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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 ON REMAND

Appearances: Jerald Feingold, 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

Statement of the Case

This remand matter concerns two alleged violations. 104(d)(1) Citation No. 3809162, was issued to the respondent by Mine Safety and Health 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 issue 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

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1 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."

to be rock dusted within 40 feet of all working faces.(Footnote 2) At trial, Dale Mullins, the corporate Vice President, appeared on behalf of the respondent. Mullins stipulated to the fact of occurrence of these violations and to their significant and substantial nature (Tr.12-13, 64-65). Therefore, the only issue for resolution was whether these violations occurred as a result of the respondent's unwarrantable failure.

On June 3, 1993, I issued a decision formalizing my bench decision that the violations in issue were not attributable to the respondent's unwarrantable failure. Mullins and Sons Coal Company, Inc., 15 FMSHRC 1061 (June 1993). On February 9, 1994, the Commission vacated my findings of no unwarrantable failure and remanded this proceeding for reconsideration of my initial decision consistent with its remand decision. Mullins and Sons Coal Company, Inc., 16 FMSHRC , Docket No. KENT 92-669 (February 1994).

Background

The pertinent facts are not in dispute. On the morning of Monday, June 17, 1991, Milburn inspected the respondent's No. 6 Mine and reviewed the preshift examination book. Coal dust accumulations in the Nos. 1 through 6 entries in the No. 2 section were noted in the preshift exam book at approximately 6:00 a.m. that morning. (Tr. 11). Production commenced shortly thereafter at approximately 7:00 a.m.(Footnote 3) (Tr. 69, 133-34). The noted accumulations occurred during the previous production day shift on Friday, June 14, 1991. (Tr. 24-25, 69-72). There was no continuous mining operation during the intervening Saturday and Sunday. (Tr. 30-31, 72, 194-95). Milburn's testimony as well as his contemporaneous inspection notes reflect that the subject entries are approximately 180 feet long, twenty feet wide and 36 inches in height. (Tr. 20, 80-81; Gov. ex. 1, pp. 6-8). Milburn was informed prior to his inspection that the scoop was out of service. Milburn proceeded to inspect the six entries and observed accumulations three to six inches in depth that he estimated to extend inby the No. 2 belt feeder approximately 180 feet in each entry. (Joint ex. 1). Milburn also observed that the accumulations were not rock dusted. At the time of the inspection, the battery operated scoop usually used for removing accumulations and for rock dusting was being charged. (Tr. 61).

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2 Section 75.403, 30 C.F.R. 75.403, contains the standard for application of rock dust.

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3 The pertinent entry in the preshift examination book occurred shortly before commencement of production at 7:00 a.m. on Monday, June 17, 1991. For simplicity, the preshift notation and the start of production will be treated as having occurred simultaneously at 7:00 a.m.

This scoop was a "low profile" Elkhorn scoop that was fitted with a low frame and small tires to enable it to operate in low coal seam entries. (Tr. 80-81). Milburn testified that there was no other scoop available that could be used as an alternative means of removing the accumulations. (Tr. 93-94).

The June 3, 1993, Initial Decision

At the culmination of the hearing in this proceeding conducted on April 14, 1993, I issued a bench decision. My decision was based on three essential findings of fact. Namely, the following:

> 1) Shoveling was not a feasible alternative to use of the scoop given the dimensions of the entries (15 FMSHRC at 1063 n.3);
>
> 2) Milburn based his unwarrantable failure findings exclusively on the fact that the accumulations had been noted in the preshift examination book (15 FMSHRC at 1063); and
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> 3) Milburn considered the accumulations to be of three hours duration (15 FMSHRC at 1063).

I issued a bench decision and a brief written decision on June 3, 1993, formalizing my bench ruling because I viewed the facts of this case as unambiguous and noncontroversial. I now realize my June 3, 1993, decision did not adequately set forth the basis for my conclusion that the Secretary had not prevailed on the unwarrantable failure issues.

