

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-375
Petitioner	:	A.C. No. 42-01697-03653
v.	:	
	:	
C.W. MINING COMPANY,	:	Bear Canyon No. 1 Mine
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 94-399
MINE SAFETY AND HEALTH	:	: A.C. No. 42-01697-03667 A
ADMINISTRATION (MSHA),	:	
Petitioner	:	
v.	:	
	:	
	:	Bear Canyon No. 1 Mine
CYRIL JACKSON, employed by	:	
C.W. MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondents.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C.W. Mining Company ("C.W. Mining") and Cyril Jackson, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. " 815 and 820 ("Mine Act"). The petitions allege that each respondent violated the mine's ventilation plan. For the reasons set forth below, I find that C.W. Mining violated the ventilation plan, that the violation was of a significant and

substantial nature, but that it was not caused by C.W. Mining's unwarrantable failure. I assess a civil penalty in the amount of \$2,000. I find that Cyril Jackson did not knowingly violate the ventilation plan and I dismiss the proceeding filed against him.

A hearing was held in these cases on February 7, 1995, in Salt Lake City, Utah. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT

The Bear Canyon No. 1 Mine is an underground coal mine in Sevier County, Utah. On January 20, 1993, MSHA Inspector Fred Marietti issued C.W. Mining an order of withdrawal (the "order") under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. ' 75.370(a)(1) at its Bear Canyon No. 1 Mine. The order states the following:

The continuous mining machine was cutting and loading coal in the pillar split between No. 4 and 5 rooms. There appeared to be little air over the machine. The air was measured with an anemometer, and no movement was indicated. The split was broke through on the right corner about a 3 feet X 3 feet opening to the gob. The hole was partially blocked off by cave gob. The section foreman was observing the mining standing next to the writer. It was obvious that there was little air. The dust was boiling back towards the operator's compartment. This machine was in the east bleeder section, MMU006.

In the order the inspector indicated that the alleged violation was significant and substantial and was caused by C.W. Mining's high negligence. The Secretary assessed a penalty of \$2,500 against C.W. Mining under section 110(a) of the Act and a penalty of \$3,000 against Cyril Jackson under section 110(c).

After arriving at the mine, Inspector Marietti proceeded to the east bleeder section. On his way to the face area he observed Cyril Jackson, a section and production foreman, in Room 4

¹ The cited safety standard provides that all coal mine operators "shall develop and follow a ventilation plan approved by the district manager." The order alleges that C.W. Mining was not following its approved ventilation plan.

setting a breaker row with other miners. (Tr. 61-62, 84, 170, 218). The inspector was accompanied by Ken Defa, the mine superintendent. Marietti and Defa then proceeded to Room 5. (Tr. 85, 109). In this area, the inspector observed a shuttle car. Id. He later returned to the shuttle car and issued a citation because it was not in permissible condition. (Tr. 163, 260; Ex. G-8). Marietti and Defa then proceeded to the face area. (Tr. 171). In the meantime, Jackson had walked past Marietti and Defa to the face and arrived in that area before they did. (Tr. 171, 219-220).

At the face, Ryan Thompson was operating a continuous mining machine. C.W. Mining was retreating from the east bleeder section and was, therefore, removing the pillars. The pillar between crosscut 4 and 5 had been split on a previous shift. For reasons that are not clear, the entire split was not cut and a wall of coal was left at the back. A hole about three by five feet in diameter was cut on the right side of this wall. (Tr. 58, 156). The gob was behind this wall and the hole was partially blocked because the roof had caved in the gob. Id. Thompson was cutting into the pillar of coal to the right of the split, called a fender, when Jackson arrived. Coal dust was blowing back over the continuous miner. (Tr. 59-60, 81-82, 124).

The parties offered conflicting testimony as to the events that followed. C.W. Mining's witnesses testified that Thompson had just started mining the fender and had not completely filled the first shuttle car with coal when Jackson arrived. (Tr. 159).

² Inspector Marietti apparently used incorrect numbers when referring to various rooms on the section. (Tr. 85, 171). I have used his numbering system because his numbers were used by all witnesses throughout the hearing.

³ Mr. Thompson testified that he mined part of the split earlier on the same shift. (Tr. 121). I have not relied upon this testimony because it is contrary to the testimony of Defa and Jackson and because it would have been difficult, if not impossible, for Thompson to have finished cutting the split that morning. (Tr. 203, 237-238). C.W. Mining is required to cut pillars in an approved pattern and bolt the roof after each cut. (Tr. 51; Ex. G-3). There was no dispute that the pillar split was bolted and clean at the time Inspector Marietti arrived at about 9:45 a.m. Earlier in the shift, Thompson had been removing the stump from another pillar. (Tr. 121, 215-216). There was not enough time after the start of the shift, 6:00 a.m., for him to have removed the stump, mined the last section of the split, and for the crew to have cleaned and bolted the area. (Tr. 66).

