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DRUMMOND V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 20, 1991

DRUMMOND COMPANY, INC.,

v. Docket No. SE 91-10-R
SE 91-11-R

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Backley, Doyle, Holen, 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)("Mine Act" or "Act"), concerns a dispute between Drummond Coal Company ("Drummond") and the Secretary of Labor ("Secretary") over the issuance of a section 104(d)(1) citation for accumulations of combustible materials in belt line conveyor areas in violation of 30 C.F.R. 5.400. 1/ Drummond filed a notice of contest on October 24, 1990, and moved for expedited hearing. A hearing was held on November 14-15, 1990, before Administrative Law Judge Avram Weisberger.

The parties filed post hearing briefs and proposed findings of fact and conclusions of law. Judge Weisberger's decision modified the section 104(d)(1) citation by vacating the unwarrantable failure finding. The Commission granted the Secretary's petition for discretionary review appealing the judge's determination that the violation was not unwarrantable. For the reasons that follow, we vacate the judge's conclusion that the violation was not unwarrantable and remand the issue of unwarrantability for reconsideration.

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1/ Section 75.400 entitled "Accumulation of combustible materials," is

a statutory provision:

> 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.

I

Factual Background and Procedural History

Drummond operates an underground coal mine, the Mary Lee No. 2 Mine, in Alabama. The mine is a thin seam coal deposit varying in thickness from approximately 34 to 52 inches. lt utilizes belt haulage to transport coal to the surface. One section of the mine contains several interconnected belt lines including the belt line and associated machinery at issue in this case. 2/ MSHA Inspector Walter Deason examined this interconnected system of belt lines during the period October 2-4, 1990. He issued several citations for accumulations of combustible materials including the citation and finding of unwarrantable failure at issue herein.

Inspector Deason's examinations proceeded toward the mine face. Early in the morning of October 2, he examined the Slope Belt and found accumulations of combustible materials, approximately thirteen inches deep and thirty feet long, in violation of section 75.400. A section 104(a) citation was issued. ln addition to the excess accumulations at the Slope Belt, Inspector Deason found that shift inspectors were not placing dates or their initials in areas required to be inspected, suggesting the possibility that no examinations were being made. The record shows that Deason told Carl Ware, the owl shift mine foreman on duty at the time, that inspections must be made and that the initials of the fire bosses must be recorded to verify the inspections.

Deason returned to the mine the next afternoon and continued examining the conveyor belts. He was accompanied by John Busby, Drummond Safety Inspector, and Sam Hunt, Alternate UMWA Safety Committeeman. Deason found accumulations of coal under the belt line drive and the take-up unit of the 40 North No. 1 Conveyor Belt. These accumulations were approximately thirty-four inches deep and between fifty and sixty feet long. Again, a citation was issued alleging a violation of section 75.400.

On October 4, Inspector Deason returned to the 40 North Belt Line and related section conveyor lines with Sidney Hill, International UMWA Representative, and Sam Hunt. Deason noted accumulations of coal approximately twelve inches deep and thirty feet long beneath the belt drive and a take-up unit of the 40 North No. 3 Conveyor Belt and noted that the belt was rubbing the accumulations. A citation charging a violation of section 75.400 was issued.

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2/ This system of interconnected belts contains six belt lines and operates in the following manner: Coal mined from the face is placed

on the 4315 Section conveyor drive and the 4050 Section conveyor drive. The 4315 Belt Line carries coal to the 430 line, which in turn proceeds to the 40 North Belt. The 40 North Belt, because of its length, is divided into three belt sections. The 430 line dumps its coal onto the 40 North Belt at the No. 2 belt, which is the middle belt of the 40 North Belt conveyor system. The 4050 section conveyor drive deposits its coal directly onto the 40 North Belt Line at the No. 3 belt. The 40 North Belt transports coal to the 10 West Belt, which connects to the Slope Belt. The Slope Belt brings the coal to the surface.

Thereafter, he proceeded to the 40 North No. 3 Belt and found accumulations of coal thirteen inches deep and between twenty and thirty feet long from the end drive rollers to the discharge rollers of the 4050 Section Conveyor Drive. The accumulations were relatively large, and consisted of small particles of coal rather than large lumpy coal usually associated with spills. 13 FMSHRC at 72.

