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UTAH POWER & LIGHT V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 24, 1990

UTAH POWER & LIGHT COMPANY,
MINING DIVISION

v. Docket No. WEST 89-161-R

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

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

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act"), involves issues of whether Utah Power & Light Company, Mining Division ("UP&L") violated 30 C.F.R. 75.400, a mandatory safety standard prohibiting accumulations of combustible materials, even if UP&L complied with the cleanup plan it established pursuant to 30 C.F.R. 75.400-2. 1/ Also at issue are whether the alleged violation was of a

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1/ 30 C.F.R. 75.400, which repeats the statutory language of section 304(a) of the Mine Act, U.S.C. 864(a), provides:

> Coal dust. including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

30 C.F.R. 75.400-2, entitled "Cleanup program," provides:

A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to

significant and substantial nature and whether it was caused by UP&L's unwarrantable failure to comply with the cited standard. Commission Administrative Law Judge John J. Morris concluded that UP&L violated 30 C.F.R. 75.400 and that the violation was of a significant and substantial nature and caused by UP&L's unwarrantable failure to comply. 11 FMSHRC 710 (April 1989)(ALJ). For the reasons set forth below, we affirm the judge's finding of a violation and his finding that the violation was of a significant and substantial nature, but reverse his unwarrantable failure determination.

UP&L operates the Cottonwood Mine, an underground coal mine located in Utah. On March 20, 1989, Department of Labor Mine Safety and Health Administration ("MSHA") Inspector Donald Gibson, accompanied by Forrest Adison, UP&L's Fire Boss, and James Behling, UP&L's Safety Engineer, conducted an electrical inspection of the Cottonwood Mine. In the 9 East working section, Inspector Gibson observed a shuttle car tear down part of the line curtain located along the left rib. When Gibson looked behind the line curtain, he observed loose coal that he believed constituted an impermissible accumulation in violation of section 75.400 (n.1 supra). The mass of loose coal measured 104 feet-6 inches in length, 14 to 31 inches in depth, and 12 to 34 inches in width, and weighed approximately 500 to 800 pounds. Tr. 80. Gibson issued UP&L a withdrawal order pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), citing a violation of section 75.400 and including significant and substantial and unwarrantable failure findings.

When Inspector Gibson and Mr. Behling arrived on the surface, Behling showed Gibson a copy of UP&L's cleanup plan established pursuant to section 75.400-2 (n.1 supra). Gibson's review of the cleanup plan did not affect his decision to issue the withdrawal order because, in his opinion, the cleanup plan conflicted with section 75.400 in that it permitted accumulations of combustible materials to exist. Gibson testified that he issued the order because, among other things, he determined that there had been production of coal in the 9 East working section on March 17, 1989, and that the cited accumulations resulting from that production had not been removed on subsequent idle shifts. He was of the opinion that there were possible ignition sources in that area and he had observed combustible float coal dust on rock-dusted surfaces. Gibson determined that, by the time the next cross-cut was driven and the loose coal would have been cleaned up under UP&L's cleanup plan (discussed below), the cited mass of coal would have almost doubled in size. Gibson was also aware of tests performed by the Department of Interior's Bureau of Mines that he believed demonstrated that similar amounts of loose coal would propagate an explosion. Exh. R-3; Tr. 106-07.

Based on these same considerations, Gibson further concluded that a hazard was created by the cited conditions, that it was reasonably likely that an injury could result from those conditions and that the injury would be of a serious nature. Accordingly, he found that the violation was of a significant and substantial nature. Gibson also

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the Secretary or authorized representative.

determined that the alleged violation resulted from UP&L's unwarrantable failure to comply with the standard.

UP&L contested the withdrawal order and the matter proceeded to an evidentiary hearing before the judge. UP&L contended that it could not be cited for a violation of section 75.400 because it was complying with its section 75.400-2 cleanup plan and that, under that plan, it was not required to clean up the cited coal in the entry until the next connecting cross-cut was driven. Specifically, according to UP&L, its cleanup plan required that, after a continuous mining machine mines a 40.foot five-cut sequence in an entry under development, the continuous miner is to be backed up and trammed forward to clean the "first cuttings" from both sides of the 40-foot cut. Tr. 23, 174; Exh. C-3. ("First cuttings" are pieces of coal dislodged by the continuous miner when the initial development work is performed.) The plan further provided that any coal remaining behind the line curtain following the initial cleanup "will be cleaned after the connecting cross-cut is broken through to prevent the short circuiting of face ventilation." Exh. C-3; Tr. 18, 35-37, 188. UP&L explained that, on one occasion less than three months prior to Gibson's inspection, it had been cited for a violation of a mandatory safety standard when it failed to follow its cleanup plan. On January 6, 1989, UP&L had rolled up the line curtain in the Third South Section of the Cottonwood Mine in order to clean up loose coal behind the line curtain with an electric scoop before the connecting cross-cut had been driven. Tr. 198. As a result, MSHA Inspector Dick Jones issued a citation to UP&L for violation of 30 C.F.R. 75.316, alleging that rolling up the curtain had disrupted fac ventilation. Inspector Jones noted in that citation that "the approved cleanup plan states that the curtain side of the entry will not be cleaned until the connecting cross-cut has been made." Exh. C-4.

