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SOL (MSHA) V. BUCK 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. LAKE 93-215
	:	A. C. No. 12-02033-03589
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC., Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Patrick A. Shoulders, Esq., Ziemer, Stayman, Weitzel & Shoulders, Evansville, Indiana, for Respondent.

Before: Judge Maurer

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) alleging a violation of the mandatory standard found at 30 C.F.R. 75.400.(Footnote 1) Pursuant to notice, the case was heard i Evansville, Indiana, on November 30, 1993. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law and I have considered them in the course of my adjudication of this matter.

The citation at bar, Citation No. 4053641, was issued by Inspector James Holland of the Mine Safety and Health Administration (MSHA) as a result of his inspection at the Buck Creek Mine on March 31, 1993. The citation was issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act", and alleges a

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1/ 30 C.F.R. 75.400, "Accumulations of combustible materials," provides:

> 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.

"significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges that "Accumulation of loose fine coal and float coal dust, black in color was permitted to accumulate underneath the belt conveyor, tail roller, and feeder from the check curtain behind the feeder and extended inby the feeder and including all three dumping points, a distance of 116 feet. The accumulations ranged from 2 inches to 3-1/2 feet in depth and 18 feet in width."

Findings of Fact and Discussion

Inspector Holland testified that after observing the cited condition, an accumulation of loose coal, coal fines, and float coal dust, black in color, he measured the length, depth, and width of the accumulations with a measuring tape in the presence of the Buck Creek Mine Manager, Charlie Austin and the miner's representative, Ron McGhee. These measurements are recorded on the face of the citation as being from 2 inches to 3-1/2 feet in depth, 18 feet in width and for a distance of 116 feet. The heaviest accumulations were located at the dumping points of the feeder, where the inspector acknowledges you generally allow a certain amount of coal to accumulate, but at some point, even that has to be cleaned up as well. The accumulations he cited at the dumping points exceeded the bounds of the normal limits in his opinion, and I agree.

In fact, I find the respondent has generally failed to rebut the inspector's factual testimony vis-a-vis the extent of the cited accumulations and accordingly, I conclude that the coal accumulations cited by the inspector in the course of his inspection did in fact exist and that those accumulations constituted a violation of 30 C.F.R. 75.400.

The "Significant and Substantial" Issue

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." 30 C.F.R. 814(d)(l). 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 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 hazard contributed to will result in an injury; and (4) 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 (August 1985), 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., 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 a 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, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasqulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; Halfway, Incorporated, 8 FMSHRC 8, 12 (January 1986).

The Secretary has established by a clear preponderance of the evidence that a violation of 30 C.F.R 75.400 existed. Furthermore, Inspector Holland's unrebutted testimony credibly establishes that there were substantial accumulations of loose coal, coal fines and float coal dust, in the feeder area, particularly at all three dumping points and the tailpiece. The tail roller was completely covered and was turning in the coal fines. The inspector also noted that the color of the accumulations was black. The significance of that fact being an indication that the accumulation was not mixed with rock dust and therefore not of the proper incombustible content. A heated roller turning in that combustible material could easily be an ignition source which could in turn cause a fire. I also take notice that the existence of nearby combustible material would serve to propagate any fire that got started from a hot roller. I therefore find that the cited accumulations presented a

discrete safety hazard - a fire hazard. Additionally, Inspector Holland credibly testified and I accept his opinion, that in the event of a fire, smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention.

Therefore, I find that in the normal course of continued mining it was reasonably likely that an ignition would have occurred, a fire would have resulted and that in that event, fire-related injuries of a reasonably serious nature would have been reasonably likely to occur. Accordingly, I conclude that the cited violation was "significant and substantial" and serious.

The "Unwarrantable Failure" Issue

The Secretary also alleges the violation was the result of the respondent's "unwarrantable failure" to comply with the cited standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

The inspector made this a "d" citation based on several factors. He testified at Tr. 17-18:

> Q. In your opinion, did the Operator exhibit aggravated conduct constituting more than ordinary negligence in allowing this violation to take place?
>
> A. Yes

Q. What facts did you rely upon in determining this was an unwarrantable condition?

A. The fact that the pre-shift exam had been made, and the section foreman had been on the unit approximately an hour and a half before I arrived, and there wasn't nothing, no action being taken on the condition.

Q. And did you rely upon anything else in determining that this was an unwarrantable failure to comply?

A. That's all.

He later added that he had previously issued an "a" citation for the same type violation in the same area earlier that month for a less severe condition, and he opined that from his experience, he felt the materials he cited had been allowed to accumulate for at least three shifts. However, he also admitted on cross-examination that he had no factual basis for that opinion, other than his long experience in the coal mining business.

I also note from the record that there was no one working to correct the cited condition when the inspector discovered it and that factor greatly influenced him toward the "d" citation vice an "a" citation.

The respondent vigorously opposes the "unwarrantable failure" finding.

Firstly, respondent, through Mr. Gary Timmons, their Safety Director, produced the on-shift examination of the belt conveyors for the date in question performed by the belt examiner between 6:00 a.m. and 7:00 a.m. (an hour or two prior to Inspector Holland's arrival). This examination would have included the feeder area and tail roller. No accumulations were noted. He also produced the pre-shift mine examiner's report for March 31, 1993, for the Section 002 Unit that was made by Roger Austin from 5:30 a.m. to 6:05 a.m. This report was called outside at 6:30 a.m., or approximately an 1-1/2 hours before the inspector's visit. Again, the feeder and the belt in the cited area were inspected with no accumulations noted. Mr. Timmons also sponsored the daily and on-shift report of the section foreman on the previous shift, which states his crew cleaned the feeder at 5:00 a.m., or approximately 3 hours before the inspector cited it.

