

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 4, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A. C. No. 46-07711-03660
v.	:	
	:	
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	Mine No. 1

DECISION ON REMAND

Before: Judge Feldman

The initial decision in this matter held that the violative water accumulations in Eagle Energy Inc.’s (Eagle Energy’s) 10 Left escapeway of its Mine No. 1 cited in Citation No. 7163242 were not attributable to an unwarrantable failure. 21 FMSHRC 1235 (November 1999) (ALJ). While the initial decision determined Eagle Energy’s degree of negligence was high, it was determined that Eagle Energy’s conduct did not rise to the level of unjustifiable or inexcusable conduct necessary for the Secretary to prevail on the unwarrantable failure issue. *Id.* at 1249 n.5, 1251 n.7 (November 1999) (ALJ). On August 30, 2001, the Commission vacated the negative unwarrantable failure determination and the civil penalty assessment, and remanded for further analysis consistent with its opinion. 23 FMSHRC 829 (August 2001).

For the reasons discussed herein, I have determined that Eagle Energy’s violation of 30 C.F.R. § 75.380(d)(1) was attributable to its unwarrantable failure.¹ However, given the Secretary’s failure to prove the special findings made in connection with the alleged duration of the subject violation, there is an inadequate basis for increasing the civil penalty above the \$2,500.00 assessed in the initial decision. 21 FMSHRC at 1251.

¹ Section 75.380(d)(1) provides, in pertinent part: “(d) each escapeway shall be -- (1) maintained in a safe condition to always assure passage of anyone, including disabled persons” 30 C.F.R. § 75.380(d)(1).

I. Background

Eagle Energy's Mine No. 1 is an extremely wet mine with recurring water problems. Water flows down to the mine from the surface and seeps in from an adjacent abandoned mine which is inundated with water. 23 FMSHRC at 830. There are over 100 pumps at locations throughout the mine where water chronically accumulates. *Id.* Approximately 5 million gallons of water are pumped out of the No. 1 Mine every day. *Id.* In areas of chronic accumulation, water can accumulate at depths of up to approximately eight inches per day. 21 FMSHRC at 1245. In short, areas of the mine floor are always wet, frequently with accumulations of several inches of water, because of slopes or irregularities in the mine floor, and, as discussed below, because of the cyclical nature of the pumping cycle.

While the 10 Left section was in production, water was removed from the escapeway by pumping it on to the belt line through discharge hoses. 23 FMSHRC at 830. The water was absorbed by the coal on the belt line and carried to the surface. *Id.* On July 9, 1997, Eagle Energy suspended production in the 10 Left section in anticipation of assembling a longwall that was to be relocated from another area of the mine. *Id.* Converting the 10 Left section to longwall operations required dismantling the belt line in order to move it from the No. 2 to the No. 1 entry. *Id.* In so doing, Eagle Energy lost its ability to discharge water on the belt line. *Id.* Consequently, on July 10, 1997, at the suggestion of Mine Safety and Health Administration (MSHA) Inspector Albert "Benny" Clark, Eagle Energy converted the section's incoming fresh water line, ordinarily used for dust suppression during mining operations, to a discharge line through which water could be pumped from the escapeway. *Id.* at 831.

At 4:00 p.m. on August 31, 1997, Eagle Energy converted the discharge line back to an incoming fresh water line to facilitate the anticipated longwall operations. *Id.* at 832-33. Eagle Energy anticipated completing the belt line installation on the morning of September 1, 1997. *Id.* at 832. However, the belt pulled apart when it was started on the morning of September 1. *Id.* Initial attempts to repair the belt were unsuccessful and the belt could not be successfully repaired until approximately 1:30 p.m. on September 2.² These events occurred during Labor Day weekend at a time when Eagle Energy's mine was short-staffed with only management personnel. *Id.* 831.

In its remand, the Commission concluded my disposition of the unwarrantable failure question placed too much emphasis on why Eagle Energy was unsuccessful in preventing hazardous water accumulations. 23 FMSHRC 837 n.8. Rather, the Commission stated the proper inquiry was whether ". . . Eagle Energy's failure to have an alternative method of discharging water readily available in case of problems in assembling the belt . . ." constituted an

² The initial decision determined the belt was repaired by the afternoon of September 2, 1997, between 12 noon and 3:00 p.m. 21 FMSHRC at 1243. For the purposes of this decision I have concluded that the belt repair was completed by approximately 1:30 p.m.

unwarrantable failure. *Id.* In this regard, the Commission stated Eagle Energy's elimination of all means of pumping from the afternoon of August 31 to the afternoon of September 2 was, as a matter of law, an aggravating circumstance for unwarrantable failure purposes. *Id.* at 837. In addition, the Commission determined that Eagle Energy's conduct was "highly negligent." *Id.* at 839.

