FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

April 18, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-259
Petitioner	:	A. C. No. 36-07416-03651
v.	:	
	:	Docket No. PENN 94-400
ENLOW FORK MINING COMPANY	:	A.C. No. 36-07416-03658
Respondent	:	
	:	Enlow Fork Mine

DECISION ON REMAND

Before: Judge Weisberger

On January 15, 1997, the Commission issued a decision, 19 FMSHRC 5, in which it, inter alia, reversed my initial determinating that the violation of 30 C.F.R. ' 75.400[1] by Enlow Fork Mining Company (AEnlow Fork@) was not significant and substantial (AS&S@), and not the result of its unwarrantable failure. The Commission remanded this matter to me for evaluation of all the material record evidence relating to S&S, and for reanalysis of the issue of unwarrantable failure.

On March 27, 1997, Enlow filed a Brief on Remand. On April 3, 1997, Petitioner=s Brief on Remand was received.

I. Significant and Substantial

As analyzed by the Commission, the issue presented is whether there was a reasonable likelihood that the hazard contributed to by the accumulation violation would result in an injury. The Commission 19 FMSHRC supra, at 9, set forth the controlling case law as follows:

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[1]Section 75.400, entitled AAccumulation 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.

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a Aconfluence of factors@ was present based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. Utah Power & Light Co., 12 FMSHRC 965, 970-71 (May 1990) (AUP&L@); Texasgulf, 10 FMSHRC at 500-03.

In analyzing this issue, I am constrained to follow the determination of the Commission that substantial evidence does not support my initial finding that there was no evidence that liberation of methane in explosive concentrations was reasonably likely to have occurred. The Commission=s determination was based on the inspector=s testimony that the Enlow Mine is object to a 5-day spot inspection, as it liberates more than 2,000,000 cubic feet of methane in a 24-hour period. The Commission also indicated that I did not analyze the inspector=s testimony Athat, because any methane liberated from the face will pass through this area, the tailgate area was a likely spot for an explosion@ (Tr. 92-93). Since this testimony was not contradicted, I accept it.

Considering the Commission=s determinations set forth above, and the Commission=s determination that, my initial finding was not supported by substantial evidence, I am constrained to find, upon reevaluation, that liberation of methane in explosive concentrations was reasonably likely to have occurred.

Further, in considering the effect of continued mining operations, I note, the inspector=s uncontradicted testimony as follows which tends to indicate that continued mining would create more coal dust: AWhen you have loose coal established in those toes and the shields are moving, it grinds the coal up, pulverizing it...it=s more readily put into atmosphere or suspension . . .@ (Tr. 115).

I note the confluence of the following: the existence of accumulation of coal dust, loose coal, and oil, the liberation of methane in the mine, the presence of rags over the top of the fluid coupler, dry coal dust on electrical boxes, and ignition sources including bearings on the drive shaft, gear case, and a 4160-volt drive motor.

Hence, upon reconsideration, and for all the above reasons, I find that it has been established that there was a reasonable likelihood that the hazard contributed to by the accumulation violation would result in an injury. Further, considering the nature of the hazard i.e., a fire or explosion, I find that there was a reasonably likelihood that resulting

injuries would be of a reasonably serious nature. For these reasons I find that the violation was S&S.

II. Unwarrantable Failure

The Commission, in its decision, 19 FMSHRC supra at 12 directed as follows:

> On remand, the judge should evaluate all the evidence related to prior warnings, including the three citations for accumulation in other areas of the mine that were issued on October 6, 7, and 28, 1993, approximately 1 month prior to the violation (Govt. Exs. 7, 8, 9), and Enlow=s 2-year violation history (Govt. Ex. 12). He should also discuss all relevant evidence relating to the operator=s compliance efforts and the extensiveness of the violation.

The Commission reiterated the applicable law as follows (19 FMSHRC, supra at 11):

> In Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. At 2001. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ Id.; at 2003-04; Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 193-94 (February 1991); see also Buck Creek, 52 F.3d at 136 (approving Commission=s unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s efforts in abating the violative condition. Mullins & Sons Coal Co., 16 FMSHRC 192, 195 (February 1994); Peabody Coal Company, 14 FMSHRC 1258, 1261 (August 1992); Quinland Coals, Inc., 10 FMSHRC 705, 709 (June 1988); Kitt Energy Corp., 6 FMSHRC 1596, 1603 (July 194). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. Peabody, 14 FMSHRC at 1263-64.

