of an unwarrantable failure. Milburn testified that it would serve no purpose to rock dust accumulations that were going to be cleaned. The respondent intended to clean the area, rather than rock dust, as soon as the scoop was placed in service. Under such circumstances, an unwarrantable failure has not been established. Therefore, I am modifying Order No. 3809164 to 104(a) citation and I am assessing a $400 civil penalty for this violation. The total penalty in this matter is $1000, which the respondent is ordered to pay within 30 days of the date of my written decision, and, upon payment of that sum this matter will be dismissed.

ORDER

ACCORDINGLY, IT IS ORDERED that the unwarrantable failure findings with respect to Citation Nos. 3809162 and 3809164 SHALL BE DELETED and that these citations ARE MODIFIED AND AFFIRMED consistent with the above bench ruling. The respondent IS ORDERED to pay a total civil penalty of $1000 within 30 days of the date of this decision, and, upon receipt of payment, this matter IS DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

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