Inspector Deason then proceeded to the 4315 Section conveyor belt and there he found float coal dust, extending a distance of nearly 500 feet. A citation was issued charging a violation of section 75.400, which was designated significant and substantial. Inspector Deason testified that an examination of the source of the dust disclosed that the 4315 header was running in the coal dust and flipping it into the air. On further examination of the area, Deason found coal dust accumulations in the area of the header and the take-up unit as well as under the belt. There was also a roller missing near the area of the take-up unit, which allowed the belt to rub against the metal frame. In addition, the belt was running in the accumulations and area guards and other guards were missing from the side of the belt line.

Based on these findings, Inspector Deason cited Drummond, pursuant to section 104(d)(1) 3/, for a violation of section 75.400, alleging accumulations of combustible materials at the 4315 Section Belt Line. The section 104(d)(1) citation stated:

> Float coal dust was allowed to accumulate beneath the take-up carriage on the 4315 section conveyor drive 19 inches deep. The take-up roller and belt was running in the said accumulations. Also coal was beneath the drive units from half way of the belt to the tight side end of the drives. Also coal was on the tight side up to 16 inches deep.
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> This is the 5th conveyor belt unit written at this mine in the past 4 days.

3/ Section 104(d)(1) provides:

> 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 standard, he shall include such finding in any citation given to the operator under this Act.

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

> The pre-shift fire boss books indicate that the headers was [sic] OK.

In addition to indicating that the citation was significant and substantial and that Drummond's failure to maintain clean belt lines was unwarrantable, Deason also charged that the citation involved high negligence.

Before the judge, the Secretary argued that Drummond's actions were unwarrantable on three grounds. First, the Secretary argued that Drummond knew or should have known of the accumulations because inspections and specific discussions regarding other belts in close proximity to the 4315 Belt line placed Drummond on a heightened alert for accumulations. The Secretary also argued that Drummond made a conscious decision not to clean up accumulations until the idle shift because it did not want to stop production. Finally, the Secretary argued that Drummond's suggestions that the standard permits a reasonable time lapse between accumulation and clean up contravenes clear Commission authority to the contrary. Citing Old Ben Coal Co., 1 FMSHRC 1954 (1979), the Secretary highlighted Commission review of the legislative history of the Act, emphasizing Congressional intent to prohibit accumulations.

Drummond argued that it had demonstrated good faith in cleaning up the accumulations, that abatement effort is the most important factor and, that based on Utah Power & Light Company v. Secretary, 12 FMSHRC 965 (May 24, 1990), such efforts can be sufficient to prevent a finding of unwarrantable failure. Drummond noted evidence that a miner was cleaning coal from under the belt line at the time of the inspection. 13 FMSHRC at 76.

In discussing the evidence of unwarrantability, the judge reviewed the history of the accumulations at the conveyor belts, the length of time the coal was allowed to accumulate, and the visibility of the accumulations. Although the judge did not specifically find that there was a history of accumulations, the judge examined the three-day review by Inspector Deason. He found that, at each step, the inspector had noted significant accumulations. The judge emphasized the strength of this evidence, especially evidence of accumulations at each of the belt lines cited prior to reaching the 4315 Belt Line. Based on the testimony of Inspector Deason and Sidney Hill, the judge found that the accumulations at the 4315 Belt Line had gradually accumulated over a period of time prior to the citation. 13 FMSHRC at 74. The judge noted the testimony of several witnesses that the conditions were readily visible, or would have been, if viewed through the screens protecting the sides of the belt line. Busby, the operator's own safety inspector, testified that the roller areas are susceptible to spillage and demand closer scrutiny than other areas of the

belt. Id.

The judge concluded that the weight of evidence established that Drummond "did not use due diligence in inspecting for accumulations in the area in question." Id. Again, the judge concluded that the weight of evidence "specifically" established that, if careful inspection had been made, the accumulations would have been noticed and that "[d]ue to the extent and depth of the accumulations ... it is highly likely that they existed at least 4 hours

earlier when the preshift examination was made." 4/ 13 FMSHRC at 75.

