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SOL (MSHA) V. MID RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

August 30, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-725 A.C. No. 05-00301-03814R
v.	:	Dutch Creek
MID-CONTINENT RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-99 A.C. No. 05-00301-03817A
v.	:	Dutch Creek Mine
WILLIAM L. PORTER, employed by MID-CONTINENT RESOURCES, INC. Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C., Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

I

These cases are before me upon petition for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"). The Secretary of Labor (Secretary) seeks civil penalties from Respondent, Mid-Continent Resources, Inc. ("Mid-Continent") and individually under Section 110(c) of the Mine Act from William L. Porter, employed by Mid-Continent.

The issues in Docket No. WEST 92-725 are whether Mid-Continent violated the Dutch Creek Mine's ventilation plan and, if so, whether that violation was of a significant and substantial ("S&S") nature and caused by Mid-Continent's unwarrantable failure to comply with the ventilation plan. Also in issue in the consolidated Docket No. WEST 93-99 is whether William L. Porter was individually liable under Section 110(c) of the Mine Act, 30 U.S.C. 820(c) for knowingly authorizing, ordering or carrying out the violation.

II

STIPULATIONS

1. All mining operations at Mid-Continent Coal Basin Mine, the Dutch Creek Mine, which includes the M-Seam and headgate entries of the 211 longwall section, were permanently shutdown on January 25, 1991. "Shutdown" as used herein means "not producing coal."

2. No mining operations have been conducted in the Dutch Creek Mine or any of its several mining sections from and after January 25, 1991. "No mining operations" for purpose of this stipulation means "not producing coal." No coal has been produced at the Dutch Creek Mine after January 25, 1991.

3. On February 12, 1992, Mid-Continent filed a petition under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the District of Colorado, as Case No. 92-11658-PAC.

III

Following an ABC inspection of Respondent's Dutch Creek Mine, Inspector Phillip R. Gibson issued the Section 104(d)(2) order in question - Order No. 3586609. The order in essence charges Mid-Continent with the violation of 30 C.F.R. 75.316 for failing to comply with the mines approved ventilation plan

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FOOTNOTE 1

Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

along the No. 6 belt conveyor entry. The plan at the time of inspection in pertinent part required that permanent stoppings be built and maintained in the connecting crosscuts between the belt entry and the return entry and that the regulator was to be left open so that air could exit out the lower entry.

The alleged violation of 30 C.F.R. 75.316(1991) is described by Inspector Gibson in the Order in question as follows:

> The operator's approved ventilation system and methane and dust control plan was not being complied with along the No. 6 belt conveyor entry. A permanent stopping (wooden block) erected between the belt entry and the return entry was partially dismantled; leaving an opening 40 inches in height and 96 inches in width. The metal pan constructed regulator erected across the lower entry (return) was closed off with metal pans and overlaid with brattice cloth. The down dip inby end of the overcast erected across the belt entry at the protected site of the 2nd extension of the 212 longwall section tailgate was not closed but left open. The opening was 5 feet high and 5 feet wide. The operator's approved ventilation plan supplement, dated January 15, 1991 addressing the 211 longwall extension, disclosed that permanent stopping were to be built and maintained in the connecting crosscuts between the belt entry and the lower return entry. The regulator was to be left open so that the air could exit out the lower entry. These combined conditions resulted in the general body of air in the belt entry containing 1.0 percent methane from the overcast to and including the headgate corner of the 211 longwall section, about 700 feet inby the overcast. A brattice cloth was installed across the inside of the overcast which limited the airflow toward the 211 longwall section.

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FOOTNOTE 2

Although 30 C.F.R. 75.316 on its face does not spell out the requirement that an operator must comply with its ventilation plan, the Commission in Jim Walter Resources, Inc., 9 FMSHRC 903 (May 1987) held that "Once the plan is approved and adopted, these provisions are enforceable as mandatory standards."