In his decision, Judge Morris determined that the largely uncontroverted testimony regarding the substantial amount of loose coal discovered by the inspector established a violation of section 75.400, citing Old Ben Coal Co., 1 FMSHRC 1954 (December 1979)("Old Ben I"). 11 FMSHRC at 727. The judge was not persuaded by UP&L's evidence that the coal was partially wet or damp noting that a fire could quickly dry damp coal. Id. The judge also rejected UP&L's reliance on its cleanup plan on the ground that "a cleanup plan developed pursuant to 75.400-2 cannot overrule the mandatory duties required in 75.400." Id.

Crediting Inspector Gibson's relevant testimony, the judge further held that the violation was of a significant and substantial nature, citing Mathies Coal Company, 6 FMSHRC 1 (January 1984). 11 FMSHRC at 728. With respect to the unwarrantable failure issue, the judge determined that UP&L's conduct was aggravated conduct constituting more than ordinary

negligence. 11 FMSHRC at 728-29. In reaching this conclusion, the judge credited testimony that MSHA and UP&L "had discussed the practice of cleaning first cuttings" (11 FMSHRC at 728), and found that UP&L could employ other adequate methods of cleanup that would not allow accumulations to exist and, unlike the rolling up the line curtain, would not sacrifice face ventilation (11 FMSHRC at 728-29).

On review, UP&L challenges the judge's findings on four grounds: (1) UP&L did not violate section 75.400, most particularly because it was complying with its section 75.400-2 cleanup plan; (2) section 75.400 is unconstitutionally vague as applied in this case; (3) substantial evidence does not support the judge's finding that the violation was of a significant and substantial nature; and (4) substantial evidence does not support the judge's unwarrantable failure finding. We consider each of these challenges in turn.

With respect to the issue of violation, the Commission previously has held that section 75.400 "is violated when an accumulation of combustible materials exists." Old Ben I. 1 FMSHRC at 1956. The Commission has further held that a violative "accumulation" exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980)("Old Ben II").

In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben II, 2 FMSHRC at 2808. The Commission emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats "demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." Old Ben I, 1 FMSHRC at 1957. The Commission also indicated that the inspector's judgment that a prohibited accumulation exists is "subject to challenge before the administrative law judge." Old Ben II, 2 FMSHRC at 2808 n.7. Within the context of the broadly phrased standard in question, which applies to myriad mining conditions, the inspector's judgment will be reviewed judicially by reference to an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent. See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

Applying the foregoing principles to the record in this case, we conclude that the judge properly determined that UP&L violated section 75.400. Substantial evidence supports the judge's finding that the cited mass of loose coal constituted a prohibited "accumulation" within the meaning of the Old Ben decisions. The loose coal measured some 104 feet in length, averaged some 23 inches in width and 22 inches in depth, and

weighed approximately 500 to 800 pounds. Inspector Gibson testified that this amount of loose coal would likely cause an explosion if an ignition source were present. Among other things, he relied upon Bureau of Mines' tests showing that as little as two 300-pound piles of loose coal can propagate an explosion even if an entry is adequately rock-dusted. Fire Boss Adison, who helped Gibson measure the loose coal, stated that there was an excessive amount of loose coal behind the line curtain and agreed that the condition was violative of section 75.400.

There was also uncontroverted testimony that this amount of loose coal would double in size from a length of 104 feet to approximately 210 feet by the time that the next cross-cut was driven and the loose coal cleaned up under UP&L's cleanup plan. Tr. 90-91, 97, 101-02, 140. The fact that there was some dampness in the coal did not render it incombustible and, as both the judge and inspector properly noted (11 FMSHRC at 727; Tr. 96), wet coal can dry out in a mine fire and ignite. See Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985). In light of this evidence, a reasonably prudent person familiar with the mining industry would have recognized that this relatively large amount of coal was an accumulation prohibited by section 75.400.