In addition, they testified that Jackson arrived at the face less than a minute before the inspector. (Tr. 171-172, 220-222). Jackson stated that he immediately saw that there was a ventilation problem and attempted to signal Thompson to stop mining. (Tr. 220-222). Defa testified that when he saw the dust, he started examining the curtains to find the problem. (Tr. 87, 173). When the inspector told Defa and Jackson that he was issuing an order, they replied that they saw the violation, but that they did not understand why an order was being issued. (Tr. 68, 177, 222).

The Secretary takes the position that Jackson arrived at the face several minutes before the inspector and he made no attempt to stop Thompson from mining. (Tr. 60-61, 77-78, 255). Inspector Marietti testified that he waited a short time for Jackson to take some action and, when he did not, he told Jackson that he was going to issue an order. Id. The inspector testified that Jackson then asked him if Thompson could finish loading the shuttle car before he shut down. (Tr. 101). When the inspector refused this request, Jackson shut down the continuous miner. (Tr. 100-101, 108).

Inspector Marietti issued the unwarrantable failure order based on the conditions he observed and the events that occurred at the face. (Tr. 60-61). The violation was abated a few hours later by tightening existing curtains and installing a line curtain brought in from another section. (Tr. 69, 70-71, 128, 201).

II. SUMMARY OF THE PARTIES' ARGUMENTS

C.W. Mining does not dispute that the conditions observed by Inspector Marietti violated the mine's ventilation plan. It contends, however, that the violation was not S&S, was not caused by its unwarrantable failure, and that Jackson did not knowingly authorize the violation.

A. Secretary

The Secretary contends that the violation was S&S because, if left unabated, the condition "would reasonably likely result in an accident, resulting in an injury of a very serious nature." (S. Br. 6). He argues that C.W. Mining was grossly out of compliance with its ventilation plan because the inspector detected no air movement with his anemometer. The Secretary maintains that the conditions presented three distinct hazards: inhalation of respirable dust, ignition or explosion of coal dust, and methane accumulations. He further argues that there were a number of

ignition sources in the area that could ignite the coal dust or methane.

The Secretary maintains that the violation was the result of C.W. Mining's unwarrantable failure to comply with the ventilation plan because the violation was "extremely obvious." (S. Br. 8). He argues that C.W. Mining should have been aware that the area was not adequately ventilated because there was only a small, partially blocked hole at the back of the split. He contends that Jackson should have addressed the problem before the fender was cut. The Secretary further maintains that Jackson arrived at the face well before the inspector and that his failure to take corrective action, either before or after the inspector arrived at the face, constituted aggravated conduct. Finally, the fact that Jackson asked the inspector to delay shutting down the continuous miner until the shuttle car was loaded demonstrates C.W. Mining's lack of concern about the inadequate ventilation.

The Secretary argues that Cyril Jackson knowingly authorized, ordered, or carried out the violation. The Secretary contends that Jackson knew that his crew was mining the right fender of the split, that there was only a small hole at the back of the split, and that it was his responsibility to assure adequate ventilation. Despite this knowledge, the Secretary contends that Jackson did nothing to correct the situation and, in addition, asked the inspector if he could continue mining to finish loading the shuttle car.

A. C.W. Mining

C.W. Mining contends that the Secretary did not establish that the violation was S&S. It states that the condition existed for a few minutes at the most, and that Mr. Jackson stopped the continuous miner once he observed the dusty conditions. C.W. Mining states that the inadequate ventilation would not have continued once the shuttle car was loaded. Thus, it maintains that the Secretary failed to establish that there was a reasonable likelihood that the dusty conditions would have caused an injury or illness.

C.W. Mining also contends that, because the inadequate ventilation observed by the inspector had existed only for a few minutes and Jackson started taking remedial steps as soon as he became aware of it, the violation was not the result of its unwarrantable failure and Mr. Jackson did not knowingly authorize, order, or carry out the violation. C.W. Mining also argues that it has a good history of compliance with its ventilation plan and

it regularly instructs its continuous miner operators to stop mining if the ventilation is not sufficient.

III. DISCUSSION WITH FURTHER FINDINGS
AND
CONCLUSIONS OF LAW

A. Significant and Substantial

The Commission has established a four-part S&S test, as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

I find that the Secretary established that the violation was S&S. C.W. Mining does not seriously dispute that the Secretary established the first two elements of the Mathies test. It contends, however, that the third and fourth elements were not met.