I credit the testimony of Inspector Gibson and Mr. Denning. On the basis of their testimony I find that the conditions described in the above quoted citation existed at the mine at the time of the inspection with one minor modification. The modification being that the inspectors bottle sample, which is considered more accurate than the meter reading, gave a reading of .9 methane.

The record clearly established that some time after January 25, 1991, when the mine stopped producing coal, changes were made in the ventilation along the No. 6 belt conveyer entry and that as a result of those changes the mine was no longer in compliance with the mine ventilation plan that was in effect at the time of the inspection. This noncompliance included the partial dismantling of a stopping required by the plan in the connecting crosscuts between the belt entry and the return entry and the closing off of a regulator erected across the lower entry return that was required by the plan to remain open.

The citation was timely abated by repairs and adjustments that brought the mine into compliance with the ventilated plan. This abatement included repairing the stopping and the hole in the overcast, and adjusting the regulator across the lower entry to allow passage of air through the regulator.

Mid-Continent's primary defense was that the ventilation plan was not in effect at the time of inspection because the mine was no longer producing coal. Mid-Continent points out that the mine's ventilation plan was written and approved while the mine was actively producing coal prior to the January 25, 1991, "shutdown" and contends that the plan had no proper application to the idle, shutdown mine that existed after January 25, 1991. It is Mid-Continent's position that after the mine shutdown of January 25, 1991, it was not required to seek or obtain MSHA approval prior to making the cited ventilation changes.

Respondent's contention that MSHA approval was not required to make ventilation changes after the January 25, 1991, shutdown is rejected. As pointed out by the Solicitor only in extreme circumstances, where a mine suddenly experiences excessive methane, can an operator make a change without prior approval. In this case, there was no methane problem prior to the ventilation change. There was no emergency that necessitated an immediate ventilation change. There was adequate time to discuss the problem with MSHA and work out a suitable plan amendment prior to Mid-Continent unilaterally making the cited ventilation change.

Even though no coal has been produced at the mine since January 25, 1991, the mine was not abandoned. The mine has been continually patrolled and pumped twenty-four hours a day, seven days a week. Since January 25, 1991, eighteen (18) miners have been employed full time on three 8-hour shifts each day so that

twenty-four hours a day seven days a week there was always some miner working underground. In addition extra people were brought underground from time to time to do specific jobs in the mine. Clearly the mine had to be ventilated in accordance with its approved plan.

If Mid-Continent or its supervisor, M.J. Turnipseed, believed changes in the ventilation plan were necessary they should have first sought and obtained MSHA approval for any needed ventilation change before unilaterally making ventilation changes even if they believed that the ventilation changes would enhance safety. The evidence present clearly establish a violation of the cited safety standard, 30 C.F.R. 75.316.

Significant and Substantial Violations

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)(1). 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:

> 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, the Commission stated:

> 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). (Emphasis in original).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

It is undisputed that the Dutch Creek Mine is a "gassy" mine. While it is true that the methane measured in the section was a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made in terms of the continuing normal mining operations.

Inspector Denning testified:

> Q. Will you tell me, please -- the ventilation plan that you have in front of you requires a stopping and it requires a regulator. Would you tell us, please, what effect on the ventilation removing that stopping and covering the regulator would have, what effect would those two things have on the ventilation?
>
> A. The covering of the regulator and removal of the stopping created a dead air space in the sump area that allowed methane to accumulate.
>
> Q. And in your opinion did that change of ventilation, that removal of a stopping and the covering of the regulator, did that create a hazard in the area?
>
> A. Yes, it did. It --
>
> (Tr. 273-274).
>
> * * * * *
>
> There was methane -- well, the methane was allowed to accumulate in the sump area and created a high concentration of methane in

> the explosive range which could create an imminent danger.
>
> Q. Are you familiar with any explosions that had occurred at this mine prior to February 7th, 1991?
>
> A. Yes, I am.
>
> Q. And could you tell us, please, when and what those explosions were?
>
> A. There was an explosion of methane gas in 1981 which resulted in the death of 15 miners at the Dutch Creek Mine. Then there was an explosion in the 1960's of methane gas that resulted in the death of nine miners.

