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SOL (MSHA) V. VIRGINIA CREWS COAL
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October 26, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 92-246 WEVA 92-247
VIRGINIA CREWS COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). Administrative Law Judge George Koutras found that Virginia Crews Coal Company ("Virginia Crews") violated its roof control plan and that the violation was of a significant and substantial nature ("S&S"),(Footnote 1) but that the violation was not the result of Virginia Crews's unwarrantable failure(Footnote 2) to comply with the plan. 14 FMSHRC 1691 (October 1992)(ALJ). Accordingly, the judge modified the section 104(d)(1) citation to a section 104(a) citation. 14 FMSHRC at 1716. The judge also found that Virginia Crews violated 30 C.F.R. 75.400, as alleged in a subsequently issued section 104(d)(1) order. 14 FMSHRC at 1709-10. The judge concluded that, because that violation was not S&S and the underlying section 104(d)(1) citation had been modified to a section 104(a) citation, it was unnecessary to consider whether the violation was the result of the operator's unwarrantable failure. 14 FMSHRC at 1717-18. The judge modified the order to a section 104(a) citation. 14 FMSHRC at 1718. The Commission granted the Secretary's petition for discretionary review, which challenges the judge's failure to find that the violations were the result of unwarrantable failure. For the reasons that follow, we affirm the judge's findings.

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1 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

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2 The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which establishes more severe sanctions for any violations that are caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards...."

I.

Factual and Procedural Background

A. Docket No. WEVA 92-246 (104(d)(1) citation).

Virginia Crews owns and operates an underground coal mine (the No. 14 mine) in West Virginia. On April 12, 1991, the crew on the evening shift mined the No. 6 entry in the first left section, which opened the last open crosscut ("break") between the No. 6 and the No. 5 entries and extended the working face beyond the break. On April 13, the evening shift began mining the break between the No. 6 entry and the No. 7 entry. The mine did not operate on Sunday, April 14 and production crews did not mine in the vicinity of the No. 6 entry on April 15.

On April 16, between 4:30 and 5:30 a.m., preshift examiner Ron Kennedy examined the No. 6 entry. Kennedy found that the mined portion of the crosscut between the No. 6 and No. 7 entries required roof bolting and reported this to day shift foreman Clyde Bailey.

At 6:00 a.m., Gerald Cook, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), began an inspection. He entered the mine with Bailey and the day-shift crew and, along with miners' representative Richard Patton, checked the working faces of the section.

Inspector Cook noted that the intersection of the No. 6 entry and the last open crosscut was supported. He saw, however, that the No. 6 working face had been advanced, in his estimation, 15 feet inby the last row of roof bolts, and that the No. 6 - 7 break had been advanced about 20 feet inby the last row of roof bolts. It appeared to the inspector that coal had been cleaned from the roadway and moved into the No. 6 - 7 break. Vehicle tracks were also apparent in the No. 6 heading. Cook concluded that miners must have traveled past one of the openings in the intersection to excavate the other opening.

Cook issued a section 104(d)(1) citation alleging a violation of 30 C.F.R. 75.220(a)(1) in the No. 6 working place.(Footnote 3) He concluded that Virginia Crews violated the approved roof control plan, which provides that "[o]penings that create an intersection shall be permanently supported or a minimum of one row of temporary supports shall be installed on not more than 4-foot centers across the opening before any other work or travel in the

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3 Section 75.220(a)(l) states:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

intersection." Ex. P-3, at 4, para. 3. Cook designated the violation S&S and noted that the operator's negligence was high. Cook also determined that the violation was the result of Virginia Crews's unwarrantable failure to comply with the plan because everyone working in the section was supposed to review the approved roof control plan and to know what it required.

The judge found that Virginia Crews had violated its roof control plan because the roof in the openings cited by Inspector Cook was not supported. 14 FMSHRC at 1707-08. The judge determined that work or travel had occurred in the area, crediting Cook's testimony that coal had been pushed into the No. 6 - 7 break, that tire tracks were present in the No. 6 heading, and that miners had to pass by one of the openings in the intersection to mine the other opening. 14 FMSHRC at 1708.

The judge found that the violation was not the result of the operator's unwarrantable failure. 14 FMSHRC 1715-16. He concluded that, in the "absence of credible testimony from witnesses who were actually present during the mining activities which may have taken place during the days prior to Inspector Cook's inspection," there was "no credible evidence to establish that [Virginia Crews] deliberately and consciously failed to act, or engaged in conduct which one may reasonably conclude was aggravated." 14 FMSHRC at 1716. The judge also rejected Cook's conclusion that the violation was due to unwarrantable failure because Virginia Crews knew or should have known about the requirements of its own roof control plan. Id. In addition, the judge noted the absence of any prior violations of section 75.220(a)(1). Id. Accordingly, the judge concluded that the Secretary failed to carry his burden of proving that the violation constituted an unwarrantable failure to comply with the roof control plan. Id.

The judge found that the violation was the result of Virginia Crews's "ordinary or moderate negligence" and found the violation to be S&S. 14 FMSHRC at 1713, 1718. The judge modified the section 104(d)(1) citation to a section 104(a) citation and assessed a civil penalty of $275. 14 FMSHRC at 1719.

B. Docket No. WEVA 92-247 (104(d)(1) order).

On April 29, 1991, Cook conducted another inspection of the No. 14 mine. Finding accumulations of loose coal and coal dust in several areas along the ribs and roadway in the return entry of the left mains section, Cook issued a section 104(d)(1) order alleging a violation of section 75.400. Cook relied on the previously issued section 104(d)(1) citation to support the order. He designated the violation as S&S and charged Virginia Crews with high negligence. In issuing the order, Cook determined that the violation was the result of Virginia Crews's unwarrantable failure because the accumulations were extensive and had existed for at least a month.