I agree with C.W. Mining that the continuous miner had been cutting into the fender for only a minute or so when Jackson arrived at the face. Assuming continued normal mining operations, how-

⁴ Mr. Thompson testified that he had been mining in the fender for 15 or 20 minutes and that he had cut about 20 feet. (Tr. 128-129). I have not relied upon this testimony because it is contrary to the testimony of the inspector, Defa, and Jackson. (Tr. 65, 77, 159, 225, 231). In addition, the metal surfaces of the continuous miner were clean of coal dust. (Tr. 182-183; Ex. R-1). Given the amount of dust that was being produced, the machine would have been dusty if Thompson had been mining for 15 or 20 minutes.

ever, the condition would likely have continued for a longer time.

The hazards of coal dust are well known. Although MSHA did not take a dust survey at the time, I believe that the evidence establishes that a significant amount of coal dust was boiling back over the continuous miner and was not being carried away by the ventilation system. (Tr. 73). Inspector Marietti could detect no perceptible movement of air in the area.

The miners in the area were not wearing respirators and were exposed to the coal dust. (Tr. 76). Pneumoconiosis is a progressive disease that can afflict coal miners who are exposed to dust over a period of years. Apparently, no miner who has worked at the Bear Canyon No. 1 Mine has ever filed a claim for black lung benefits. (Tr. 185). That fact, however, does not lessen the hazard.

Inspector Marietti testified that he discovered a permissibility violation on a shuttle car in the section and an accumulation of coal on one part of continuous miner. (Tr. 103-104). This evidence is not contested by C.W. Mining. (Tr. 163-164, 182). The permissibility violation was a potential ignition source for the dust and the accumulation could help spread a fire. Although the coal seam does not contain large amounts of rock, the bits of the continuous miner could, nevertheless, strike a rock and create a spark causing an ignition of the coal dust. (Tr. 29, 74, 103). Finally, although excessive amounts of methane are not emitted at the mine, methane could be released at the face and mix with the coal dust thereby increasing the likelihood of an ignition. (Tr. 75). In order for an ignition to occur, there must be a confluence of factors. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In the present case, the shuttle car with impermissible gaps would have traveled to the dusty area, assuming continued normal mining operations.

Taking into consideration the health risk and ignition hazard posed by the violation, I find that there was a reasonable likelihood that the hazard contributed to would have resulted in an injury. I also find that the Secretary established the fourth element of the Mathies S&S test. If there was an ignition in the area, miners could be burned or killed. In addition, black lung disease is a serious progressive disease.

B. Unwarrantable Failure

In addition, I find that the violation was S&S considering the ignition and fire hazard alone.

In Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-194 (February 1991).

I find that the Secretary did not establish that the violation was caused by C.W. Mining's unwarrantable failure to comply with the ventilation plan. The Secretary is asking that I conclude that C.W. Mining engaged in aggravated conduct based on inferences drawn from events and conversations that occurred at the face in a very short period of time. As discussed below, I believe during this period there was a breakdown in communications and that this breakdown is the primary source of the conflicting testimony.

I credit the testimony of Defa and Jackson that Jackson arrived at the face only moments before the inspector. (Tr. 171-172, 220). Jackson walked from Room 4 to the face via the same route as the inspector. Inspector Marietti also proceeded to the face with only a momentary stop at a shuttle car. Jackson could not have been at face very long before the inspector arrived.

I also credit the testimony of Defa and Jackson that Jackson attempted to signal Thompson to stop the continuous miner. (Tr. 172, 178-179, 220-221). Jackson is an experienced miner and is familiar with the MSHA inspection process. It is hard to believe that he would stand there, knowing that Inspector Marietti was on the way, and do nothing about the violation that everyone said was obvious. Apparently, Thompson did not see his signal and kept mining. (Tr. 126). The dark, noisy environment of underground coal mining makes communication difficult.

I believe that Inspector Marietti perceived that Jackson was not doing anything to correct the violation because the continuous miner operator was still mining when he arrived. (Tr. 59, 76-77). The inspector did not see Jackson's signal. Inspector Marietti testified that Jackson asked him if the operator could finish filling the shuttle car before he shut down. (Tr. 76, 101). Jackson denied making this statement and testified that the inspector told him that if he had stopped the continuous miner before the shuttle car was loaded, then a citation would have been issued, rather than an order. (Tr. 222). A shuttle car is usually filled in about a minute. (Tr. 99, 126, 146, 159). Accordingly, this discrepancy is not particularly sig-

nificant. I cannot assume that Jackson was disregarding the hazard presented by the violation based on the inspector's testimony about this conversation.

