FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

April 5, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-129
	:	A.C. No. 46-07751-03542
v.	:	
	:	Seminole Mine
DOSS FORK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Pamela Silverman, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia for Petitioner;
David Hardy, Esq., Jackson & Kelly, Charleston,

Before: Judge Melick

This case is before me upon remand by the Commission, 18 FMSHRC 122, (February 1996) to determine whether the violations charged in Order Nos. 3554292 and 3554293 were the result of unwarrantable failure, and whether Order No. 3554294 should be sustained.

Order No. 3554292

The evidence established that on October 26, 1992, MSHA Inspector James Graham, accompanied by MSHA Supervisor Clyde Ratcliff, observed that loose coal, mixed with pieces of rock, had been pushed into ten crosscuts in the right return air course of the Doss Fork Seminole Mine. Inspector Graham issued this order alleging a Asignificant and substantial@ violation of 30 C.F.R. ' 75.400.[1] He also charged that the violation was the result of Doss Fork=s Aunwarrantable failure@.

[1] 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.@

In the initial decision it was concluded that the cited material constituted a violation but that the Secretary had not proven the violation was Asignificant and substantial@. It was also found that section foreman Carl Dalton entertained a good faith belief that the material was not a violative accumulation. Primarily for this reason the violation was not found to be the result of Aunwarrantable failure@.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emory 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). The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure. Among these are Athe extensiveness of the violation, the length of time that the violative condition has existed, the operator=s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.@ *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). The Commission has also noted that in order to serve as a defense to a finding of unwarrantable failure an operator=s good faith belief that the cited conditions were not violative must also be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). The Commission seeks on remand a determination of whether this operator=s belief that the cited conditions were not violative were reasonable.

Upon examination of the record I must conclude that the belief of the operator=s agent in this regard was not, in fact, reasonable. The violation was extensive in that there were accumulations of up to 26 inches in depth in 10 crosscuts. Section Foreman Dalton also testified that the material was pushed into the crosscuts during the last week of September or the first week of October, thereby acknowledging that the accumulations had existed for at least three weeks. In addition, the record indicates that the operator was on notice that the storing of coal, even when mixed with rock and mud, was violative. Prior to issuance of the subject order, the operator was cited on June 3 and October 21, 1992, for three violations of the same standard. The record also shows that MSHA had warned the operator on October 15 about similar accumulations. Under the circumstances I conclude that it was not reasonable to believe that the cited conditions were not violative. Since the operator has failed to sustain his burden of proving this affirmative defense, I conclude that the violation indeed resulted from Aunwarrantable failure@ and high negligence.

In light of these findings, the previous determination that the violation was not Asignificant and substantial@ (and accordingly of lessened gravity) and the other criteria under Section 110(i), I find that a civil penalty of $800 is appropriate.

Order No. 3554293

The record shows that on October 26, 1992, Inspector Graham, accompanied by MSHA Supervisor Ratcliff, issued a Section 104(d)(1) order[2] alleging a Asignificant and substantial@ violation of 30 C.F.R. ' 75.202(a).[3] Based on his observation of inadequate roof support in the left return air course of the mine, Inspector Graham charged that the violation was the result of Doss Fork=s unwarrantable failure. The violation was found to be significant and substantial.

The Commission has remanded for evaluation of the unwarrantability issue in light of appropriate testimony. In this regard Inspector Graham testified that, during his inspection of the left return air course, several places existed where roof bolts were hanging down and exposing 24 inches between the roof and the plate. Graham also described three particular areas where groups of six, 10, and 12 adjacent defective bolts were observed. Additionally, Graham testified that there were many other damaged bolts throughout the area with cracked and loose rock in the roof with much of the loose roof left hanging. Graham concluded that the condition had existed for at least several weeks because of the state of deterioration. He

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[2] Order No. 3554293 stated in part:

The mine roof in the left return air course is not adequately supported at spot locations starting at crosscuts outby survey station number 65 and extended outby this point to within three crosscuts of the surface portal. There were several roof bolts at each location that were damaged to a point they no longer adequately supported the roof.