In this case, the normal operations are the ones that existed after January 25, 1991 shutdown. As stated by the Commission in U.S. Steel Mining Co., Inc., 6 FMSHRC "The fact that the methane was low when the violation was cited is not fatal per se to the establishment of "reasonable likelihood." After the unilateral ventilation changes were made and before the date of inspection, Jerry Highfill and Mike Walpole found excessive amounts of methane in the area in question. The buildup of methane was caused by the unilateral ventilation changes; the knocking out of the stopping and blocking the regulator. On two separate occasions after these unilateral ventilation changes were made they measured 5 to 8 percent methane in the area. They immediately deenergized the pump in that area by going to the power center and shutting down all of the power to that section. They then cleared the area of methane by returning the ventilation to the aircourse required by the plan.

Based upon the testimony of Jerry Highfill the former 212 Longwall Coordinator, Mike Walpole the former Longwall Maintenance Superintendent and Inspector Gibson, I find the preponderance of the evidence established all four elements of the Mathies, supra, formula. The violation in question was significant and substantial.

Unwarrantable Failure

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).

It is clear from the record that the Respondent, Mid-Continent Resources, unilaterally without seeking or obtaining prior MSHA approval deliberately changed the ventilation so that it was no longer in compliance with the approved plan and changed it back and forth several times. The changes, in the ventilation were intentional changes with reckless disregard or at least "indifference" to the requirements of the approved ventilation plan. I agree with Inspector Gibson that this violation was unwarrantable.

Section 110(c) Liability

In relevant part, Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

Respondent presented considerable evidence that after the mine's shutdown on January 25, 1991, the 18 full-time miners who formerly held positions of some authority were all on equal parity with each other and had the same salary. M.J. Turnipseed was the only supervisor for the 18 member caretaker crew. Only M.J. Turnipseed had authority over other employees and only he had authority to order anyone to remove the stopping or otherwise make changes in the MSHA approved ventilation plan.

John Reeves, the President and chief operating officer of Mid-Continent, was asked about this and testified as follows:

> Q. Was there a chain of command or a hierarchy among those people (working after the shutdown) so that one could give orders to the other(s)?
>
> A. No, they were all equal.
>
> (Tr. 343).

Jesus Meraz, the former Master Maintenance Mechanic, testified concerning the status of the mine employees after the January 25, 1991, shutdown and testified in effect everybody was essentially on a parity as follows:

> Q. As between you and the guy that you were working on-shift with, Bill Porter, who was the boss?
>
> A. There wasn't any such a thing. He couldn't tell me to do anything, I couldn't tell him, hey, you know, I want you to do this or that. It was an understanding that, hey, we had a job to do and we'll do it together.
>
> Q. Okay. How did you get direction each day as to what you were to do?
>
> A. Well, I'd say it had to be through M.J. Turnipseed. He wouldn't give us direct orders other than we were supposed to keep the water pumped out of the mine and patrol the mine.
>
> Q. All right. Is it your understanding that Mr. Porter had the authority to make a ventilation change?
>
> A. Well, I don't think Mr. Porter was in any other position than the rest of us. We were all the same, fireboss/pumpers is what we were. [Emphasis supplied.]
>
> (Tr. 386).

The Respondent Porter described the status of the mine employees as told to them at the employee meeting immediately following the shutdown at 11:00 o'clock A.M. on January 25, 1991, Tr. 431-432:

> M.J. (Turnipseed) was the main speaker of the meeting and he told us at that time we were all relieved of our duties as supervisors and any position was held at that time was no longer in need. There was a [sic] a certain few of us that he was going to keep on as a salary employee [sic] but just doing firebossing and pumping of the mine, maintaining the property, basically. And everybody else was let go.

* * * * *

Q. And you were told, as you recall it, that everybody was going to be retained as -- or the people were going to be retained as principally firebosses and pumpers, is that correct?

A. Yes.

(Tr. 431-432).