II. Unwarrantable Failure

The Commission's determination that Eagle Energy's underlying conduct was aggravated in nature is the law of the case. It is well settled that unwarrantable conduct is aggravated conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04(Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7TH Cir. 1995) (approving Commission's unwarrantable failure test). Accordingly, in view of the Commission's determination that the underlying conduct that gave rise to this case is aggravated, as well as the Commission's finding that Eagle Energy was highly negligent in allowing the water accumulations to occur, I am constrained to conclude that Eagle Energy's violation of section 75.380(d)(1) was attributable to its unwarrantable failure. 23 FMSHRC at 839 [*citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (holding that highly negligent conduct on its face suggests an unwarrantable failure)]. The conclusion that Eagle Energy's conduct was unwarrantable also is consistent with the Commission's findings that Eagle Energy's previous history of violations, and its failure to run a discharge hose to the Mudlick Mains, were aggravating factors. *Id.* at 837, 839.

The Commission directed that I reconsider Eagle Energy's history of previous violations. Eagle Energy received seven citations for water accumulations in the 10 Left Escapeway between May and August 1997. *Id.* at 838. The No. 1 Mine is an extremely wet mine. As discussed *infra*, since a period of water accumulations must occur before the pumping cycle can resume, it is apparent that, at the discretion of MSHA inspectors, Eagle Energy can face section 75.380(d)(1) liability on a daily basis. It is in this context that Eagle Energy's conduct was not unwarrantable *per se* solely because of its history of prior violations. 21 FMSHRC at 1249; *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001). (factors relevant to the unwarrantable failure issue must be viewed in the context of the factual circumstances in a particular case). With respect to notice, given the daily pumping of approximately 5 million gallons of water, irrespective of its history of previous violations, Eagle Energy was on notice that diligent compliance efforts were required.

The Commission also directed that I reconsider Eagle Energy's failure to run a 1000 feet long discharge line to the Mudlick Mains. As discussed *infra*, although the discharge waterline was converted to fresh water on August 31, pumping was not supposed to resume until September 1. The Secretary has not shown that the time and man hours necessary to run and connect discharge lines from each pump into a new Mudlick Mains discharge hose, given the holiday weekend shortage of workers, was significantly less than the time it took to fix the belt after it initially broke down on September 1. Moreover, the Mudlick Mains discharge hose was

not suggested by MSHA as a solution to the cited water accumulations of September 2, 1997. The Mudlick Mains discharge hose was suggested by MSHA inspector Clark on July 10, 1997, as an alternative to converting the fresh water line to a discharge line. Tr. III 90, V 290-92.³ This alternative method of discharging water was rejected by Eagle Energy because it was too far to run a discharge line. 23 FMSHRC at 835. The efficacy of a Mudlick Mains discharge line has not been demonstrated.

III. Civil Penalty

I now revisit my initial imposition of a \$2,500.00 civil penalty for this violation. It is noteworthy that the Secretary also initially proposed a \$2,500.00 civil penalty for this violation. Ordinarily, I would be inclined to raise the civil penalty in a remand decision where the citation has been modified to reflect that the cited violation is attributable to an unwarrantable failure. However, the facts of this case fail to justify an increase in penalty.

Citation No. 7163242 states:

The intake escapeway for the 10 Left has water in depths of 1 inches (sic) to 15 inches between cross cut 70 and 71 for a distance of 110 ft., water between 59 and 60 cross cuts in depths of 1 inch to 15 inches for a distance of 90 ft., water in depths of 1 inch to 12 inches between 51 and 52 cross cuts for a distance of 40 ft., and water in depths of 1 inch to 15 inches between beginning 20 ft. inby cross cut No. 49 and extending to cross cut 48 for distance of 120 ft. The water in all areas are (sic) muddy with loose coal and slick bottom. *This condition was reported [in the weekly examination book] on 8-15-97, 8-22-97 and 8-29-97.* (Emphasis added).

The Secretary's proposed \$2,500.00 civil penalty was based on special findings under Part 100 of her civil penalty regulations. 30 C.F.R. Part 100. Section 100.5(h) of those regulations provides for special assessments for "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique circumstances." In this regard, in the special findings in Citation No. 7163242, in substantial testimony presented by the Secretary at trial, and in her appeal, an important, if not crucial, element of the Secretary's unwarrantable failure case has been that *these cited water conditions* existed for more than two weeks, *i.e.*, from August 15 through September 2, 1997, because the weekly examination book lacked notations reflecting remedial

³ The transcript contains a separate volume for each day of the six day hearing. Transcript references note the volume by Roman numeral I through VI followed by the pertinent page number.

pumping.⁴ However, the Commission, in its remand, has affirmed the determination that the evidence fails to establish that the cited conditions existed for more than two days, *i.e.*, from August 31 through September 2, 1997. 23 FMSHRC at 839.