UP&L, however, argues that the Old Ben precedent is inapplicable because those decisions did not address the manner in which section 75.400 is to be harmonized with 75.400-2. As noted, UP&L contends that it cannot be cited for a violation of section 75.400 because it was complying with its section 75.400-2 cleanup program. We disagree. Section 75.400-2 implements section 75.400, not vice versa. A cleanup plan cannot establish procedures that allow coal and other combustible materials to accumulate in violation of section 75.400. In agreement with the judge, we hold that an operator cannot avoid a finding of violation of section 75.400 by arguing that it was merely following a section 75.400-2 cleanup plan that it had established. 2/

UP&L also points to language in MSHA's Program Policy Manual ("Manual") to the apparent effect that existing "accumulations" may be removed on a regular basis. See Exh. R-3 at 51-53. The Manual language cited by UP&L must be read in context with the Manual's explanation of the intent of section 75.400: "The intent of this Section is to prevent the accumulations of the specified combustible materials in order to reduce the dangers of mine fires and explosions." Exh. R-3 at 51 (emphasis added). More importantly, the Manual's instructions and commentary are not officially promulgated and do not prescribe rules of law binding upon the Commission. E.g., King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). The interpretation of section 75.400 advanced by the Secretary and adopted in the Old Ben decisions overcomes any arguable conflict posed by language in the Manual. Finally, we also reject UP&L's argument that section 75.400 is unconstitutionally vague as applied in this case. As discussed above, in light of the nature of the accumulation in question, the inspector's judgment that it constituted a prohibited accumulation satisfies an objective reasonable person test.

2/ Although a section 75.400-2 cleanup plan need not be approved by MSHA, we believe that this case illustrates the strong desirability of communication and cooperation between operators and the Secretary in the

development of operators' cleanup plans. Such coordination is of great importance in ensuring the safety of miners and in implementing the policies of the Mine Act. Cf. Southern Ohio Coal Company, 10 FMSHRC 138, 143 (February 1988); Jim Walter Resources, Inc., 9 FMSHRC 903, 909 (May 1987).

Accordingly, we affirm the judge's conclusion that UP&L violated section 75.400.

We also hold that substantial evidence supports the judge's conclusion that the violation was of a significant and substantial nature. Although we agree with UP&L that the judge could have provided a more detailed analysis of this issue, he credited Inspector Gibson's testimony, which is detailed.

A violation is properly designated as being of a significant and substantial nature "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and the violation itself must be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

With respect to the first element, we have concluded above that the judge properly found that UP&L violated section 75.400. The second element, whether a measure of danger to safety was contributed to by UP&L's violation, is also established. The relevant legislative history demonstrates that Congress recognized that experience has proven that loose coal can propagate an explosion and must therefore be kept to a minimum. See Old Ben I, 1 FMSHRC at 1957, citing S. Rep. No. 411, 91st Cong., 1st Sess. 65, reprinted in Senate Subcommittee 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 191 (1975). Inspector Gibson discovered loose coal in an active working area in which possible ignition sources existed, and in which burn areas had previously been discovered. The mass of coal was large and in an amount that the Bureau of Mines has found could propagate an explosion. Therefore, a "measure of danger to safety" was presented by the cited accumulation.

With respect to the third element, a reasonable likelihood of injury caused by the violation, Inspector Gibson testified that the continuous miner was generating dust and sparks and had a trailing cable with 950 volts of alternating current. Tr. 95-98, 101. He stated that other possible ignition sources in the 9 East working section, such as the trailing cables of the shuttle car and roof bolter, both of which conducted 480 volts of alternate current, could combine with the loose coal and cause an explosion. Tr. 106. Gibson also noted that there was float coal dust on rock-dusted surfaces within the area, giving it a "salt and pepper" appearance. Tr. 96. The fact that some of the coal accumulations were damp was not determinative because, as noted above, damp coal dries in the presence of fire. Inspector Gibson properly took into consideration the fact that, in the normal course of operations, the accumulation would expand from 104 feet in length to approximately 210 feet by the time that the next connecting cross-cut was driven and further cleanup undertaken. Tr. 90-91. There was also evidence in the record that burn areas had been encountered in the 9 East working section and that diesel equipment was sometimes used. Tr. 38, 43, 189, 217. The foregoing evidence supports the judge's finding that the hazard contributed to by the violation, an ignition or explosion in the active workings in question, posed a reasonable likelihood of injury to any miners working there.

The fourth element, a reasonable likelihood that the injury in question would be of a reasonably serious nature, was also established. The area in which the accumulation existed was an active working section. Gibson testified that he believed that it was reasonably likely that any injuries resulting from a fire or explosion would be serious, including burns and, possibly, a fatality. Tr. 106. Gibson's testimony on this point was uncontroverted and proves the fourth element.

We have considered other evidence in the record relied upon by UP&L that mitigates the degree of danger created by the violation. We conclude, however, that substantial evidence supports the judge's finding that the violation was of a significant and substantial nature. We turn to the judge's finding that the violation also resulted from UP&L's unwarrantable failure to comply with the standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), 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 in the Mine Act, the Act's legislative history, and judicial precedent. We stated that while negligence is conduct that is "inadvertent",

"thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Emery, supra, 9 FMSHRC at 2001.

