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FMSHRC-WDC
March 22, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. PENN 86-44-R
PENN 86-92

RUSHTON MINING COMPANY

BEFORE: Chairman Ford; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), the issues are whether Commission Administrative Law Judge James Broderick erred in finding that Rushton Mining Company ("Rushton") violated mandatory underground coal mine safety standard 30 C.F.R. $ 75.1434(a)(2) and whether the violation was caused by Rushton's "unwarrantable failure" to comply with that standard. For the reasons that follow, we affirm the judge's finding of a violation of section 75.1434(a)(2), but reverse his finding of unwarrantable failure.

The Rushton Mine is an underground coal mine located in Centre County, Pennsylvania. On the morning of November 5, 1985, Joe Colton, an inspector of the Department of Labor's Mine Safety and Health Administration, conducted an inspection of the mine's wire hoist rope. The hoist rope is used to lower and raise miners and materials into and out of the mine. The machinery that powers the hoist rope is located on the surface in the hoist house. The hoist rope is attached to a 4-foot diameter drum which lowers the rope into the mine when the drum is rotated clockwise and raises the rope when the drum is rotated counter-clockwise. From the hoist house, the rope travels approximately 150 feet, where it turns around a sheave wheel

before running another 150 feet to the entrance of the mine. At the mine portal, the rope is attached to mine cars that transport men and materials into the mine. As the drum rotates, the mine cars are lowered approximately 650 feet on a slope that is estimated at 17 degrees. Each fully loaded trip of cars transporting miners into the mine ("man trip") puts a load of approximately 5 tons on the rope.

The hoist rope is one inch in diameter, 1100 feet long, and has a breaking strength of more than 50 tons. It is composed of a fiber core surrounded by six wire strands, with each wire strand consisting of 19 individual wires. The hoist rope in service on November 5, 1985, had been in use since May 11, 1985. Under Rushton's policy of changing the hoist rope every six months, unless its condition requires earlier retirement, the rope was due to be replaced later that week.

Before lowering the man trip on November 5, Frank Petriskie, a hoist operator with more than six years of hoisting experience, visually examined the portion of the rope extending from the hoist house to the man trip. While a man trip with 34 miners aboard was lowered into the mine, he examined the remainder of the rope by inspecting it visually and by draping a rag over the rope as it was reeled so that broken wires could snag on the rag. Tr. 12 (November 18, 1986), Tr. 55 (November 19, 1986). Petriskie found no deficiencies in the rope and recorded the results of his examination in the hoist examination record book. Petriskie's notation was countersigned by his supervisor.

Shortly thereafter, Inspector Colton arrived at the mine to inspect the hoist rope. By then the man trip had reached the bottom of the slope and the miners had left the mine cars. Colton went to the hoist house, took a piece of rag, wrapped it around the hoist rope, and instructed Petriskie to raise the hoist rope at the hoist's slowest speed. As the rope was being reeled in, Colton observed a one-inch long gouge in one strand of the rope. Colton told Petriskie to stop the hoist so that the gouge could be examined more thoroughly. Colton testified that in this area he found at least seven broken wires in one lay length of one strand of the rope. 1/ Colton also testified that about two feet farther down the rope he found another gouge with at least five broken wires in one lay.

Section 75.1434(a)(2) requires that a wire rope be removed from service when the number of broken wires within a rope lay length exceeds fifteen percent of the total number of wires within any strand. 2/

1/ A lay length is defined as "the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 629 (1968).

2/ 30 C.F.R. & 75.1434(a)(2) provides in pertinent part:

Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the.following conditions occurs:

(a) The number of broken wires within a rope lay length, excluding filler wires, exceeds ...

(2) Fifteen percent of the total number of wires

Since three broken wires represented 15.8 percent of the 19 wires in one strand of the rope and each of the two damaged areas contained at least three broken wires within a lay length, Colton determined that Rushton had violated section 75.1434(a)(2) and issued to Rushton an order of withdrawal pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. $ 814(d)(1). 3/ The order indicated that the violation was the result of Rushton's unwarrantable failure, that the violation was of a significant and substantial nature and was due to Rushton's "moderate negligence." Exh. G-1.

Rushton promptly abated the violation by replacing the hoist rope. Subsequently, Rushton initiated a new procedure to examine the rope, whereby Petriskie examines the rope at the hoist house and another miner examines the rope at the sheave wheel while the man trip is lowered into the mine.

At the hearing, Rushton conceded that there were enough broken wires in the hoist rope to satisfy the retirement criteria of section

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within any strand;

* * * *

3/ Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons

> in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. $814(d)(1).

75.1434(a)(2). However, Rushton argued that in order to prove a violation the Secretary of Labor also needs to establish that an operator knew or should have known of the presence of the broken wires. The administrative law judge rejected this argument and held that the existence of defects in the rope sufficient to require its retirement constituted a violation of the standard, regardless of whether Rushton knew or should have known of the existence of the defects. 9 FMSHRC 613-614 (March 1987)(ALJ).

