

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 15, 1997

JIM WALTER RESOURCES, INC., :	CONTEST PROCEEDING
Contestant :	
v. :	Docket No. SE 94-244-R
	Citation No. 3182848; 1/31/94
SECRETARY OF LABOR, :	
MINE SAFETY AND HEALTH :	
ADMINISTRATION (MSHA), :	No. 7 Mine
Respondent :	Mine ID No. 01-01401

DECISION ON REMAND

Appearances: David M. Smith, Esq., J. Alan Truitt, Esq., and Warren B. Lightfoot, Esq., Maynard, Cooper & Gale, Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Respondent.

Before: Judge Melick

This case is before me upon remand to this Commission by the United States Court of Appeals for the District of Columbia Circuit, by decision dated May 2, 1997, (Secretary of Labor v. FMSHRC, 111 F.3d 913) and upon subsequent remand to this judge by the Commission on August 11, 1997, (19 FMSHRC 1377).

The procedural and factual background of the case was set forth by the Commission in its initial decision on April 19, 1996, (18 FMSHRC 508) as follows:

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR [Jim Walter Resources, Inc.,] for a violation of [30 C.F.R.] section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. See 16 FMSHRC at 1514.

On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the

issuance of the January 24 citation.¹ Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the outby area consisted of "[a] garbage bag, one box and one rock dust bag" 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. *See* 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). [fn 1, supra]. The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. [fn 1, supra]. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the active workings and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* at 1513-14.

Subsequent events were reported by the Commission in its August 16, 1997, decision:

The Secretary petitioned the Commission to review the S&S and unwarrantable determinations. A divided Commission affirmed the judge's decision. 18 FMSHRC 508 (April 1996).

¹ As a matter of clarification, the only charging document at issue in this case is the withdrawal order issued by Inspector Meredith on January 31, 1994, pursuant to Section 104(d)(2) of the Act, Order No. 3182848. That withdrawal order was subsequently modified to a citation by decision of the trial judge on August 28, 1994.

Subsequently, the Secretary filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On May 2, 1997, the court issued its decision, affirming in part and reversing and remanding in part the decision of the Commission. *Secretary of Labor v. FMSHRC*, 111 F.3d 913 (D.C. Cir. 1997). The court affirmed the Commission's determination that the section 7[5].400 violation was not S&S and rejected the Secretary's argument that, in considering whether the violation was S&S, the Commission should take account of the seriousness of the nearby non-violative accumulation. *Id.* at 917-18. Relying on the language of section 104(d)(1), the court determined that "Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards" from the S&S determination. *Id.* at 917.

However, the court determined that section 104(d)(1) was ambiguous on the question whether the non-violative accumulation could be considered for the unwarrantable determination. *Id.* at 919-20. The court noted that, when the Mine Act is ambiguous on a point in question, a court is required to apply the analysis set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and defer to a reasonable interpretation of the Secretary. 111 F.3d at 914-15, 919-20.

The court agreed with the Secretary's interpretation of Section 104(d) of the Act, which had not been advanced at the trial below, that, in determining unwarrantable failure, consideration must also be given to the surrounding non-violative conditions. The Secretary argued before the court that the existence of inby trash, although not violating any health or safety statute or regulation, demonstrates negligence rising to unwarrantability. The court accordingly remanded this case to the Commission to determine whether, "applying the Secretary's interpretation of the statute, the record contains sufficient evidence of causation and culpability to support an unwarrantable failure finding." In its subsequent remand order to this judge, the Commission directed that the non-violative accumulations in the inactive area of the mine therefore be considered "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that the violative condition has existed, whether the violation is obvious or poses a high degree of danger, 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 made prior to the issuance of the citation or order."

Before proceeding with an analysis of the issues on remand it should be observed that two issues in this case have now been resolved through the appellate process, i.e., that the accumulations cited in the inactive area were not violations and that the violative accumulations in the active area were not the result of "unwarrantable failure" or high negligence based upon consideration of those violative conditions alone. Accordingly, those issues are not reconsidered here.

The limited issue on remand, then, is whether or not the non-violative accumulations were

the result of operator negligence (culpability) and, if so, whether that negligence was of such an aggravated nature as to constitute more than ordinary negligence.² If such non-violative accumulations were the result of such negligence, the issue then is whether the record contains sufficient evidence of causation to support an "unwarrantable failure" finding as to the violative condition.

In general, negligence is defined as "the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence." Mod Tort Law ' 3.01 (Rev. Ed). The Secretary defines negligence in Part 100 of her regulations as follows:

Negligence is committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risks of harm. The standard of care established under the Act is that the operator of a mine owes a high degree of care to the miners. A mine operator is required to be on the alert for conditions and hazards in the mine which affect the safety or health of the employees and to take the steps necessary to correct or prevent such conditions or practices. 30 C.F.R. ' 100.3(d).