Somewhat incongruously, although Inspector Holland opined that the accumulations had been present for at least three shifts, he did not cite the respondent for any failures or omissions in these prior examinations. The inspector admitted at

trial that this was an inconsistency on his part; he should have issued a second citation for an inadequate preshift examination.

Mr. Hedgepath, a shuttle car operator, testified that he personally "scooped" or cleaned the feeder area and then ran his shuttle car for approximately 30 minutes prior to the citation being written. But he explained that you could still have piles of coal in "furrows" because he had to be careful with the scoop bucket or he would hit and damage the feeder. He also testified that he had personally cleaned the tail roller that morning and it was running freely when he started dumping coal into the feeder.

Mr. Wayne Laswell, the section foreman, was made aware that the feeder was stopped at approximately 7:50 a.m., to "scoop" it in order to clean up coal accumulations. Half an hour later he was surprised to hear that they had a "d" citation issued for accumulations in the feeder area. He testified that "I thought it was just cleaned. That's what they told me." Furthermore, he was under the impression from the preshift examination that he came on the shift with a clean report.

Respondent's defense to the unwarrantable failure finding is somewhat illogical. On the one hand, their evidence would tend to show that no excess accumulations existed in the feeder area prior to the start of the shift in question. On the other hand, Mickey Hedgepath testified that he had to scoop up the cited area at the beginning of the shift because a shuttle car was "hung-up" in loose coal. He also testified that there were still substantial coal accumulations piled up in "furrows" even after he cleaned the cited area and started dumping coal into the feeder himself. Hedgepath estimated that he scooped up three buckets of loose coal at the start of the shift, yet there were no accumulations noted in the preshift examiner's report. Where did all this coal suddenly come from? The only reasonable answer seems to be that it was there all the time. I note here as an aside the obvious fact that just because these accumulations were not recorded in the preshift examiner's report does not necessarily mean the feeder area was clean at that time. It may only mean that the examiner failed to see and/or record the accumulations, and certainly does not bar an unwarrantable failure finding.

Respondent appears to be relying chiefly on the testimony of the section foreman, Laswell, that he was unaware of the violative condition that existed and had a right to rely on the clean preshift examination report. But assuming, arguendo, that this was so, the lack of actual knowledge by Laswell and/or other mine management likewise does not preclude an unwarrantable failure finding from being affirmed herein.

The Commission has previously recognized as relevant to unwarrantable failure determinations such factors as the extent of a violative condition, or the length of time that it has existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. See, e.g., Quinland Coals, 10 FMSHRC 705, 708-09 (June 1988); Youghiogheny & Ohio Coal Company, supra, 9 FMSHRC at 2011; Utah Power & Light Co., 11 FMSHRC 1926, 1933 (October 1989); and Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992).

The accumulations, if we believe the testimony of the inspector, and I do, were extensive. His testimony as to amounts of material, measurements, and so forth, is unrebutted in the record. Mr. Hedgepath even corroborates his testimony to some extent. He testified that up to 9 inches of coal under the feeder was a "natural" or "regular" accumulation. And in the area of the dumping points, his idea of a "regular" accumulation is up to the point where a shuttle car gets hung-up in a pile of coal, and they can no longer go on. Only then does anyone clean up the accumulated coal.

While there is no direct evidence in the record as to how long the accumulations were there, the preponderance of the circumstantial evidence would appear to indicate that they existed at least as far back as the previous shift. It just does not ring true that if the area had just been cleaned at 5:00 a.m., and been given a clean preshift examination at 6:00 a.m., that there would be enough coal piled around the feeder by 7:00 a.m., to hang-up a shuttle car. Moreover, there was enough coal accumulated at that point around the belt conveyor and feeder to cause Mr. Hedgepath to scoop up three scoops full of loose coal in a bucket that is 12 or 13 feet wide. Then, after only 20-25 minutes of mining on that shift, the inspector found the accumulations he described in his citation, which was yet still enough coal and coal dust to fill another scoop bucket in order to abate the violation. It took five employees approximately 2-1/2 hours to clean up the excess coal accumulations in that area.

This operator has also had prior notice that a problem with coal and coal dust accumulations existed in the cited area and indeed the mine generally. Inspector Holland himself issued a citation for the same violation in the same location on March 4, 1993, some 3 weeks before the "d" citation at bar. Additionally, it is noteworthy that the respondent received a grand total of nine citations for violations of 30 C.F.R. 75.400 just during the month of March 1993, alone. This indicates to me that the operator has been placed on notice that greater efforts are necessary for compliance with this particular standard.

At the time the inspector issued the instant citation, no abatement efforts were underway to remove the accumulations. The coal mining operation was going on as usual, as if nothing was amiss. This was one of the factors the inspector cited in deciding on a "d" citation instead of the garden variety 104(a).

Under all the circumstances found in this record, I find a clear lack of due diligence, indifference, and a lack of reasonable care demonstrating aggravated conduct of both omission and commission on the part of the operator, constituting an "unwarrantable failure" to comply with the standard in question.

Considering all of the six statutory criteria contained in section 110(i) of the Act, I find that the civil penalty proposed by the Secretary in this case is appropriate, reasonable, and in the public interest.

ORDER

Section 104(d)(1) Citation No. 4053641 IS AFFIRMED. Respondent is directed to pay a civil penalty of $2000 for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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