FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-95
Petitioner	:	A.C. No. 46-01286-03985
v.	:	
	:	Windsor Mine
WINDSOR COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

This civil penalty proceeding is before me based upon a decision by the Commission in this matter, 21 FMSHRC 997 (September 19, 1999), which vacated the decision of Judge George A. Koutras[1] (19 FMSHRC 1694 (October 27, 1997)) that the violation by Windsor Coal Company (Windsor) of 30 C.F.R. § 75.400 was not the result of its unwarrantable failure, and remanded this proceeding for further consideration.[2] Subsequent to the issuance of the Commission's decision, the undersigned conferred with counsel for both parties in a telephone conference call and suggested that the parties attempt to negotiate to settle the issues raised by the Commission's remand. The parties subsequently indicated that they were unable to reach a settlement, and counsel were allowed until January 28, 2000 to file briefs. Pursuant to the parties' request the time to file briefs was extended, and the parties filed their briefs on March 6, 2000.

In its remand, the Commission, directed a reconsideration of the issue of unwarrantable failure. Compliance with the Commission's decision requires analysis of the circumstantial evidence regarding the duration of the cited conditions, along with an analysis of the evidence of record regarding notice of the need for greater compliance efforts, efforts to eliminate the violative conditions, and the danger and obviousness of the cited accumulations. (21 FMSHRC *supra*, at 1004, 1006-1007).

1. Duration

On September 19, 1996, MSHA inspector Lyle Tipton inspected the No. 10 belt. The Commission, 21 FMSHRC *supra* at 998, set forth Tipton's observations of the violative

[1]Judge Koutras is presently retired.

[2]This case was subsequently assigned to me by former Chief Judge Paul Merlin.

conditions, and the description of the violative conditions as set forth in his order as follows:

> Tipton observed an `accumulation of combustible material consisting of float coal dust, ... loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom roller structure[.]' *Id*. at 1697. Tipton's order states that `the total distance of this 6,000 foot entry containing float coal dust was 3,600 feet' and that spillage of `coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers.' *Id*. The order indicated that Inspector Tipton observed accumulations of float coal dust from the belt drive (227 crosscut) to the 260 crosscut; accumulations of loose coal beneath the majority of the bottom belt and in contact with the bottom rollers; spillage in contact with rollers and visual signs that a roller had heated up at the 254 stopping; an 80-foot long, 1-foot wide, and 1-foot deep spillage at the 248 stopping; a 50-foot long, 1-foot wide, and 1-foot deep spillage at the 268 stopping; a 20-foot long, 3-foot wide, and 2-foot deep spillage at the 275 stopping; and a 10-foot long, 3-foot wide, and 2-foot deep spillage at the 276 stopping. Ex. P-3 at 2. He concluded that the cited conditions `for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in this action.' 19 FMSHRC at 1698.

Generally, the testimony of miners Cox and Welch corroborated Tipton's opinion that the accumulations developed over a period of several shifts. On the other hand, Porter indicated that in his preshift examination of September 18, he had not observed any hazardous conditions, and that specifically the conditions noted in Tipton's order were not present in his preshift examination made on September 18. Also, there is no specific reference in Windsor's pre-shift and on-shift reports prior to September 19, relating to the violative conditions described in Tipton's order at the following stoppings: 248, 254, 268 and 275.

However, most importantly, as noted by the Commission, (21 FMSHRC *supra* at 1001) the September 19 preshift report showed that the area between crosscuts 227 and 253 needed cleaning. Also, on September 19, the midnight pre-shift report listed accumulations on both sides of stopping 276, but the midnight on-shift report showed that only the right side of the belt was cleaned i.e., "the left side of stopping 276 still needed cleaning by the time the day preshift report was written" (21 FMSHRC *supra* at 1002) I thus find that the preponderance of the evidence establishes that float cut accumulations from crosscut 227 to 260, and accumulations along the left side of the belt at the 276 stopping had existed for at least one shift prior to Tipton's inspection.