A. Prior Warnings

Sixty-two citations or orders were issued to Enlow for violations of Section 75.400

for the 2-year period December 8, 1991 to December 7, 1993. Citations were issued on October 6, 7, and 28, 1993 for accumulations of combustible materials. MSHA Inspector Hardy testified that after the issuance of each citation A[w]e discussed the severity--the consequences of not having an adequate clean-up program, mine fires, exposure, et cetera@ (Tr. 87). According to Hardy, he told mine management on October 7, 1993 that he was Anot satisfied with the clean-up program of the face equipment@ (Tr. 88). He testified that he told the operator that A...if compliance wasn=t gained by the citations being issued, I would have to increase my enforcement.@ (Tr.88). According to Hardy, Enlow was responsive to his concerns, and made appropriate responses to his citations.

MSHA supervisor Robert Newhouse stated that prior to the issuance of the orders at issue, he had instructed mine management on the hazards of dust accumulation.

The Commission is analyzing my initial evaluation of the testimony of Hardy and Newhouse relating to their discussions with management regarding inadequate clean-up procedures stated as follows:

> We agree with the Secretary that the judge employed an incorrect legal analysis with respect to the factor of repeated similar violations and past warnings. The judge, discounting the testimony of MSHA Inspectors= Hardy and Robert Newhouse that they had met with mine management to discuss inadequate clean-up and preshift procedures, incorrectly characterized their testimony as Anot probative of the degree of [Enlow=s] negligence in allowing the specific materials at issue to have accumulated.@ 17 FMSHRC at 568 (emphasis in original). In evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue. (19 FMSHRC supra, at 11).

The Commission concluded as follows:

> Thus, to the extent that the inspectors= discussions with management placed Enlow on notice of its need for greater compliance efforts with Section 75.400, those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge. (19 FMSHRC supra, at 12).

Following the dictates of the Commission not to discount the testimony of Hardy and Newhouse, I find that their testimony indicates that they did put Enlow on notice of the need for greater compliance efforts with Section 75.400, which is a factor to be considered in evaluating unwarrantable failure.

B. Compliance efforts

Petitioner argues that Enlow did not present any testimony that its clean-up program of hosing the longwall area was Achanged or was increased after the inspector=s original warnings in October.@ However, it is significant to note that Hardy, on cross examination indicated that once management understood what his concerns were, they did Atake steps to address those conditions@ (Tr. 146). He also indicated that after he issued citations for accumulations in October 1993, management did Amake changes to their clean-up program@ (Tr. 146). He did not issue any subsequent accumulation citations for the equipment cited in October 1993. I thus find there was no aggravated conduct involved in Enlow=s compliance efforts.

C. Extensiveness of the violation

In directing me to discuss all relevant evidence relating to the extensiveness of the violation, the Commission indicated that I failed to consider Athat it took three to four miners 2 **2** hours to clean up the accumulation@ (19 FMSHRC supra at 12). This finding by the Commission becomes the law of the case. Taking this finding into consideration along with Hardy=s testimony that the area of accumulation of hydraulic oil on the floor was 4 feet by 10-15 feet, that there was coal packed on the floor to a height of 2 **2** feet, and that over 90 percent of the housing fuel coupler and gear box were covered with floor dust and oil, I find that the accumulation was extensive.

Based on all the above, upon reevaluation, and taking into account the dictates of the Commission, I conclude that the violation was the result of Enlow=s unwarrantable failure.

III. Penalty

In my initial decision I found that a penalty of $2,000 was appropriate, based, inter alia, upon a finding that the gravity of the violation was relatively high. This finding is essentially consistent with my findings herein that the violation was S&S. Hence, the original penalty is not to be increased due to the factor of gravity. However, considering the degree of Enlow=s negligence, as discussed above (II, infra), I find that the penalty I initially assessed shall be increased to $3,000.

ORDER

It is ordered that, within 30 days of this decision, Enlow pay a total civil penalty of $3,000 for the violation set forth in Order No. 3660021.

Avram Weisberger
Administrative Law Judge

Distribution:

Linda Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Elizabeth S. Chamberlin, CONSOL Inc., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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