The Secretary also contends that Jackson should have known, before Thompson started mining, that the ventilation would not be sufficient because there was only a small hole at the back of the pillar split and it was partially blocked. Jackson examined the split about 30 minutes before Thompson started mining the fender, but he did not measure the air flow. (Tr. 216, 247; Ex. G-9). Nevertheless, I believe that Jackson's failure to adjust the ventilation earlier in the shift constitutes, at most, ordinary negligence, not aggravated conduct. First, the configuration of the pillar split with the hole in the back was somewhat unusual. (Tr. 90, 243). There is no indication that a line curtain is usually needed when making the first cut into a fender. (Tr. 35-36, 156). Second, it is not clear when the gob caved behind the split and partially blocked the hole. It is common for the roof in the gob to cave during retreat mining and the resulting bump can affect ventilation. (Tr. 91, 174-175, 223, 229). Defa and Jackson testified that they heard the roof cave a few minutes before they were at the face. (Tr. 174, 176, 218, 223-224, 238). They thought the hole was clear before that time. Id. Thompson, on the other hand, testified that the hole was partially blocked when he arrived at the split. (Tr. 122, 126, 132-133). Finally, there were curtains in the area to direct air into the split. (Tr. 55-58, 92-94; Exs. G-4, G-6). Apparently, C.W. Mining was having difficulty keeping the curtains tight, in part because of the bumps. (Tr. 80, 94, 174, 198, 223). Inspector Marietti testified that if all of the curtains that were in place had been tight, the ventilation at the face may have been adequate. (Tr. 98).

C. Liability of Cyril Jackson under Section 110(c)

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. ' 820(c). The Commission has

⁵ The shuttle car that Thompson was loading was the first shuttle car to be filled on that shift. (Tr. 172, 224). As a consequence, it is unlikely that Jackson was motivated by production concerns. For the reasons set forth in footnote 4, I have not given any weight to Thompson's testimony that he had loaded eight to ten shuttle cars. (Tr. 136-137).

held that a "violation under section 110(c) involves aggravated conduct, not ordinary negligence." BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

C.W. Mining is a corporate operator and Mr. Jackson was an agent of the corporation. In addition, as discussed above, the corporate operator violated the mine's ventilation plan and, as a consequence violated 30 C.F.R. ' 75.370(a)(1). I find, however, that Jackson did not knowingly authorize, order, or carry out the violation. I reach this conclusion for the same reasons that I concluded that the violation was not unwarrantable, as discussed above. I find that Jackson was somewhat negligent by not checking the air flow before Thompson started cutting. I conclude, however, that he did not knowingly violate the ventilation plan.

Based on the facts available to him, Jackson did not have "reason to know that a violative condition or conduct would occur" and he did not fail "to take appropriate preventive steps." Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984). He believed that there was sufficient air in the split. He also took steps to stop production once he saw that the ventilation was inadequate. Inspector Marietti assumed that because he did not see Jackson try to stop the continuous miner, Jackson had not, in fact, done so. (Tr. 108, 222, 257).

The Secretary bases its 110(c) allegation, in large measure, on the events that took place at the face in the first few moments after the inspector arrived. (Tr. 221). I have determined that there was a miscommunication between Inspector Marietti and Jackson at that time. As discussed above, I find that Jackson tried to signal Thompson to stop mining, but the inspector did not see him do so. When Jackson stood there a few moments without taking any action, Inspector Marietti concluded that Jackson was indifferent to the violation and issued the withdrawal order. (Tr. 60-61, 257-258).

IV. CIVIL PENALTY ASSESSMENT

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on this criteria, I assess a penalty of \$2,000 for the violation. I find that C.W. Mining was issued 148 citations and orders in the 24 months preceding the inspection in this case. (Ex. G-1). I also find that C.W. Mining is a medium-sized operator that produced between 300,000 and 400,000 tons of coal in 1992. I find that the civil penalty assessed in this decision would not affect C.W. Mining's ability to continue in business. The violation was timely abated by C.W. Mining. I further find that the violation was very serious, and that C.W. Mining's negligence was moderate. In assessing the penalty, I

gave special consideration to the violation's high level of gravity.

V. ORDER

In WEST 93-375, Order No. 3852378 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED** and C.W. Mining Company is **ORDERED TO PAY** Secretary of Labor the sum of \$2,000.00 within 40 days of the date of this decision.

In WEST 94-399, Order No. 3852378 is **VACATED** against Cyril Jackson and the civil penalty proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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