2. Notice of the Need for Greater Compliance Efforts.

Windsor, in asserting that it lacked notice of a greater need for compliance, argues that annotations in the pre-shift book reflecting that coal had accumulated and some of the accumulations remained for several shifts without abatement, does not demonstrate that Windsor was on notice. In this connection, Windsor argues that none of the specific conditions set forth by

the Commission 21 FMSHRC *supra* at 1004, were cited by Tipton, and that many of the conditions that were recorded do not amount to violative conditions. Also, Windsor argues that its two-year history of Section 75.400 violations fails to show that it was on notice of a greater need for compliance. In this connection, Windsor refers to the record as establishing that only two-violations, both issued in 1995, were viewed by the Secretary to be the result of indifference or serious lack of reasonable care, that these violations were spread out over 14 miles of belt haulage, that in the three month period preceding the issuance of the order at issue Windsor had received only three section 75.400 violations, and that during the inspection at issue, the 14 mile haulage was inspected, and only one violation was issued.

However, the record establishes that float coal dust existed along 3,600 feet of the 6,000 foot belt in question. Further, 15 to 20 miners worked over a two-shift period to correct the violative accumulations. Hence, I find that, when cited by Tipton, the accumulations were extensive. Considering the extent of the accumulations as well as the history of 98 section 75.400 citations in a two-year period which the Commission considered to be a "high number of violations during this time period" (21 FMSHRC *supra* at 1004, I conclude that, within the framework of evidence in this case, Windsor was on notice that greater efforts were necessary for compliance with Section 75.400, *supra*.

3. Efforts to Eliminate the Violative Conditions.

The Secretary argues, in essence, that Windsor's efforts to correct the violative conditions were incomplete and ineffective. In this connection the Secretary argues that not withstanding Windsor's efforts to clean up the violative conditions, it took nearly 30 employees working over a period of two shifts to abate the violation. On the other hand, I am cognizant of the Commission's findings, that prior to the order's issuance, "....the record contains evidence of Windsor's abatement efforts on the number 10 belt and elsewhere in the mine... ." 21 FMSHRC *supra* at 1005). Further, on the September 18, afternoon shift six miners were assigned to work on the No. 10 belt. The on-shift report indicated that these miners "corrected" conditions at the head to drive, 269 to 272, 238 to 271. The on-shift report for the midnight shift September 19, 1996 indicated that the following areas were cleaned: 282 to 260, 278 and 276. The work assignment record for September 19, 1996 indicates the completion of the following: "cleaning and dusting 265 to 260 crosscut, cleaning 272 to 278, changing 23 rollers, changing bad stands 262 to 263".

4. Danger and obviousness.

Judge Koutras, in addition to finding the existence of a section 75.400 violation, also found that the violation was significant and substantial. He specifically found that "...the presence of float coal dust on a running belt with potential ignitions sources such as hot defective rollers, rollers turning in loose dry coal accumulations, and a belt dragging and/or in contact with loose dry accumulations and/or spillage presented serious potential fire and explosive hazards" (19 FMSHRC at *supra* 1715). No appeal was taken regarding Judge Koutras' finding of significant and substantial. Accordingly his conclusion in this regard as well as the underlying facts he cited

in support of his conclusion becomes the law of the case. However, there is no evidence in the record that Windsor either knew or reasonably should have known of the specific defective hot rollers, and rollers turning in loose dry coal accumulations cited by the inspector.

Within the framework of the above discussed factors, I find that it has been established that the violation herein was as a result of more than ordinary negligence, reached the level of aggravated conduct, and hence constituted an unwarrantable failure (See: *Emery Mining Corporation* 9 FMSHRC 1997 (Dec 1997*))*.

5. Penalty

Judge Koutras, in his decision, 19 FMSHRC *supra* at 1728 made findings, pursuant to section 110(i) of the Act, regarding the size of Windsor's business and the effect of a penalty on its ability to continue in business, its history of its prior violations, good faith abatement, and gravity. None of these findings have been appealed, and they become the law of the case. Regarding negligence, as discussed above (*infra 4*), I find that the level of negligence was more than ordinary and reached the level of aggravated conduct.

Taking into account all the above factors, I find that a penalty of $2,500.00 is appropriate.

ORDER

It is **ORDERED** that within 30 days of this decision, Windosr shall pay a total civil penalty of $2,500.

Avram Weisberger
Administrative Law Judge

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