In further concluding that the violation of section 75.1434(a)(2) was the result of Rushton's unwarrantable failure, the judge found that Petriskie was a conscientious employee and that because the defects in the wire rope were substantial and "clearly visible on careful examination," Petriskie's failure to detect the broken wires could be due only to a seriously inadequate method of examination requiring Petriskie to do too many tasks at one time. The judge stated that this inadequacy was recognized by Rushton when, after being issued the withdrawal order, it assigned another miner to help Petriskie perform the rope examination. The judge held that the flawed procedure for examining the hoist rope represented a serious lack of reasonable care on Rushton's part. 9 FMSHRC at 615.

Rushton's petition for discretionary review was granted, and we heard oral argument. On review Rushton reiterates its argument that the standard by its terms requires that an operator must know of the existence of defects before its obligation to retire the rope arises. Therefore, in Rushton's view, to establish a violation, the Secretary must prove the existence of the retirement criteria and that the operator knew that the rope met this criteria and nonetheless failed to retire it.

We reject this argument. In interpreting section 75.1434 we look first to its language. Section 75.1434 states that "wire ropes shall be removed from service when any of the following conditions occur ...." (There is no dispute that the conditions set forth in subsection (a)(2) did in fact occur). "Occur" is defined as to "take place" or to "happen." Webster's Third New International Dictionary 1561 (1971). Thus, the standard expressly requires removal from service when any of the criteria for retirement take place or happen. The standard does not provide or imply any requirement that the operator must first have knowledge of the existence of the conditions causing retirement and then fail to retire it before liability for a violation attaches.

Further, section 2(e) of the Mine Act declares that operators

with the assistance of miners have the primary responsibility to prevent the existence of unsafe conditions in the nation's mines. 30 U.S.C. $.801(e). Finding a requirement of operator knowledge would also run counter to an operator's general responsibility under section 2(e) to prevent unsafe conditions in the first instance. Therefore, given the undisputed fact that the rope met the retirement criteria and was not removed from service, we affirm the judge's finding of a violation of section 75.1434(a)(2).

We now turn to the issue of unwarrantable failure. In Emery

Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip. No. 88-1019 (D.C. Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), we held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history, and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable failure is conduct that is "not justifiable" or is "inexcusable." Only if unwarrantable failure by a mine operator is construed to mean aggravated conduct constituting more than ordinary negligence, can unwarrantable failure sanctions assume their distinct place as intended in the Act's enforcement scheme. See Emery, 9 FMSHRC at 2001. Applying these principles to the case at hand, we hold that substantial evidence does not support the judge's finding that the violation of section 75.1434(a)(2) was the result of Rushton's unwarrantable failure.

The judge's conclusion that Petriskie's failure to detect the broken wires was due to Rushton's seriously inadequate procedure for examining the rope is not supported by the record. Inspector Colton testified that requiring Petriskie to operate the hoist rope and inspect the rope at the same time established a lack of reasonable care on Rushton's part. Colton also based his finding of unwarrantable failure on the fact that he detected the violation shortly after Petriskie had completed his examination without detecting the condition, and because management had countersigned Petriskie's notation of his completed inspection. When Colton inspected the wire rope, however, he used the same examination procedures as Petriskie, using the rag technique and visually examining the hoist rope as it was being reeled. Also, there is no indication in Petriskie's testimony that his duties interfered with his ability to adequately examine the rope. Indeed, Colton testified that "it is conceivable for one person to do both," Tr. 27 (November 18, 1986), and this possibility was reiterated by the Secretary at oral argument before us. Oral Arg. Tr. at 26-27. Colton further conceded that the rope was difficult to examine and that it was possible to miss damaged portions of the rope no matter how carefully it was examined. Tr. 42 (November 18, 1986).

Moreover, Rushton required that the rope be inspected on a daily basis even though the relevant standard (30 C.F.R. $ 75.1433) requires inspection only once every 14 days. Rushton also retired

its rope every 6 months notwithstanding the absence of any of section 75.1434's criteria requiring replacement. In light of the above, we cannot conclude based on this record that Petriskie's failure to detect the damaged portions of the rope resulted from aggravated conduct exceeding ordinary negligence. The judge's finding that Petriskie was a conscientious employee actually supports a conclusion that at most the oversight resulted from no more than ordinary negligence. The fact that Petriskie's examination took place only shortly before Colton discovered the damage and that Petriskie's report had been countersigned would not

convert ordinary negligence into aggravated conduct. 4/

Accordingly, the judge's finding that Rushton violated section 75.1434(a)(2) is affirmed, the judge's conclusion that the violation was caused by Rushton's unwarrantable failure to comply is reversed, and the proceeding is remanded for reconsideration of the civil penalty. The section 104(d)(1) order is modified to a citation issued pursuant to section 104(a). 30 U.S.C. $ 814(a).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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4/ In view of our disposition of the unwarrantable failure issue, we need not address Rushton's argument that the judge erred in considering Rushton's change in its rope examination procedure after issuance of the withdrawal order.

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