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MSHA V. THE HELEN MINING

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSIONER
WASHINGTON, DC

December 15, 1988

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

v.

Docket Nos. PENN 86-94-R

PENN 86-181

THE HELEN MINING COMPANY

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The issue before us is whether Commission Administrative Law Judge Avram Weisberger properly found that a violation of 30 C.F.R. § 75.200, the mandatory roof control safety standard for underground coal mines, was not caused by the unwarrantable failure of The Helen Mining Company ("Helen") to comply with the standard. 9 FMSHRC 1095 (June 1987)(ALJ). For the reasons that follow, we affirm the judge's decision.

The relevant facts are undisputed. The Homer City Mine is an underground coal mine located in Homer City, Pennsylvania. Homer City is the only underground coal mine in the country that utilizes the shortwall mining method. The shortwall method is a pillar extraction system whereby the roof is temporarily supported by hydraulically-pressurized shields while a remote controlled continuous miner cuts 10-foot deep swaths from the face. The extracted coal is removed from the face area by a conveyor belt or pan line. The hydraulic shields are advanced into the void created by the cut as the face is advanced and are repressurized against the newly exposed roof. As the shields move forward, the roof that the shields had been supporting "caves" or falls creating a "gob" area behind the shields. If, because of the structure of the overburden, the main roof does not break, it will start to bend, exerting extreme pressure in the roof over the tops of the shields. Although the shields support this pressure, the roof between the inby

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end of the shields and the face will show signs of stress and

start to fracture, resulting in small roof falls or "pot-outs."

Tr. 426-27, 433, 435-36; Battistoni Deposition, p. 16.

In August 1985, Helen installed in its H-Butt No. 4 shortwall section new Gullick Dobson shields that Helen's engineers had designed to meet the specific needs of the Homer City Mine. 1/ On January 7, 1986, Helen began using a new continuous mining machine, the Joy 14 CM, in the section. Since the remote controls on the Joy miner differed significantly from those of the machine that had been previously used, operators of the Joy 14-CM experienced some difficulty in precisely controlling the cuts made. The operators overcut the coal seam creating changes in the height of the roof of the mine. "Step-ups" in the roof generated by the overcuts ranged up to 7 inches and averaged between 3-4 inches. 2/

On January 28 1986, William McClure, an inspector with the Department of Labor s Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine. McClure was accompanied by his supervisor, Robert Nelson. Upon arriving at the H Butt No. 4 shortwall section, McClure noted that the first four shields, located in the headgate entry area, had cribbing installed between their main canopies and the mine roof, due to gaps in the roof created by pot-outs. McClure also observed that of the 53 shields, 13 had forepole pads that were not in contact with the roof. The inspector determined that four of the 13 forepole pads were not in contact due to pot-outs and the remaining nine were not in contact because a step-up had been created in the roof on the prior pass across the face. McClure measured gaps of 10 to 13 inches from the tops of the forepole pads to the roof on at least four of the shields, and lesser gaps of 2 to 10 inches over the other nine shields. The 13 forepole pads not in contact with the roof were within 4 feet of the face.

The Homer City mandatory roof control plan required that:

The space in between the shield canopy extensions and the coal face shall not exceed 4 feet. Where this spacing is exceeded, roof support shall be installed not to exceed 4 foot spacing before any work or travel is permitted in this unsupported area, except for the purpose of installing supports.

1/ The shields have five major components: (1) the main canopy, which supports up to 688 tons; (2) the forward canopy, which supports up to 44 tons and can be cantilevered against the roof; (3) the forepole extension pad (or forepole pad), which supports up to 13.9 tons and which can be extended from the forward canopy; (4) the shield hydraulic legs; and (5) the ram arm. which pushes the conveyor forward and pulls the shield ahead as the face advances.

2/ "Step-ups" are vertical overcuts into the mine roof by the

continuous miner at a height greater than the height of the previous cut. Tr. 714-722; see also Tr. 495-498.

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Exhibit GX-2, Diagram 16(b). McClure interpreted this provision to require the forepole pads to be in contact with the roof at a point no greater than 4 feet from the face. McClure also found that the violation of section 75.200 was significant and substantial in nature and the result of Helen's unwarrantable failure to comply with the mandatory safety standard. Therefore, the inspector issued an order to Helen pursuant to section 104(d)(2) of the Mine Act alleging a violation of section 75.200. 3/ The order was terminated within 45 minutes of its issuance after cribbing was installed between the forepole pads of some shields and the roof, and other shields were repositioned so that the forepole pads contacted the roof.