The hope of Mid-Continent after the shutdown and the purpose of the remaining employees was described by Porter:

Q. Did Mr. Turnipseed outline to you what was going to be done with this (the mine) after this shutdown, what they were trying to achieve?

A. Yes. He more or less told us that he -- or that the company was going to take care of the property and put it on the market and try and sell it. They was [sic] bringing in a company to advertise and do the selling of the property. We was [sic] to more or less take care of the property.

Q. You were the housekeepers?

A. Yes.

(Tr. 433).

The work scheduling of the post-shutdown employees was also described by Porter:

A. And who devised the scheduling for the employees on who's going to work on what shift, who was going to partner with who and that sort of thing? How was that assigned.

A. M.J. Turnipseed.

Q. You didn't have any part of that?

A. No, I didn't.

(Tr. 433).

The Respondent Porter, consistent with the testimony of the other fireboss/pumpers, testified about his lack of authority to order the stopping removed.

> Q. Let's go to the 211 section and the stuff that's the subject matter of Mr. Gibson's D-2 [sic] order that was issued on February 7th, 1991. There is a stopping up here and that stopping got shot out. My question to you, here and that stopping got shot out. My question to you, Mr. Porter, did you order that stopping to be shot out?
>
> A. No, I didn't.
>
> Q. Did you have any authority to order anyone to shoot out that stopping?
>
> A. No. There was nobody that took orders from me.
>
> (Tr. 437).

While the question of whether any member of the caretaker crew other than M.J. Turnipseed was an agent of the corporation within the meaning of Section 110(c) after January 25, 1991, may be an open and interesting question. I find in this case it is not necessary or appropriate to reach that question. The reason I so find is that I credit Porter's testimony that he did not order or otherwise authorize the cited violative ventilation changes. The heresay evidence in this case may be sufficient to create a suspicion but the evidence presented is insufficient in my mind to establish the charge against him in view of Porter's credible testimony.

Conclusion

I find that Porter did not knowingly authorize, order or carry out the cited violation of the miners ventilation plan. For this reason the Section 110(c) civil penalty proceeding against Porter shall be dismissed.

Disposition of Remaining Citations in Docket No. WEST 92-725

The parties reached an amicable settlement of the seven remaining citations in Docket No. WEST 92-75 and jointly move for approval of their agreement. Under the proffered settlement Respondent agrees to reduce the proposed penalties by 40 percent based on Respondent's ability to pay and accordingly amend the proposed penalties as follows:

Citation/ Order No.	Proposed Penalty	Amended Proposed Penalty
34105564	$ 91.00	$ 55.00
3586784	20.00	20.00
3586798	79.00	47.00
3586800	20.00	20.00
3586721	20.00	20.00
3586829	20.00	20.00
3586830	50.00	30.00
TOTAL	$300.00	$212.00

After due consideration of the record, including consideration of Respondent's financial condition as a debtor-in-possession under Chapter 11 of the Bankruptcy Code. I find the proposed settlement of the seven remaining citations is reasonable, in the public interest and consistent with the criteria in 110(i) of the Mine Act. I therefore approve the agreed amended proposed penalties.

With respect to the proposed penalty for the unwarrantable S&S violation of the ventilation plan I find on consideration of the statutory criteria that Mid-Continent's conduct was such that even considering Mid-Continent's financial condition the full initial proposed MSHA penalty assessed is the appropriate penalty without any reduction. Thus the total civil penalty payable to the Secretary for the violations found in this docket is $828 payable to the Secretary of Labor. Pursuant to Federal Rule of Bankruptcy Procedure, payment of the proposed penalties is subject to the approval of the United States Bankruptcy Court.

ORDER

Docket No. WEST 92-725

Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658PAC, it is ORDERED that civil penalties be and are assessed against the Respondent in the amounts shown above and Petitioner is authorized to assert such assessment as a claim in Respondent's bankruptcy case.

The 110(c) civil penalty proceeding is DISMISSED.

August F. Cetti
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., P.O. Drawer 790, 818 Colorado Avenue, Glenwood Springs, CO 81602
(Certified Mail)
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