

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 1996

CYPRUS CUMBERLAND RESOURCES, : CONTEST PROCEEDINGS
Contestant :
 : Docket No. PENN 96-46-R
 : Order No. 3668592; 11/15/95
v. :
 : Docket No. PENN 96-47-R
SECRETARY OF LABOR, : Order No. 3668593; 11/15/95
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Cumberland Mine
Respondent :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 96-144
Petitioner : A.C. No. 36-05018-04087
v. :
 : Cumberland Mine
CYPRUS CUMBERLAND RESOURCES, :
Respondent :

DECISION

Appearances: Allison Anderson Acevedo, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania for the Secretary of Labor;
R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corp., Pittsburgh, Pennsylvania for
Cyprus Cumberland Resources.

Before: Judge Melick

These consolidated cases are before me pursuant to
Section 105(d) of the Federal Mine Safety and Health Act
of 1977, 30 U.S.C. ' 801 *et seq.*, the AAct,@ to challenge two
withdrawal orders issued by the Secretary of Labor to Cyprus
Cumberland Resources (Cyprus) under Section 104(d)(2) of the Act
and to challenge the civil penalties proposed for the violations
charged therein.¹ The general issue before me is whether the

¹ Section 104(d)(2) of the Act provides as follows:

(1) 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

orders at bar should be affirmed and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Order No. 3668592

This order, issued November 16, 1995, (in modification of Citation No. 3668592 issued November 15, 1995) alleges a significant and substantial violation of the standard at 30 C.F.R. ' 75.400 and charges as follows:

The clean-up program was not being complied with in [that] dry, black in color loose coal, coal dust, and float coal dust was permitted to accumulate on the active shuttle

if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such Footnote 1 continued

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 violations has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

car roadway for a distance of approximately 200 feet in length, 0 to 12 inches in depth in an entry, 16 feet to 16.5 feet in width. This condition was observed in the No. 2 entry and connecting crosscut No. 2 to No. 1 entry in the last open crosscut of the 36 Butt developing section.

As grounds for modifying the initial citation to an order, the issuing inspector for the Mine Safety and Health Administration (MSHA), Charles Pogue, noted as follows:

Additional information was provided during a conference held on 11-16-95, concerning conditions observed on the midnight shift on 11-15-95. Statements indicated that the section foreman (pre-shift examiner) had inspected and traveled through the area on Citation No. 3668592, dated 11-15-95 and failed to comply with the Cumberland Mine clean-up program.²

The cited standard, 30 C.F.R. ' 75.400, provides that Acoal 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.@

On November 15, 1995 experienced MSHA coal mine inspector Charles Pogue was continuing a six-month roof control evaluation at the Cumberland Mine. He had performed approximately 100 previous inspections at this mine. Pogue arrived at around 8:10 a.m. and, among other things, reviewed the pre-shift examination report. There were no notations for hazards in the 36 Butt section.

Accompanied by representative-of-miners Dave Chipps and company representative Michael Konosky, Pogue proceeded to the 36 Butt section. In the face area of the No. 4 entry, he performed methane and oxygen tests. He found no trace of methane and 20.9 percent oxygen. In the No. 2 entry Pogue found .4 percent methane and 20.8 to 20.9 percent oxygen and in the No. 3 entry he found .4 percent methane and 20.8 percent oxygen.

² It is undisputed that there had been no intervening clean inspection subsequent to precedential ASection 104(d)@ Order No. 3664528, issued July 12, 1995.

In the No. 2 entry Pogue observed a pile of coal left from the loading cycle along with large amounts of coal, loose coal and coal dust in the crosscut. He dug into the pile with his foot and measured it, finding it to be 12 inches deep. Upon measuring with a 50-foot tape, assisted by miners= representative Chipps, he found the accumulation to be 194 feet long, 16 feet to 16 **2** feet in width, and 12 inches deep. According to Pogue the accumulations extended from rib to rib and there was coal dust from the rib to the floor at an angle of repose. Pogue also testified that generally in the center of the entry the depth was from .9 of one foot to 12 inches and that the depth was generally uniform throughout the cited area. He also testified however that along the rib the coal dust was 16 inches deep lying at an angle of repose. Government Exhibit No. 5 purports to represent a typical cross section of the area of cited accumulations. Pogue also squeezed some of the cited accumulations in his hand and concluded that there was no moisture. The material was black in color and there was no rock dust in it. Based on his experience, Pogue opined that the accumulations had resulted from the loading cycle over the midnight shift.