[3] 30 C.F.R. ' 75.202(a) provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

disputed that the deterioration could have occurred within the five days since the last weekly examination. MSHA Supervisor Ratcliff testified that the conditions he observed were similar to an earthquake, with fallen material in any direction you looked. He observed areas of major roof falls that he believed had existed for weeks because Aroof transition that excessive doesn=t occur in a matter of days.@

On the other hand Section Foreman Webb testified that he made the last weekly examination on October 21, only five days before the conditions were observed and cited by MSHA, and that he did not observe any violative conditions at that time. Based on the expert testimony of Graham and Ratcliff and the significant factor that only five days had actually elapsed between the date of the last weekly examination reportedly conducted by Foreman Webb and the date the conditions were discovered by MSHA, it is clear that at least some of the violative conditions must have existed at the time of the previous weekly examination on October 21. In view of the circumstances, it may reasonably be inferred that Webb must have known of these conditions at the time of that weekly examination. With such notice to an agent of the operator, the failure to have corrected those conditions during the interim five days is clearly sufficient to find the high degree of negligence necessary for a finding of Aunwarrantable failure.@ Accordingly, Order No. 3554293 is affirmed with an appropriate civil penalty of $2,300.

Order No. 3554294

Order No. 3554294 alleged in part as follows:

Adequate weekly examinations for hazardous conditions in the return air courses of this coal mine are not being conducted. There were obvious violations that were observed and there was no report made of these violations in the weekly examination book.

The cited standard, 30 C.F.R. ' 75.305 (1991) provided, in part as follows:

Examinations for hazardous conditions . . . shall be made at least once each week . . . . If any hazardous condition is found, such condition shall be reported . . . promptly . . . . A record of these examinations . . . shall be recorded . . . in a book . . . and the record shall be open for inspection . . . .

The underlying basis for this violation was the failure to report in the weekly examination books roof conditions in both the right and left return air courses and loose coal stored in the right return as charged in Order No. 3554291, discussed in the initial decision (16 FMSHRC 797 (April 1994)), and Orders No. 3554292, and No. 3554293, previously discussed in that decision and herein. Inspector Graham reviewed the weekly examination books for the right and left return air courses after he arrived on the surface of the mine on October 26, 1992. Significantly, when Inspector Graham asked Foremen Webb and Dalton, the weekly examiners, why these conditions had not

been reported in the weekly examination books, they gave no answer. As discussed in the original decision issued in this case, supplemented by the discussion herein of the violations cited in Orders No. 3554292 and No. 3554293, the operator was clearly in a position from which it may reasonably have been inferred that he knew of the violative conditions.

The failure to have reported these conditions in the weekly examination books constitutes a violation as charged. The violation was also A significant and substantial@. A violation is properly designated as A significant 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 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (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 (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 (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 (1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991).

The failure to have reported in the weekly examination books the serious conditions cited in the noted orders clearly constituted a A significant and substantial@ and serious violation. Without the warning provided by such reports, unsuspecting persons would likely be placed in hazardous and potentially life-threatening situations -- particularly in regard to the hazardous roof conditions.

The violation was also the result of A unwarrantable failure@. The failure to have reported these conditions, and, in particular, the serious roof conditions, in the weekly

examination books was clearly inexcusable and the result of an aggravated omission constituting high negligence. Considering the criteria under Section 110(i) of the Act, a civil penalty for this violation of $1,000 is appropriate.

ORDER

Order Nos. 3554292, 3554293 and 3554294 are affirmed. Doss Fork Coal Company is hereby directed to pay within 30 days of the date of this decision civil penalties of $800, $2,300 and $1,000, respectively, for the violations charged in the above orders.

Gary Melick
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

David J. Hardy, Esq., Jackson & Kelly, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

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