My decision with respect to the alternative of shoveling was predicated on the fact the six entries in issue were low seam coal entries 36 inches in height by 20 feet in width by 180 feet in length. Accepting Inspector Milburn's approximation of coal dust three to six inches in depth the full length of each entry, the accumulations amounted to between 5,400 and 10,800 cubic feet of dust. Inspector Milburn testified the Elkhorn scoop was out of service and no alternative scoops were available. My conclusion that manual shoveling was not a feasible alternative to using the specially equipped low profile scoop was based on

Inspector Milburn's estimated size of the coal dust accumulations and the inherent difficulty of manual shoveling in a low seam environment.(Footnote 4) In apparent recognition of the magnitude of the cleaning task, Inspector Milburn established 1:00 p.m. on Tuesday, June 18, 1991 (27 hours after his inspection) as the termination deadline for the coal dust removal. Although not addressed in the record, it is not inconceivable that the scoop could have returned to service long before shoveling could be completed.

Regarding the issues of the duration of the subject accumulations and Inspector Milburn's reliance on the preshift notation as dispositive of the unwarrantable failure question, Milburn testified "...if there was no notation in the preshift examiner's book, that this condition existed, prior to them operating on this Monday, then, it wouldn't be unwarrantable (emphasis added)." (Tr. 105, See also tr.22-24, 40). Thus, Milburn cited the respondent for unwarrantable failure at 10:00 a.m. solely because it did not remove the subject accumulations after they were noted by the preshift examiner at 7:00 a.m. In this regard, my June 3, 1993, decision that the "accumulations were of three hours duration" was not intended literally as the accumulations must have occurred before they were noted in the preshift examination book. 15 FMSHRC at 1064. Rather, I was referring to Inspector Milburn's issuance of Citation No. 3809162 three hours after the accumulations were noted by the preshift examiner. Moreover, this conclusion comports with Inspector Milburn's testimony that "...I considered this to be a three hour violation -- or condition, that had been

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4 At trial, Mullins position was that the accumulations could not be removed by shoveling. So overwhelmed by the thought of shoveling, he calculated, albeit erroneously, that the accumulations constituted over 20,000 square feet, or maybe even 40,000 square feet including the crosscuts. (Tr. 87-88). While this statement was made during Mullins' questioning of Milburn, it was nevertheless Mullins' statement and position at trial. While not presented by Mullins in his direct case, I considered the statement as testimony given the fact that Mullins is not an attorney. See Francis A. Marin v. Asarco, Inc., 14 FMSHRC 1269, 1273 (August 1992). Consequently, as the trier of fact, I did not afford any weight to the statement attributed to Mullins at page 89 in the transcript, also not made under oath, that "...it would have took (sic) several shovels..." to remove what he had immediately preceded to describe as 40,000 square feet of accumulations. I do not recall hearing this statement and the statement as attributed is inconsistent with my follow-up remarks. (See statement by the Court, tr. 89). Rather it is apparent that Mullins misspoke or was misinterpreted.

allowed to exist." (Tr. 24).(Footnote 5) Thus, three hours is the operable time period for considering the unwarrantable failure issue as this is the basis for the Secretary's case.(Footnote 6)

A. Section 75.400 Violation

I have reviewed my initial decision in the context of the Commission's remand decision. While I have concluded that shoveling was not a reasonable alternative to using the low profile scoop given the dimensions of the entries and that three hours is the operable time period for considering the unwarrantable failure issue, I am cognizant of the Commission's expressed strong inclination to vacate my initial finding of no unwarrantable failure. Therefore, I have revisited this issue. An operator's failure to cease operations prior to the issuance of a citation for a significant and substantial violation is not unwarrantable per se if the operator has not demonstrated a conscious disregard or indifference. Nor is a violation of section 75.400 per se unwarrantable. The issue of unwarrantable failure must be resolved on a case by case basis based on what, if anything, the operator has done to remove the risk associated with the hazardous condition. In this case, while the respondent's charging of the scoop in recognition of the

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5 Significantly, the Secretary does not assert that the accumulations in issue were permitted to occur over days or weeks as the basis for the respondent's unwarrantable failure. On the contrary, the evidence reflects these accumulations developed over the prior shift and that they were timely noted at the next preshift exam. (Tr. 24-25, 40, 69-72, 105). This conclusion raises the question of how such extensive accumulations could occur during only one shift. The answer lies in Inspector Milburn's equivocal estimation of the extent of the accumulations. As a threshold matter, Milburn testified the accumulations were three to six inches in depth as measured by a wooden ruler. (Tr. 20, 63). Thus, the accumulations were not uniformly six inches in depth. More importantly, Milburn stated he used his wooden ruler to measure the accumulations in each entry a total of "...four to five times on the section..." (Tr. 61-62). Five measurements are insufficient to accurately determine the extent of accumulations in six entries each 36 inches in height and 180 feet in length.