Pogue testified that on November 16 he modified the citation to a **A**Section 104(d)(2)@ order after interviewing foreman Bernard Steve. Steve performed the pre-shift examination on the section and had also later traveled into the crosscut between the Nos. 1 and 2 entries where the accumulations were found. Steve admitted to Pogue that at the time of his pre-shift exam at around 6:01 that morning he observed loose coal, coal dust and float coal dust in the cited area but did not consider it to be hazardous.

Although inconsistent regarding the precise dimensions of the alleged accumulations, I find Pogue's testimony generally credible and sufficient to establish the existence of significant violative accumulations. His expert testimony is also sufficient to establish its combustibility. Indeed, in significant respects, his testimony is also corroborated by that of Michael Konosky, the Cyprus representative accompanying him on his inspection. Konosky acknowledged at hearing that there was an excessive amount of material in the No. 2 entry and the crosscut. He further acknowledged that Inspector Pogue dug a hole in the coal to show him the depth (apparently where the depth was 12 inches) but paid no attention. Konosky further acknowledged that he did not perform any tests on the cited material and did not remember whether he had objected to any of Pogue's measurements of the cited material.

In reaching my conclusions herein I also note the testimony of Cyprus= area manager, Robert Kimutis, who acknowledged that the continuous miner had made a mess that night as it backed out of the No. 2 entry because the regular operator was not at the controls. I also note that section foreman John Perry also recognized that the crosscut between entries 2 to 1 Alooked bad@ although he attributed this to what he believed was the dragging of coal back through the crosscut and the fact that it had been Aorn up@ presumably by the continuous miner backing out of the crosscut.

Inspector Pogue also concluded that the violation was Asignificant and substantial@. A violation is properly designated as Asignificant and substantial@ if, based on the particular facts surrounding that 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 standard is significant and substantial under *National Gypsum* the Secretary 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. See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff-g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (June 1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this regard Pogue noted that a fire or explosion were likely since all the necessary factors were present.³ He noted the presence of oxygen, of combustible coal and coal dust, and ignition sources from the energized electrical face equipment and power cables. He also noted that methane was being liberated from the face and that coal dust was being placed in suspension both during the mining cycle and from mine traffic. He further noted that methane was liberated from the cited section at the rate of 600,000 cubic feet per minute over 24 hours. Other ignition sources were also likely from drilling holes for roof bolts. Drill bits may become hot enough to cause ignition, or strike rock. Friction heat may also result from the roof bolt rubbing on a face plate. Pogue further noted that the continuous miner itself can cause an ignition. Six workers in the area during the mining cycle could be burned or inhale toxic smoke and gases as a result of an explosion or fire.

Inspector Pogue's conclusion regarding the insignificant and substantial nature of the instant violation was fully corroborated by the expert testimony of Clete Stephan, a graduate engineer with a professional engineering license in mining engineering. Stephan is also the principal mining engineer at the MSHA Tech Support Center and an experienced fire and explosion investigator. Stephan confirmed that the cited accumulation presented a serious hazard. He noted that all the necessary ingredients were present for a fire or explosion. Stephens also noted that the coal at the Cumberland Mine is within the Pittsburgh Seam which contains coal at the higher end of the explosivity scale. In particular Stephens testified as follows with respect to the likelihood of an explosion on November 15 in the 36 Butt section:

A. Well, it would by my opinion that based on the accumulation of such a considerable length of hazardous materials, that an explosion -- that a propagating explosion, not just an explosion that would stay in the face area, but one that would propagate even to other areas of the mine would result.

