CCASE:
SOL (MSHA) V. ISLAND CREEK 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 92-1030
	:	A.C. No. 15-03178-03722-R
v.	:	
	:	Ohio No. 11 Mine
ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Marshall S. Peace, Esquire, Lexington, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of 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," charging the Island Creek Coal Company (Island Creek) with violations of mandatory standards. The general issue before me is whether Island Creek violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Before and following the hearing the parties moved to settle Citation Nos. 3548709, 3549133, 3548691 and 3548694 and Order Nos. 3168531, 3548864 and 3548698 proposing a reduction in total penalties for the violations charged therein from $3,433 to $1,497. In addition, the parties have proposed to modify Order Nos. 3168531 and 3548864 to citations under Section 104(a) of the Act and to delete the "significant and substantial" findings from Citation/Order Nos. 3548709, 3548864, 3549133 and 3548694. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of these penalties will be incorporated in the order accompanying this decision.

Order No. 3548870 is the only charging document remaining for disposition. The Order was modified at hearing to an order issued pursuant to Section 104(d)(1) of the Act(Footnote 1) and alleges a violation of the mandatory standard at 30 C.F.R. 75.400. It charges as follows

> Loose coal and fine coal was left along both ribs of the No. 1 Unit supply road, for approx. 25 X cuts, 1500 feet. The loose coal and fine coal was more prevalent along the left rib. The coal ranged in depth from 2 inches up to 1 foot in depth and 18 inches to 36 inches wide. Coal was pushed up in a left X cut approx. 12 X cuts from air lock. The coal was 3 feet deep, 6 feet long and approx. 3 feet wide. The loose coal had been rock dusted over along the supply entry.

The cited standard, 30 C.F.R. 75.400, provides that "[c]oal 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 electrical equipment therein."

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1 Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

According to Inspector Ted Smith of the Mine Safety and Health Administration (MSHA), on August 20, 1990, during the course of an ongoing inspection of the subject mine, he discovered an accumulation of loose coal and coal dust along the ribs of the No. 1 Unit supply road. According to Smith, the coal ranged in depth from two inches to 12 inches and was more prevalent along the left rib. Smith measured the size of the accumulations at a number of locations with a steel tape. They were from 18 to 36 inches wide. In addition, coal was found pushed into a crosscut approximately 12 crosscuts from the air lock. This coal was three feet deep, six feet long and about three feet wide. Upon close visual and physical examination Smith concluded that the material in each accumulation was in fact coal and coal dust with some mixture of fine clay near the bottom of each accumulation examined. He concluded, however, that because the accumulations had been rock-dusted and were wet the violation was not "significant and substantial." It was in fact noted on the face of the order that injuries were "unlikely."

General Mine Foreman Tommy Gatlin acknowledged that there were two inch to three inch lumps of loose coal mixed with fine clay along the left rib but he believed that the coal came from rib sloughage. According to Gatlin the material was continually falling off the ribs. Gatlin further testified that it took only about one hour to clean up the entire area cited.

The credible testimony of Inspector Smith alone amply supports a finding of the violation as charged. Moreover, based on the admissions of Gatlin regarding the presence of loose coal in the cited area, the existence of the violation is amply corroborated. The fact that the cited accumulations had admittedly been rock dusted also tends to corroborate the evidence that the material beneath consisted of, at the very least, combustible loose coal.

The Secretary further argues that the violation was the result of "unwarrantable failure." Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Emery, supra, at 2003-04. In this case the Secretary relies in its findings of "unwarrantable failure" in part on Inspector Smith's opinion that the cited condition had existed for about 30 days (i.e., from the time the entry was first cut until cited), and his opinion that the condition was "obvious" because of its size and height.

While Respondent is clearly chargeable with negligence in this case to have permitted combustible materials to have remained in its mine for at least some period of time, I

find several factors that mitigate against a finding of the high level of gross negligence necessary for an "unwarrantable failure" finding. First, it does not appear that the condition was as "obvious" as alleged by the Secretary. If the Secretary's theory that the cited condition had existed for 30 days is accepted, it is evident that the same condition was overlooked during at least three other inspections (consisting of six trips past the cited condition) by state and Federal inspectors.

In addition, it is apparent that confusion regarding enforcement of the cited standard had been generated by MSHA inspectors during previous inspections. According to Mine Foreman Gatlin, MSHA Inspector Wilburn Vaughn told him in 1988 not to clean up rib sloughage and that it would not be cited. Indeed Gatlin raised this contention underground when Smith first cited the accumulations at issue. Moreover, Inspector Smith acknowledged at trial that there were indeed circumstances under which MSHA permitted rib sloughage not to be cleaned although he maintained that those circumstances did not exist on the facts of this case. According to Smith only when the mine roof is high and large chunks of coal have sloughed off the rib is the exception granted.

The potential for confusion and, in fact, the existence of confusion resulting from MSHA's enforcement policies has accordingly arisen. In King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (1981), the Commission held that confusing or unclear MSHA policies are a factor mitigating operator negligence. See also Secretary v. American Mine Services, Inc., 15 FMSHRC 1830 (1993). Under the circumstances it is apparent that the confusion engendered by certain unwritten MSHA enforcement policies regarding the cleanup of rib sloughage mitigates against a finding of aggravated conduct on the part of Island Creek on the facts of this case.

Finally, there is credible evidence of many possible sources for the accumulations found in this case, including rib sloughage and loose material scraped and scooped from the roadway. I do not therefore find that the Secretary has met his burden of proving that the cited accumulations were solely the result of original mining activity initiated some 30 days before discovery by the inspector. The undisputed evidence that other inspections were conducted in the cited area within the preceding 30 days without citation, further suggests that the accumulations had not existed for such a period.

The Secretary also cited a large number of prior violations of the same standard at this mine over the preceding two years. While such evidence might ordinary be a factor in evaluating unwarrantability, under the unique facts of this case, I do not give that evidence decisive weight. Considering the above

factors I do not find that the Secretary has met his burden of proving that the violation was the result of "unwarrantable failure" and accordingly the order herein must fail.

ORDER

Order No. 3548870 is hereby modified to a citation pursuant to section 104(a) of the Act. The additional modifications proposed in the settlement agreements are hereby adopted and Island Creek Coal Company is directed to pay a civil penalty of $1,897 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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