Helen contested the issuance of the order and the Secretary's proposed civil penalty for the violation. Helen contended that the language of its roof control plan did not require the forepole extension pads to contact the mine roof within 4 feet of the face, that MSHA had never before cited the lack of contact between forepole pads and the roof as a violation of the plan, and that installing cribbing above the forepole pads posed a greater hazard than allowing forepole pads to not be in contact with the roof.

3/ Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), states:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

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

The roof ... of all active ... working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof.... 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....

No person shall proceed beyond the last permanent

support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners....

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Following an evidentiary hearing the judge determined that Helen did not violate its approved roof control plan because "the ... plan did not specifically require the forepole pads to be in [contact] with the roof...." 9 FMSHRC at 1101. The judge noted, however, that section 75.200 requires, in addition to compliance with the approved roof control plan that "the roof ... of all ... working places ... be supported or otherwise controlled adequately to protect persons from falls." 9 FMSHRC at 1103. The judge observed that the Commission has stated that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." Id. (citing Canon Coal Company, 9 FMSHRC 667. 668 (April 1987)). Finding that "... a substantial hazard ... [exists] as the gap between the roof and the forepole pad can lead to unsupported roof being exposed for the duration of a pass by the [continuous] miner," and that "a reasonably prudent person familiar with the mining industry would have recognized the hazard," the judge concluded that Helen, by allowing the gaps to exist, had failed to support or otherwise adequately control the roof at the shortwall face in violation of section 75.200. 9 FMSHRC 1104-05. The judge also concluded that the violation significantly and substantially contributed to a mine safety hazard. 9 FMSHRC at 1105-06.

In determining whether the violation of section 75.200 constituted an unwarrantable failure to comply with the regulation, the judge found that Helen reasonably interpreted its approved roof control plan to not require the forepole pads to be in contact with the roof, had a long history of not being cited by MSHA for similar conditions and had a reasonable belief that miners would be exposed to a serious safety hazard if they were required to install cribbing over forepole pads. Therefore, the judge concluded that Helen's failure to comply with the requirements of section 75.200 was not the result of either indifference, willful intent, or serious lack of reasonable care. 9 FMSHRC at 1106 07.

We granted the Secretary's petition for discretionary review which challenges only the judge's conclusion that the violation did not result from Helen's unwarrantable failure. The Secretary contends that the judge set the legal standard for an unwarrantable

failure at a higher threshold than that intended by Congress. The Secretary argues that application of a correct unwarrantable failure standard to the facts in this case would result in a finding that Helen unwarrantably failed to comply with section 75.200. The Secretary also asserts that the judge erroneously limited his consideration of those aspects of Helen's violative conduct that might be indicative of an unwarrantable failure.

In determining whether or not Helen's violation of section 75.200 resulted from an unwarrantable failure the judge relied upon the holding in *United States Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1981), that "an unwarrantable failure may be proved by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of indifference, willful intent, or serious lack of reasonable care." Subsequent to both *U.S. Steel* and the judge's

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decision in the present case, however, we further addressed the proper interpretation of the term "unwarrantable failure" as used in section 104(d) of the Mine Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987) and *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). After careful consideration of the ordinary meaning of the term, the purpose of unwarrantable failure sanctions under the Mine Act, and the legislative history and judicial precedent, 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." 4/ In *Emery* we determined that the same "indifference willful intent or serious lack of reasonable care" language from *U.S. Steel*, relied upon by the Judge in large measure describes aggravated forms of operator conduct constituting more than ordinary negligence. 9 FMSHRC at 2003-04. Accordingly, as we did in *Emery*, we find that the judge's approach to resolving the unwarrantable failure issue in this case is sufficiently congruent with the subsequently announced "aggravated conduct" standard to allow us to proceed to an examination of the evidence supporting the judge's finding. See also *Quinland Coals, Inc.*, 10 FMSHRC 705, 707 08 (June 1988). Applying *Emery*, we find that substantial evidence supports the judge's finding that Helen did not unwarrantably fail to comply with section 75.200.