Q. [By Ms. Acevedo] Can you explain why?

A. Well, with even the ignition of a body of methane that had a slight amount of coal dust in it, there would be

³ The Respondent's contention in its brief that Pogue only testified that a fire or explosion could occur is incorrect. See, e.g., Tr.64.

enough of a shock wave generated at that point to suspend the coal dust that would be throughout this length of accumulation.

In the context of this as well as the totality of his testimony, it is clear that Stephan fully supports the significant and substantial findings of the Secretary.

The Secretary also alleges that the violation was the result of the Respondent's unwarrantable failure. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference or a lack of reasonable care. *Id.* At 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194-194 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it 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. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

The Secretary first argues in this regard that the cited condition was obvious because of the large amounts of loose coal, coal dust and float coal dust. Indeed Pogue found these to have been the largest amount of accumulations that I have observed of loose coal, coal dust and float coal dust at a distance of 194 feet. The credible evidence establishes that the violative accumulations were extensive. From this evidence alone it is also apparent that the accumulations had built up over a rather long period of time and that the operator's abatement efforts were inadequate.

The Secretary also notes in his brief that in the six months before this order was issued, MSHA had cited this mine ten times for violations of the same standard, including one issued only two weeks prior to the order at bar. When all of the above factors are considered it is clear that the violation herein was indeed the result of gross negligence and unwarrantable failure. The order is accordingly affirmed.

Order No. 3668593

This Section 104(d)(2) order alleges a significant and substantial violation of the standard at 30 C.F.R. ' 75.360(g) and charges as follows:

An adequate pre-shift examination was not conducted in that dry, black in color loose coal, coal dust, and float coal dust was accumulated on the active shuttle car roadways. The loose coal, coal dust and float coal dust was measured to be approximately 200 feet in length and 0 - 12 inches in depth and not observed and noted as a hazardous condition in the pre-shifter's examination book located on the surface. This condition was observed in the No. 2 entry and No. 2 to 1 crosscut between No. 2 and No. 1 entries in the 36 Butt section.

The cited standard, 30 C.F.R. ' 75.360(g), provides in relevant part that Aa record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made in a book provided for that purpose on the surface before any persons other than certified persons conducting examinations required by this subpart enter any underground area of the mine.@ It is undisputed in this case that no entry was made in the pre-shift examination books for the pre-shift examination performed for the day shift on November 15, 1996, i.e., during the three hours preceding the commencement of that shift, regarding the accumulations noted in the order at bar.

In order for there to be a violation as charged herein the Secretary must prove that the cited hazardous and violative conditions existed when foreman Bernie Steve's pre-shift examination was conducted around 6:01 on the morning of November 15. Inspector Pogue acknowledged that he was not present at that time and did not know what accumulations in fact then existed. Foreman Steve provided the only direct evidence on this issue and he testified that at the time of his pre-shift exam that morning he did not see any hazardous accumulations of coal.

Given the absence of direct evidence of a violative accumulation at the time of the pre-shift exam the Secretary must resort to secondary or circumstantial evidence. In this regard the large amount of accumulations found in this case and the evidence there was little production after the 6:01 a.m. pre-shift exam certainly raises suspicions that hazardous conditions may have also existed at the time of the pre-shift exam, however suspicions are not enough. I find therefore that I cannot reasonably infer that the same hazardous conditions in fact also existed some five hours before they were discovered by Inspector Pogue. The use of circumstantial evidence in this regard is particularly difficult because the conditions at the time of the pre-shift exam, to be considered hazardous, must be evaluated in terms of whether a reasonably prudent person familiar with the

purposes of the regulation would have recognized the conditions as hazardous. See *Utah Power and Light Company*, 12 FMSHRC 965, 968 (May 1990). Since Inspector Pogue acknowledged that he did not know the extent of the accumulations at the time of the pre-shift exam it is difficult for this evaluation to be based on anything but speculation.

ORDER

Order No. 3668592 is hereby affirmed and Cyprus Cumberland Resources Corporation is hereby directed to pay a civil penalty of \$4,500 for the violation charged therein within 30 days of the date of this decision. Order No. 3668593 is hereby vacated.

Gary Melick
Administrative Law Judge

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