In analyzing the significance of Eagle Energy's inability to pump water for two days, it is essential to focus on the water pumping process. As noted in the initial decision, pumping water requires an alternating cycle of water accumulation and pumping, in that water must be allowed to accumulate to levels significant enough to pump. Tr. V 303-04, 306; 21 FMSHRC at 1236-37, 1247-48. When adequate accumulations occur, the pumps are turned on until the water is drained, at which time the pumps are turned off. Significantly, pumps cannot operate continuously because "dry pumping" would burn out the pump motors. *Id.* at 1237; Tr. III 119, 146-48. Even the Secretary does not assert that the pumps were required to run continuously. In this regard, Eagle Energy's production director John Adkins testified that the large-type portable commercial pumps used in Mine No. 1 do not have floats that automatically turn the pumps on and off. Tr. V 50-1. Adkins' testimony that the pumps must be manually turned on was corroborated by MSHA inspector Terry Price. *Id.* Inspector Clark conceded that water accumulation is an unavoidable consequence of the pumping cycle. Tr. V 306.

Under such circumstances, the evidence suggests Eagle Energy could not have pumped water from the afternoon of August 31, when it converted its discharge water line, until the following afternoon on September 1, 1997, when the water would have first reached depths that were adequate to pump. Although it should have started pumping on September 1, despite efforts by experienced belt assemblers, Eagle Energy was unable to resume pumping until September 2 because the belt broke when it was started on the morning of September 1. Thus, in the final analysis, Eagle Energy's conduct resulted in its inability to pump water for approximately 2½ shifts, from 4 p.m. on September 1 until 1:30 p.m. on September 2. It bears repeating that the duration of the violation was no more than several shifts rather than the duration of more than two weeks alleged by the Secretary in her special findings, at trial and on appeal.

In addressing the duration issue as it impacts on the Secretary's failure to support her special findings, I am cognizant that, in assessing penalties, this Commission makes *de novo* findings based on the record in adjudicatory proceedings, and it is not bound by Part 100 of the Secretary's penalty regulations. *Dolse Brothers Company*, 16 FMSHRC 689, 694 (April 1994) citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although Commission judges are not bound by the Secretary's special findings, ". . . consideration of all incidents of a violation, including the special findings, is appropriate." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 (September 1987). In *Quinland*, the Commission stated:

⁴ Citation No. 7163242 does not rely on Eagle Energy's conversion of its waterline to fresh water on August 31 as a basis for its unwarrantable failure designation. In fact, the testimony reflects that the Secretary first became aware that the discharge hose had been converted to fresh water when it was raised by Eagle Energy at trial. See Tr. V 290-92.

The validity of the allegation of violation and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found

Id. (emphasis in original), *citing Old Ben Coal Co.*, 7 FMSHRC 205, 207-08 (February 1985).

In sum, the Secretary has failed to support her assertion that the violative water accumulations existed for more than two weeks. It follows that the evidence, establishing that the violative water accumulations existed for no more than several shifts, during a period when short-staffed management personnel were focused on repairing the belt that would alleviate the cited violative condition, does not warrant an increase in the \$2,500.00 penalty assessed in the initial decision. Accordingly, a \$2,500.00 civil penalty shall be assessed for 104(d)(1) Citation No. 7163242.⁵

ORDER

_____ In view of the above, **IT IS ORDERED** that 104(d)(1) Citation No 7163242 reflecting that the cited violation of section 75.380(d)(1) is attributable to Eagle Energy Inc.'s unwarrantable failure **IS AFFIRMED**.

IT IS FURTHER ORDERED that Eagle Energy Inc. shall pay a \$2,500.00 civil penalty in satisfaction of 104(d)(1) Citation No. 7163242. Payment is to be made within 40 days of the date of this decision. Upon timely receipt of payment this matter **IS DISMISSED**.⁶

Jerold Feldman
Administrative Law Judge

⁵ While I have not increased the \$2,500.00 civil penalty assessed in the initial decision, I emphasize that the unanticipated problems it encountered in converting to longwall operations did not relieve Eagle Energy of its obligation to maintain its escapeways in this wet mine in a passable condition. *See* 21 FMSHRC at 1251.

⁶ The parties have reached a settlement agreement with respect to two other citations that were the subjects of this civil penalty proceeding. Eagle Energy has agreed to pay civil penalties of \$50.00 in satisfaction of Citation No. 7158529, and \$300.00 for Citation No. 7163240. Thus, the total civil penalty owed by Eagle Energy in this matter is \$2,850.00.

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