The judge found that UP&L's decision to mine in a manner that allowed accumulations to exist amounted to an unwarrantable failure to comply with section 75.400. 11 FMSHRC at 729. The judge credited

testimony that MSHA had discussed with the operator's upper management the practice of cleaning up first cuttings. The judge rejected UP&L's argument that it was justified in relying on the prior MSHA citation which was issued when UP&L rolled up the line curtain in order to clean up loose coal. 11 FMSHRC at 728-29. The judge found that UP&L was not, in fact, faced with the choice of either rolling up the line curtain to clean up the loose coal behind it and receiving an "Inspector Jones citation" for inadequate ventilation at the face, or waiting to clean until after the cross-cut had been driven and receiving an "Inspector Gibson citation." The judge determined that UP&L could use other cleanup methods which would not violate its ventilation plan and would not allow accumulations to exist. 11 FMSHRC 728-29.

While we agree with the judge that UP&L made a conscious decision to adhere to its cleanup plan, such conduct does not rise to the level of aggravated conduct constituting more than ordinary negligence. The evidence showed that UP&L chose to follow its cleanup plan in good faith, believing that such conduct was consistent with applicable regulations. Testimony indicates that issuance of the Jones citation stating that "the approved cleanup plan states that the curtain side of the entry will not be cleaned until the connecting cross cut has been made" (emphasis added), led UP&L to believe that it should follow its cleanup plan in order to comply with the regulations. Tr. 51-52, 55, 201. The fact that seemingly conflicting MSHA policies left UP&L in doubt as to what was required for compliance with section 75.400 is a factor which militates against finding that UP&L's conduct was aggravated. King Knob, 3 FMSHRC at 1422.

Other testimony revealed that UP&L employed the cleanup methods in issue because it believed that those methods were safer than alternative procedures. Tr. 208. Bad ribs were a major source of problems at the Cottonwood Mine, and the cleanup plan adopted at the mine was one which could be used consistently throughout the mine and would decrease miners' exposure to the ribs. Tr. 207, 217. John Boylen, Mine Manager of the Cottonwood Mine, testified that the alternative of using ventilation tubing was not employed by UP&L because such a procedure would present hazards associated with the use of fans, such as those associated with the electric current provided by the cable and the possible recirculation of dust and methane. Tr. 208-09. In addition, Boylen testified that the process of hanging line curtain was safer than the process of hanging ventilation tubing. Tr. 209.

The Commission has determined that when an operator believed in good faith that the cited conduct was the safest method of compliance with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence. Florence

Mining Co., 11 FMSHRC 747, 752-54 (May 1989); Southern Ohio Coal Company, 10 FMSHRC 138, 142-43 (February 1988). See also Westmoreland Coal Co., 7 FMSHRC 1338, 1343 (September 1985). Here, it appears from UP&L's testimony that it adopted and followed its cleanup program in good faith, believing that it was employing the safest method of cleanup available.

The judge's reliance upon the alleged discussions between MSHA and

UP&L was misplaced. Preliminarily, we note that the judge did not set forth his findings with respect to the discussions in a manner such that we can attach much weight to them. Moreover, the record lacks sufficient or uncontradicted evidence as to the specific content of such discussions. Inspector Gibson testified that he had three discussions with UP&L regarding cleaning up first cuttings, but he did not indicate whether cleaning behind the line curtain was discussed. Tr. 94-95, 136. William Ponceroff, Supervisor of MSHA's Orangeville Field Office, testified that he had three discussions with UP&L management, including Mine Manager Boylen, regarding cleaning up first cuttings, including some discussion pertaining to cleaning up behind line curtains. Tr. 151-53, 155, 157. Boylen admitted that he had discussed cleaning up first cuttings with Ponceroff, but denied discussing cleaning up accumulations behind line curtains. Tr. 210-11. Randy Tatton, the chief safety engineer of Cottonwood Mine, who was alleged to have been present on at least one of the discussions with Ponceroff, also denied that the discussion involved cleaning first cuttings behind line curtains. Tr. 45, 155. This evidence does not support any finding that UP&L delayed the removal of the first cuttings behind the line curtain knowing that the practice was violative of section 75.400. Rather, UP&L's conduct resulted from a good faith, albeit mistaken, belief that the procedures in its cleanup plan were in compliance with section 75.400. Therefore, we conclude that substantial evidence does not support the judge's finding that UP&L's violation of section 75.400 was caused by its unwarrantable failure to comply.

For the foregoing reasons, we affirm the judge's finding that UP&L violated section 75.400 and that the violation was of a significant and substantial nature but reverse the judge's finding that UP&L's violation was the result of an unwarrantable failure to comply with the standard.

L. Clair Nelson, Commissioner

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