Witnesses for both parties testified that Helen's roof control plan did not expressly address whether the forepole extension pads had to contact the roof within 4 feet of the face. Helen's witnesses testified without dispute that there had never been a requirement in Helen's roof control plan that the forepole pads be in contact with the roof at any distance from the face. All witnesses to whom the question was posed also agreed that the roof control plan expressly

excluded forepole pads from the bearing area specification for the shields. Tr. 218, 367, 451, 512, 516, 564- 65 605, 685. Further, Helen's witnesses consistently testified that the function of the forepole pads is to provide coverage from falling roof debris rather than to support the roof, and General Mine Foreman Dunn testified, without contradiction, that the primary roof support component on the Gullick Dobson shield is the main canopy area, located directly over the shield's hydraulic legs, rather than the forepole pad. Tr. 578-83, 601. 618-22, 628-29, 645-50, 743 44, 761.62. We find this evidence concerning the design and function of Helen's Gullick Dobson shortwall shield system provides a substantial evidentiary basis supporting the judge's finding that Helen's conduct in relation to its violation of the standard did not constitute aggravated

4/ The judge focused his determination of unwarrantable failure upon Helen's motive in not correcting the violative condition. The judge stated "[t]he critical issue is not what caused the violative condition. but rather the operator's motive in not correcting the violative condition." 9 FMSHRC at 1106. Emery makes clear that in resolving unwarrantable failure questions, the operator's total conduct "in relation to a violation of the Act" must be examined. This examination includes the operator's conduct in causing the violation, remedying it, or both, depending upon the circumstances of the case.

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conduct exceeding ordinary negligence under Emery. Although this substantial evidence is sufficient for affirming the judge's finding, we also note other factors we find supportive of the judge's finding of no unwarrantable failure.

First, Helen officials testified that MSHA had not issued any citations or orders relative to the forepole pads not being in contact with the roof prior to the order in issue and the Secretary introduced no evidence of prior enforcement actions that would have put Helen on notice that forepole pad contact with the roof was required. In fact, Helen's evidence indicated that similar shields had been used for over 10 years and no controversy concerning such gaps had ever arisen. 9 FMSHRC at 1101, 1107: Tr. 566, 596. 681. 763.

Second, pursuant to meetings between Helen and MSHA officials after the subject order was terminated the Secretary approved an amended roof control plan that requires "... whenever abnormal conditions are encountered, and two or more adjacent [forepole pad] tips cannot be made to contact the roof, lagging should be installed." Exhibit GX-2, p. 15. The fact that even under the revised plan, not all forepole pads are required to be in contact with the roof can be

viewed as supporting Helen's belief that the forepole pads did not have to contact the roof in order to maintain adequate roof support. Third, there is also substantial record support for the judge's finding that Helen's officials reasonably believed that installing cribbing over the forepole pads would expose a miner to a greater hazard of roof fall than allowing the forepole pads to remain in a non-contact status. Helen's witnesses testified clearly and unequivocally that they believed the chance of a miner being injured by falling roof debris was significantly higher if the miner was installing cribbing than if some of the forepole pads were not in contact with the roof for the duration of a pass by the continuous mining machine. Tr. 609 10, 626, 769, 793. We note that the reasonableness of Helen's belief is lent some support by the fact that although no miners were injured under Helen's practice of not installing cribbing between the forepole pads and the roof, in the period between the issuance of the order in question and the hearing before the judge, during which period Helen installed cribbing between the forepole pads and the roof, two miners were injured by falling roof debris while installing cribbing. Tr. 273, 608.

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In sum, in light of all the above, we conclude that substantial evidence supports the judge's finding of no unwarrantable failure and that the failure of Helen to install cribbing in the gaps did not constitute aggravated conduct exceeding ordinary negligence.

Accordingly, we affirm the finding of the judge that Helen did not unwarrantably fail to comply with the requirements of section 75.200.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Colleen A. Geraghty, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, VA 22203

Ronald B. Johnson, Esq.

Volk, Frankovitch, Anetakis,

Recht, Robertson & Hellersted

3000 Boury Center

Wheeling, West Virginia 26003

Administrative Law Judge Avram Weisberger

Federal Mine Safety and Health Review Commission

5203 Leesburg Pike, Suite 1000

Falls Church, Virginia 22041