The judge credited the testimony of Inspector Cook concerning the accumulations and found a violation of section 75.400. 14 FMSHRC at 1709-10. The judge granted the Secretary's motion to modify the order to delete the inspector's S&S finding. 14 FMSHRC at 1714.

The judge did not consider whether the violation was the result of Virginia Crews's unwarrantable failure. 14 FMSHRC at 1717-18. He held that the section 104(d)(1) order could not stand because the underlying section 104(d)(1) citation had been modified to a section 104(a) citation. The judge modified the order to a section 104(a) citation rather than to a section 104(d)(1) citation because the order did not describe an S&S violation, which is required for the latter citation. Id. The judge found, however, that the violation resulted from a high degree of negligence and assessed a civil penalty of $225. Id.

II.

Disposition of Issues

A. Docket No. WEVA 92-246

The Secretary argues that Virginia Crews's conduct was an unwarrantable failure to comply because the operator knew about the violative condition, but did not attempt to correct it. The Secretary asserts that the judge failed to consider the April 16 preshift examination report, which explicitly noted the need for roof bolting and that he improperly focused on whether the operator should have reasonably expected miners to work or travel in the cited area rather than on the operator's knowledge of the violative condition. Virginia Crews argues that the judge's finding that the violation was not the result of an unwarrantable failure is supported by substantial evidence and should be affirmed.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("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, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. "Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991).

The Secretary argues that Virginia Crews knew of the violative condition because preshift examiner Kennedy reported that the No. 6 - 7 crosscut needed roof bolting. Knowledge of a preshift examiner is imputable to the operator. Rochester & Pittsburgh, 13 FMSHRC at 194-98; Mettiki Coal Corp., 13 FMSHRC 769, 772 (May 1991). Kennedy's April 16 report to day shift foreman Bailey was made at 5:45 a.m. and Cook issued the citation an hour and a half later, at 7:15 a.m. Thus, Virginia Crews had only a brief period of notice of the existence of a violation as a result of the preshift examiner's report. No activity occurred in the cited area during that period. We conclude that reliance upon the preshift report would not have supported an unwarrantable failure conclusion, and that, therefore, the absence of comment by the judge regarding this evidence is harmless.

We also reject the Secretary's argument that the judge should be reversed because he focused on the expectation of work or travel in the cited area. While the judge discussed the lack of evidence of "mining activities that may have taken place during the days prior to Mr. Cook's inspection," he did so in reaching his conclusion that there was "no credible evidence to establish that the respondent deliberately and consciously failed to act or engaged in conduct which one may reasonably conclude was aggravated." 14 FMSHRC at 1716. Based on this determination, and noting both the inspector's erroneous belief that the violation was unwarrantable solely because the operator "knew or should have known" the requirements of the roof control plan(Footnote 4) and the absence of any prior violations of section 75.220(a), the judge reasonably concluded that the Secretary had failed to carry his burden of proving that the violation was the result of unwarrantable failure. Id. at 1716.

We agree with the judge that a breach of a duty to know is not necessarily an unwarrantable failure. 14 FMSHRC at 1716. The Secretary, in relying on the "knew or should have known" language of Emery, 12 FMSHRC 2003, misconstrues the context in which those words were used. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Id. at 2004. Use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence and we reject such an interpretation of Emery.

We have reviewed the record and conclude that substantial evidence(Footnote 5) supports the judge's finding that Virginia Crews's violation of section 75.220(a) was not the result of its unwarrantable failure to comply with its roof control plan.

B. Docket No. WEVA 92-247

An MSHA inspector is required to designate a citation issued under section 104 of the Mine Act as a section 104(d)(1) citation if he finds that (1) the violation could significantly and substantially contribute to the cause and effect of a mine hazard; and (2) the violation was caused by the

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4 Inspector Cook stated that the violation was the result of Virginia Crews's unwarrantable failure because the roof control plan was "supposed to be known by everybody who is working on that section that has to deal with roof control." Tr. 33. See 30 C.F.R. 75.220(d). Under Cook's reasoning, virtually every breach of a roof control plan would be the result of the operator's unwarrantable failure because his employees should know the plan's requirements.

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5 The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's conclusion. 30 U.S.C. 823(d)(2)(A)(ii)(I). See also Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

operator's unwarrantable failure to comply with the standard.(Footnote 6) A section 104(d)(1) withdrawal order is issued if, during the same or another inspection within the next ninety days, the inspector finds another violation that was caused by the operator's unwarrantable failure to comply with a standard. 30 U.S.C. 814(d)(1).

Based on his finding that the roof control violation was not the result of the operator's unwarrantable failure, the judge modified that section 104(d)(1) citation to a section 104(a) citation, removing the basis for the section 104(d)(1) order issued in this docket for a violation of section 75.400. Accordingly, he modified the order to a section 104(a) citation.

The Secretary urges that, if the judge's finding of no unwarrantable failure as to the underlying citation is remanded for reconsideration, this docket should also be remanded for a determination of whether the violation of section 75.400 was caused by the operator's unwarrantable failure. Because we have affirmed the judge's finding that the underlying violation was not the result of unwarrantable failure, the issue in this docket is moot.

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6 Section 104(d)(1) 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 ... 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 ... 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).

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that Virginia Crews's violation of its roof control plan was not caused by its unwarrantable failure.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner