CCASE:
MSHA V. QUINLAND COALS
DDATE:
19880629
TTEXT:

FMSHRC-WDC
June 29, 1988

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 85-169

QUINLAND COALS, INC.

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act"), is before us for a second time. In a previous decision, we remanded the matter to Administrative Law Judge William Fauver for a determination of whether a violation of 30 C.F.R. $ 75.200, the mandatory roof and rib control standard, was the result of the unwarrantable failure of Quinland Coals, Inc. ("Quinland") to comply with the standard. 9 FMSHRC 1614, 1625 (September 1987). The sole issue before us now is whether the judge, on remand, erred in concluding that the violation of section 75.200 was the result of Quinland's unwarrantable failure to comply. 9 FMSHRC 2159 (December 1987) (ALJ). For the reasons that follow, we affirm.

The underlying facts and procedural history are set forth in detail in our prior decision (9 FMSHRC at 1614-1617) and may be summarized here. Quinland owns and operates the Quinland No. 1 Mine, an underground coal mine located in southern West Virginia. On October 11, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the No. 7 seal located in an entry in the East Mains area of the mine. 1/ In the

entry, near a crosscut, the inspector observed a large roof fall. As the inspector walked toward the seal, he observed broken roof support posts lying on the entry floor. He also observed cracks in the roof of the entry which ran from the roof fall to and over the seal. In addition, one side of the seal was crushed by the weight of the roof. The inspector found that these

_____

1/ The seal was a concrete block bulkhead notched at least six inches into the ribs and flush with the floor and the roof of the entry. It was constructed following a methane explosion, and its purpose was to seal off the area where the explosion occurred from the rest of the mine. Tr. 21. See also Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral. and Related Terms 975 (1968).

conditions constituted a violation of 30 C.F.R. $ 75.200, in that the roof was not adequately supported to protect persons from falls. 2/ The inspector also found that the violation resulted from Quinland's unwarrantable failure to comply with section 75.200. Accordingly, he cited the violation in a withdrawal order issued pursuant to section 104(d)(1) of the Act. 3/ Quinland abated the violation by installing

_____

2/ Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. $ 862(a), provides in part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

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) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the

approximately 20 roof support posts in the entry.

Subsequently, the Secretary proposed a civil penalty for the violation of 75.200 and Quinland requested a hearing, denying that it had violated the standard and denying, in the alternative, that it was guilty of an unwarrantable failure to comply in the event a violation should be found. Following an evidentiary hearing, the judge issued a decision in which he found a violation of 75.200 but made no finding as to whether the violation resulted from Quinland's unwarrantable failure to comply with the standard. 8 FMSHRC 1175, 1178 (ALJ). Reviewing this decision, we concluded that the judge erred in failing to consider Quinland's challenge to the unwarrantable failure finding associated with the violation of 75.200, and we remanded the matter to the judge. 9 FMSHRC at 1619-23.

In his decision on remand, the judge briefly reviewed the meaning of the phrase "unwarrantable failure." He noted the discussions of unwarrantable failure in the pertinent legislative history and in U.S. Steel Corp., 6 FMSHRC 1423 (June 1984). The judge opined that whether the "legislative history definition" of unwarrantable failure or the U.S. Steel explanation of unwarrantable failure was applied, Quinland unwarrantably failed to comply with the standard. 9 FMSHRC at 2160. The judge found that the roof conditions were highly dangerous and were known or should have been known to mine management prior to the inspector's issuance of the order. Id. The judge also found that the mine foreman was aware that the roof control plan required broken timbers to be replaced and that some timbers had not been replaced. 9 FMSHRC at 2160. The judge stated, "the ... evidence shows that the violative roof condition was known by [Quinland] or should have been known by [Quinland] before [the violation was cited], and the failure to correct this condition was due to an unwarrantable failure to comply with [section] 75.200." Id.

The judge issued his decision on December 10, 1987. On Dec. 11, 1987, the Commission issued decisions in two cases addressing in detail the proper interpretation of the term "unwarrantable failure" as used in 104(d)(1) of the Mine Act. Based upon the ordinary meaning of th term, the purpose of unwarrantable failure sanctions under the Mine Act, the legislative history, and judicial precedent, we held that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (Dec. 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (Dec. 1987). On review, Quinland notes that in analyzing the issue of unwarrantable failure, the judge did not apply the aggravated conduct standard enunciated in these subsequently issued decisions. Further, Quinland asserts that in failing to comply with 75.200, it was "guilty of no more than ordinary

negligence." Q. Br. 6. We do not agree.

---

Secretary determines that such violation has been abated.

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

Even though the judge did not literally anticipate and apply the aggravated conduct standard of unwarrantable failure enunciated in Emery, his treatment of the question of unwarrantable failure in this case is in accord substantively with that decision. The judge relied upon the statement in the legislative history that unwarrantable failure to comply means "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Senate Committee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id. at 1602. The judge also relied on United States Steel, supra, 6 FMSHRC at 1437, wherein we stated that unwarrantable failure may be proved by showing that a violative condition or practice resulted from an operator's "indifference, willful intent or serious lack of reasonable care."

In concluding in Emery that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence," we looked to the same legislative history. 9 FMSHRC at 2002. We further noted that in Zeigler Coal Co., 7 IBMA 280, 295-96 (March 1977), the Interior Board of Mine Operations Appeals had interpreted unwarrantable failure to mean the failure to abate conditions or practices the operator "knew or should have known existed or which it failed to abate because of [a lack of] due diligence, or because of indifference or a lack of reasonable care" and that in drafting the Mine Act, the Senate Committee report cited Zeigler with approval. Emery, supra, 9 FMSHRC at 2002 (citing S. Rep. 181, 95th Cong., 1st Sess. at 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978)). We concluded that the terms used in the legislative history and in Zeigler, including the formulation used by the judge in this case, in large measure describe aggravated forms of operator conduct constituting more than ordinary negligence. 9 FMSHRC at 2003-04. Thus, we hold that the judge's approach to resolving the unwarrantable failure issue is sufficiently congruent with the subsequently announced "aggravated conduct" test to allow us to proceed to an examination of the evidence supporting the judge's finding.

The next question, therefore, is whether substantial evidence supports the judge's finding that the violation of section 75.200 was the result of Quinland's unwarrantable failure. Applying the principles enunciated in Emery to the case at hand, we hold that it

does. Substantial evidence reveals that the violation was the result of Quinland's serious lack of reasonable care. The conditions indicating that the roof was not adequately supported were extensive and visually obvious. The judge credited the inspector's testimony that, in addition to the broken posts that had not been replaced and were lying on the floor of the entry, there was a large roof fall near the intersection of the entry and the crosscut, there were cracks in the roof running from the intersection to and over the seal, and one side of the seal was being crushed by the weight of the roof. 8 FMSHRC at 1178. We have accepted these findings previously. 9 FMSHRC at 1618.

The mine foreman testified without dispute that the mine had a history of bad roof conditions similar to those involved in this violation. Tr. 124; 9 FMSHRC at 1618. In addition, the judge concluded that the roof conditions were highly dangerous, and we agree. 9 FMSHRC at 2160. Further, Quinland itself acknowledges that the roof conditions existed "for a considerable length of time and were repeatedly observed by ... the operator." Q. Br. 7. Given the extensive and obvious nature of the conditions, the history of similar roof conditions, and Quinland's admitted knowledge of the conditions, we find that Quinland failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from Quinland's unwarrantable failure. 4/

One final aspect of the case requires comment. In his decision the judge affirmed his "previous assessment of a civil penalty for $800" for the violation. 9 FMSHRC at 2160. The Secretary correctly notes that the civil penalty previously assessed by the judge was $850, not $800. S. Br. 8 n.3; 8 FMSHRC at 1180. The Secretary requests that we correct that inadvertent error. Quinland has not objected. Accordingly, we affirm the judge's unwarrantable failure finding for the violation of section 75.200, and we amend the penalty assessment to $850.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

---

4/ Quinland also asserts that prior to October 11, 1984, the conditions were "repeatedly observed" by MSHA's inspectors but not cited as a violation of section 75.200. Quinland argues that MSHA's failure to previously cite a violation is "compelling evidence that [Quinland's] conduct [was] not negligent." Q. Br. 11. Our review of the record does not reveal that MSHA's inspectors previously observed the conditions that were cited as a violation on the date at issue.

~710
Distribution

Dennis D. Clark, Esq.
Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Anthony J. Cicconi, Esq.
Shaffer & Shaffer
330 State Street
P.0. Box 38
Madison, West Virginia 25130

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041