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6 While the period of accumulations during the Friday, June 14, 1991, shift is relevant to the fact of occurrence of the violation of section 75.400, it is not a significant factor in resolving the unwarrantable failure issue. Had the accumulations been removed immediately after the preshift notation on Monday, June 17, 1991, it is apparent that the respondent would not have been cited for unwarrantable failure.

hazardous accumulations(Footnote 7) was something, it was not enough. Having opted to continue operations during the charging of the scoop, the respondent should have made a good faith attempt to remove the accumulations by assigning adequate personnel to manually shovel pending the scoop's return to service. Therefore, consistent with the Commission's remand decision, I hereby reinstate the unwarrantable failure findings in 104(d) Citation No. 3809162. In view of the significant mitigating factors discussed above I am assessing a civil penalty of $700 for this violation of the mandatory safety standard in section 75.400.

B. Section 75.402 Violation

I have also reconsidered the respondent's responsibility to rock dust in light of the Commission's remand decision. Having elected to continue operations, the respondent had an obligation to neutralize the noted combustible accumulations if a means to do so was readily available. While I have concluded shoveling six low seam entries is labor and time intensive, the application of rock dust is not so onerous. In addition, the Commission's remand notes Inspector Milburn's testimony that operators are required by safety standards to rock dust areas after coal dust is removed. (Tr. 150-53); 16 FMSHRC , slip op. at 6. Therefore, I have determined the mitigating circumstances associated with the section 75.400 violation are not as applicable to the rock dusting failure. Accordingly, I conclude that the respondent's violation of the mandatory safety standard in section 75.402 is attributable to its unwarrantable failure.

With respect to the appropriate civil penalty, for 104(d) Order No. 3809164, I continue to believe the respondent's notation in the preshift examination book as well as its efforts to repair the scoop in order to remove the accumulations are mitigating factors. Consequently, I am adjusting the civil penalty to $800 in recognition of the increase in the degree of respondent's negligence associated with the violation of the mandatory safety standard contained in section 75.402.

As a final note, I am concerned that this decision may be construed as punishing operators for acknowledging hazards in the preshift examination book. In fact, Inspector Milburn testified that operators are "...apprehensive about writing anything in the record book... [because] ...its MSHA's intent to use the record books as a "Gotcha" type of record." (Tr. 54). However, such notations constitute a recognition rather than a disregard of a hazard. Operators should be encouraged to make preshift

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7 Inspector Milburn testified that he did not consider the subject accumulations to be an imminent danger because he found no potential ignition source. (Tr. 42-43).

notations. Unless the operator disregards such notations and takes no action to remedy the condition, preshift entries should be viewed as a mitigating circumstance rather than evidence of conscious neglect.(Footnote 8) Thus, I emphasize that while the degree of the respondent's negligence in this case was high, it would have been significantly greater if the respondent had failed to make the pertinent entry in the preshift examination book, or, if the respondent had failed to make any effort to repair the scoop after the preshift notation was made.

ORDER

In view of the above, IT IS ORDERED that the unwarrantable failure finding in 104(d)(1) Citation No. 3809162 IS REINSTATED and the citation IS AFFIRMED as written. The civil penalty associated with this citation has been increased to $700. IT IS FURTHER ORDERED that the unwarrantable failure finding in 104(d)(1) Order No. 3809164 IS REINSTATED and the order IS AFFIRMED as written. The civil penalty for this order has been increased to $800. ACCORDINGLY, IT IS ORDERED that the respondent SHALL PAY a total civil penalty of $1500 in satisfaction of the citation and order in issue. Upon receipt of payment, this case IS DISMISSED.

Jerold Feldman
Administrative Law Judge

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8 In Emery Mining Corp., 9 FMSHRC 1997, 1999 (December 1987), the Commission determined that the failure of a preshift examiner to note loose roof bolts that had existed for at least one week was not, alone, evidence of unwarrantable failure. Similarly, a preshift notation of an unresolved violation is not unwarrantable per se. Resolution of the unwarrantable failure issue must be accomplished on a case by case basis and not determined solely by whether or not an entry has been made by the preshift examiner.

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