The judge found, however, that the record did not support a conclusion of unwarrantable failure. He rejected the Secretary's assertion that the operator had actual knowledge of the conditions at the 4315 conveyor, finding that "the record fails to establish such knowledge on the part of Contestant of the specific accumulations at the specific locations in issue, i.e., the 4315 conveyer belt." (Emphasis in the original). Id. In reaching this conclusion, he found that Inspector Deason had not discussed the problem of accumulations at the belt lines prior to citation.

The judge also relied on Drummond's efforts to clean up the accumulations. The judge credited testimony that a miner was shoveling coal at a distance 200 to 250 feet inby the cited area and that shoveling had occurred at the header and 25 to 30 feet inby on the tight side of the belt.

After reviewing the history of the accumulations, the length of time coal had been allowed to accumulate and the visibility of the accumulations, the judge focused on whether the operator actually knew of the violations and the efforts made by the operator to clean up the accumulations. Based on those considerations, he found the record insufficient to support a conclusion of unwarrantable failure.

II.

Disposition of Issues

On review, the Secretary challenges the judge's finding that the violation was not the result of Drummond's unwarrantable failure. She asserts that the judge failed to apply correctly the Emery test of unwarrantability and erred by expressly limiting the scope of aggravated conduct to actual knowledge of the specific violative conditions. She asserts that proper application of Emery and its progeny demands recognition that the required knowledge can also be established by a showing that the operator should have known, or had reason to know, of the violative conduct and that the evidence establishes that Drummond had every reason to know of the conditions and chose to do nothing about them.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010

(December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable"or "inexcusable"), "failure"("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, supra, 9 FMSHRC at 2001. This determination was also based on the purpose of

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4/ In this case the judge found that Drummond's failure to conduct adequate pre-shift examinations was unwarrantable with respect to this very same belt line.

unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent. Id.

The judge, in rejecting the Secretary's assertion that Drummond knew of the violation, found that Drummond did not know "of the specific accumulations at the specific locations in issue, i.e., the 4315 section conveyor belt." 13 FMSHRC at 75. The Secretary argues that the judge was incorrect in requiring advance notice to Drummond of the accumulations before issuance of a citation. The Secretary cites the following language from the decision as indication that the judge imposed such a requirement:

> There is insufficient evidence that Deason had any discussion with any of Respondent's personnel prior to the issuance of the Citation in issue, with regard to problems with accumulations at the belt lines... . A plain reading of this testimony reveals that it does not establish that Deason informed Busby of the need either to take care of accumulations in general on belt lines, or to be aware of such problems in the area in question.
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> There is no evidence that respondent was informed by Deason of the need to make a thorough inspection of the area in question. Thus, the fact that Deason found accumulations after he spoke to Ware and Busby does not, per se establish aggravated conduct.

13 FMSHRC at 75.

We agree that the Secretary is not required to give advance notice to operators of violative conditions before issuance of a section 104(d) citation. Such rationale would contravene fundamental notions of miner safety and operator responsibility upon which the Mine Act rests, see S. Rep. No. 181, 95th Cong., 1st Sess. 17-18 (1977), reprinted for the Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess., 605-06 (1978). It would also severely weaken the unwarrantable failure provisions of section 104(d) by establishing a standard that would allow an operator to avoid sanction by claiming that MSHA had not provided advance notice that certain violative conduct would result in section 104(d) enforcement action.

It is well settled under Commission precedent that actual knowledge of a violative condition is not a necessary element to establish aggravated conduct for an unwarrantable failure finding. Eastern Associated Coal

Corn., 13 FMSHRC 178, 187 (February 1991). In Eastern, the Commission reviewed unwarrantable behavior based on an operator's constructive knowledge of a continuing hydraulic oil leak problem at a hoist tipple. The Commission rejected the necessity of actual knowledge on the part of the operator and the notion that nonfeasance on the part of mine personnel might insulate the operator from imputed knowledge. The Commission stated:

> A lack of actual knowledge by Eastern's management of the apparently continuing leak does not necessarily bar an unwarrantable failure finding. In Pocahontas Fuel Co., 8 IBMA 136, 148-49 (1977), aff'd sub nom Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), failure of a rank-and-file preshift examiner to detect a violation was found to be imputable to the operator for unwarrantable failure purposes. Even assuming that Eastern's preshift and onshift examiners did not record any continuing problem, that consideration does not necessarily preclude an unwarrantable failure finding. Emery makes clear that unwarrantable failure may stem from what an operator "had reason to know" or "should have known." 9 FMSHRC at 2003. Eastern Associated Coal Corporation, 13 FMSHRC at 187.