A finding of negligence presupposes that there was a legal duty to conform to the standard of conduct established by law. Mod Tort Law ' 3.02 (Rev. Ed). In a pervasively regulated industry such as coal mining, those duties are specifically defined by statute and regulation. Indeed, the Supreme Court of the United States recognized this in Donovan v. Dewey, 452 US 594, 69 L Ed 2d 262, 101 S Ct 2534, when it stated as follows:

. . . the standards with which a mine operator is required to comply

² 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 Areckless disregard,@Aintentional misconduct,@Aindifference@or a Alack of reasonable care.@ *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). As noted by the Commission in its remand order, 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).

are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations. Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act. ' 811(e). Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in Biswell, the operator of a mine "is not left to wonder about the purposes of the inspector or the limits of his task." 406 US, at 316, 32 L Ed 2d 87, 92 S Ct 1593. 452 US at 604.

The duties of a mine operator (and, conversely, what are not duties) are even further defined when Congress, in enacting mandatory standards such as the one at issue, carefully carves out an exception and clearly distinguishes between prohibited and non-prohibited conduct. As also noted by Commissioner Riley and the court on review of this case, if the Secretary is truly concerned about hazards presented by accumulations of trash outside active workings, she has a responsibility to clearly proscribe such hazards through rulemaking. The absence of a legally defined duty in such a pervasively regulated industry may therefore appropriately be considered in determining whether negligence existed or at least in mitigation of negligence. Mod Tort Law ' ' 3.33 and 3.36 (Rev. Ed).

Within this legal framework and based on the present record, it is reasonable to conclude that the operator was at least minimally negligent to have allowed the non-violative accumulations to exist. Accepting Inspector Meredith as a reasonably prudent person familiar with the mining industry and based on Meredith's undisputed testimony, it is apparent that even the non-violative accumulations in this case presented a hazard that such a person would recognize and, therefore, had some duty to promptly remove.³ Based on the amount of combustible materials found in the inactive area, it may also reasonably be inferred that management knew or should have known of the existence of those materials. The non-violative accumulations extended throughout the Number 3 Entry over a distance of 250 feet and included approximately 100 to 250 empty rockdust bags that had been piled two or three feet high along the rib, five wooden pallets and a number of wooden cable spools. It may also reasonably be inferred, based on Inspector Meredith's observations of rock dusting activity on January 24, 1994, that at least some of the materials, i.e., some of the rock bags and wooden pallets, may have accumulated over as long as a week. On the other hand, even Inspector Meredith conceded that he had no idea how long some of the other materials, e.g., the wooden cable spools, had been present.

While the Secretary also notes that, only seven days earlier, another withdrawal order (Gov. Exh. 3) had been issued for accumulations in an adjacent entry, those accumulations were presumably in an active area of the mine, and were, therefore violative. The prior order would not, therefore, have provided notice in itself that the accumulations now at issue, which were in an

³ It is noted that since this issue was first raised by the Secretary on appellate review and was not squarely presented at trial, there may be an absence of contrary evidence in the record. Because of the result in this case, however, "due process" concerns in this regard are moot.

inactive area of the mine, were unlawful or had to be promptly removed. The Secretary correctly observes, however, that there is no evidence that the operator attempted to abate or clean up the non-violative accumulations.

Under the circumstances, it is clear that JWR was not without negligence in allowing these non-violative accumulations to exist. Such negligence was, however, strongly mitigated by the factors previously discussed and clearly was not so aggravated or of such a gross nature as to constitute unwarrantable failure. As the Commission noted in Secretary v. Mettiki Coal Corporation, 13 FMSHRC 760 (May 1991), typical definitions of gross negligence include: "the intentional failure to perform a manifest duty and reckless disregard of the consequences;" "an act or omission respecting a legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care;" "indifference to present legal duty and utter forgetfulness of legal obligations;" and "a heedless and palpable violation of legal duty." Citing Black's Law Dictionary (5th Ed.), 931-32 (1979). The non-violative facts of this case considered in light of the mitigating factors, previously discussed, do not meet these definitions.

In its remand order, the court also directed the Commission to address the issue of causation. In determining legal responsibility for negligence, it is indeed customary to divide the inquiry into two steps, i.e., was there negligence (culpability), and, if so, was that negligence the proximate cause of the subsequent harm (causation).⁴ Although the Secretary was accordingly directed to specifically address the issue of "causation" in her brief on remand, she declined to do so. The Secretary's failure to have addressed this essential element may be considered an abandonment of her claim on which she has the burden of proof and a default.

However, even assuming, arguendo, that the Secretary had a theory of causation and the record evidence supported such a theory, on the facts of this case it would in any event be irrelevant. Since the level of negligence associated with the non-violative accumulations has been found on the unique facts of this case to be minimal, I conclude that such negligence would not enhance the negligence in regard to the violative accumulations sufficient to justify unwarrantable failure findings.

ORDER

Order No. 3182848, is hereby modified to a citation under Section 104(a) of the Act.⁵

⁴ Under the "substantial factor" test of causation which has been adopted by the Restatement (second) of Torts ' 431, conduct is the cause of an effect if that conduct has such an effect in producing the harm "as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." Mod Tort Law ' 4.03 (Rev. Ed).

⁵ Inasmuch as this is a Contest Proceeding, no civil penalty is assessed.

Gary Melick
Administrative Law Judge

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