The record indicates that Drummond had reason to know of the conditions at the 4315 Belt Line. The evidence is uncontested that during the period of October 2-4, Inspector Deason conducted a systematic, step-by-step, inspection of the conveyor belt system, proceeding toward the 4315 Belt Line. Indeed, findings of fact with regard to the extent and course of the inspections and the accumulations found in those areas prior to the citation at issue here demonstrate that Drummond was on notice that accumulations were, in fact, being found at each step along the way toward the 4315 Belt Line. As a result Drummond should have been on heightened alert, see Youghiogheny & Ohio Coal Co., supra, and Eastern Associated Coal Corporation, supra., for accumulations of combustible materials, which the judge found had been there since at least the preshift examination. 13 FMSHRC at 74.

Also Drummond's own safety inspector testified at trial, and the judge so found, that the belts in the subject section required closer scrutiny. 13 FMSHRC at 74. The evidence establishes that the accumulations in question would have been noticed upon a careful inspection. 13 FMSHRC 74, 75. Drummond's own witness, John Busby, testified that the area in question under the take-up unit at the 4315 Belt Line was not clean and that he would have seen the accumulations if he had looked through the screens. 13 FMSHRC at 74. Inspector Deason testified that the accumulations would have been visible to a person walking by them. Id.

In addition, Drummond was warned on the first day of the inspections that no initials or dates appeared at the Slope Belt, suggesting that no preshift inspections had taken place. Inspector Deason reminded Carl Ware,

mine foreman, that inspections had to be made. Moreover, the judge's recognition of the fact that "some" cleanup effort had been made suggests that the judge believed that Drummond knew of the accumulations. We conclude that Drummond knew or had reason to know of the accumulations.

We next address whether Drummond's conduct was unwarrantable, i.e., aggravated conduct, constituting more than ordinary negligence. The judge, in finding that the operator's conduct was not unwarrantable, rejected the Secretary's assertion that Drummond had made a conscious decision to delay

cleanup until the owl shift. He relied on Drummond's mitigation efforts and found that the operator had "made some efforts to clean up the accumulations." 13 FMSHRC at 74. The Secretary argues that Drummond's abatement efforts were not sufficient to mitigate unwarrantability and furthermore that the judge's decision is inconsistent in the following respects: first, the significant accumulations problems together with the unwarrantable failure to conduct an adequate inspection is inconsistent with good faith mitigation; second, vacation of the unwarrantability finding with respect to this violation is inconsistent with the finding of unwarrantability in the preshift examination violation; and, third, the judge's conclusion that the operator unwarrantably failed to inspect is inconsistent with his finding that the operator had no reason to know of the accumulations. We agree that there are inconsistencies in the judge's opinion.

On remand, the judge, in determining whether the violation arose as a result of Drummond's unwarrantable failure, should weigh the evidence in light of Drummond's actions in the context that it had reason to know of the accumulations, not in the context of actual knowledge.

On remand the judge should also consider whether Drummond's mitigation efforts were sufficient to deal effectively with the accumulation problems given the undisputed evidence that the belt was actually running in contact with the accumulations and over a portion of the metal frame where a roller was missing, and whether the miner could have completed the necessary abatement in an expeditious manner. He should consider these efforts in light of his previous findings that Drummond lacked due diligence in inspecting for accumulations and that accumulations remained during preshift examinations.

III.

Accordingly, we vacate the judge's finding of no unwarrantable failure and remand this matter to him for reconsideration of Drummond's actions in light of the legal standards enunciated herein.