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SOL (MSHA) V. MULLINS AND SONS COAL
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February 9, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-669
MULLINS AND SONS COAL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners(Footnote 1)

DECISION

BY: Holen, Chairman; and Doyle Commissioner:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), raises the question of whether violations of 30 C.F.R. 75.400 and 75.402 by Mullins and Sons Coal Company, Inc. ("Mullins") were caused by its unwarrantable failure to comply with the standards.(Footnote 2) Administrative Law

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1 Commissioner Nelson participated in the disposition of this case. He passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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2 30 C.F.R. 75.400, "Accumulations of combustible materials," 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. 75.402, "Rock dusting," provides:

> All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding

Judge Jerold Feldman determined that both violations had not been caused by Mullins' unwarrantable failure. 15 FMSHRC 1061 (June 1993)(ALJ). The Commission granted the Secretary's petition for discretionary review challenging these findings. For the reasons discussed below, we vacate the judge's decision and remand for further proceedings.

I.
Factual and Procedural Background

Mullins operates the No. 6 mine, an underground coal mine in Pike County, Kentucky. On Monday, June 17, 1991, Inspector Donald Milburn of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the mine and reviewed the preshift examination book. A notation stated that accumulations of coal and coal dust existed in the Nos. 1 through 6 entries in the No. 2 section and that the area needed rock dusting. He inspected the six entries and observed accumulations that were between three and six inches in depth and extended inby the No. 2 belt feeder approximately 180 feet in each entry . The accumulations, which were dry and black, consisted of loose coal, coal dust and float coal dust. The inspector also observed that the mine roof, floor and ribs in the six entries and the connecting crosscuts were black. At the time of the inspection, the battery-operated scoop usually used to remove accumulations and to rock dust was being charged.

Inspector Milburn issued a citation to Mullins under section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), alleging a significant and substantial ("S&S") violation of section 75.400, and an order of withdrawal under section 104(d)(1) of the Act, alleging an S&S violation of section 75.402.(Footnote 3) The citation and order were terminated the following day after the accumulations were removed and the area was rock dusted.

The Secretary proposed that a civil penalty of $1,000 be assessed against Mullins for each violation and Mullins challenged the proposals. At the hearing, Mullins conceded that it had violated the standards and that the violations were S&S, but contended that the violations were not caused by its unwarrantable failure.

The judge found that Mullins' violation of section 75.400 was not caused by its unwarrantable failure because the accumulations had existed for only three hours, they had been noted in the preshift examination book, the scoop usually used to remove accumulations was inoperable, and no alternative means of clean-up existed. 14 FMSHRC at 1064. The judge found that Mullins' violation of section 75.402 was not caused by its unwarrantable failure

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> that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

3 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...."

because Mullins intended to remove, rather than rock dust, the accumulations as soon as the scoop became operable. 14 FMSHRC at 1065. Accordingly, the judge assessed civil penalties for the violations of sections 75.400 and 75.402 in the amounts of $600 and $400, respectively. Id.

II.
Disposition

A. Legal standard

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 ... characterized by `inadvertence,' `thoughtlessness,' and `inattention'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).

The Secretary argues that, as to both violations, the judge applied an incorrect legal standard by equating unwarrantable failure with gross negligence.(Footnote 4) We disagree. Although the judge stated that unwarrantable failure is a phrase "used to connote gross negligence," relying upon Emery and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987), he also distinguished unwarrantable failure from ordinary negligence, stating that "ordinary negligence is manifested by inadvertence, thoughtlessness or inattention, whereas unwarrantable failure is conduct that is not justifiable, or, conduct that is inexcusable." 15 FMSHRC at 1063. The judge applied the correct legal standard in determining whether Mullins' behavior reflected unwarrantable failure.

B. Section 75.400 violation

The Secretary argues that the judge erred in concluding that Mullins' notation of the violation in the preshift log insulated it from an unwarrantable failure finding. He contends that Mullins' failure to commence removal of the accumulations after they were discovered demonstrates its unwarrantable failure to comply with the standard. The Secretary requests that the Commission vacate the judge's determination to the contrary and remand to him for reconsideration.

The judge stated that "a notation in the pre-shift examination book ... insulates, to a certain degree, the operator from an unwarrantable failure charge because it shows a recognition of the hazard created by the accumulations." 15 FMSHRC at 1064. The judge further stated that, if the

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4 Mullins did not file a brief on review.

operator "proceeds to ignore the accumulations, such conduct would constitute an unwarrantable failure." Id. He determined that the violation was not unwarrantable failure based on his finding that Mullins' failure to remove the accumulations, after the preshift examination, was not the result of its "inexcusable neglect." Id.

We agree with the Secretary that the notation of coal accumulations in a preshift examination book does not insulate an operator from an unwarrantable failure finding. The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. See, e.g., Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992). Although the judge correctly stated that the operator's efforts to eliminate the hazard must be examined when determining whether a violation resulted from an unwarrantable failure, we conclude that the judge did not adequately consider such factors in his analysis. Moreover, the findings relied upon by the judge in reaching his conclusion that Mullins' violation of section 75.400 was not an unwarrantable failure are not supported by substantial evidence.

The record indicates that, at the time of the inspection, Mullins had taken no steps to remove the accumulations, except to begin charging the scoop. The judge found that Mullins' lack of abatement activity did not constitute aggravated conduct because the scoop used for cleaning accumulations was being charged and no other scoops were available. 15 FMSHRC at 1064. He further found that, "given the length of [the accumulations] in each entry (180-feet), cleaning the accumulations by manual shoveling was not feasible." 15 FMSHRC at 1063 n.3 (citation omitted). He concluded that "no alternative means of cleaning up the accumulations" existed. 15 FMSHRC at 1064.

The judge's finding that Mullins had no alternative means to remove the accumulations is not supported by substantial evidence.(Footnote 5) Inspector Milburn testified that Mullins could have used shovels to remove the accumulations or refrained from producing coal until the area had been cleaned. Tr. 33-34, 39, 146.(Footnote 6) The judge's finding that shoveling was not feasible was not based on evidence, but rather on a question asked by Dale Mullins, vice president of Mullins, who represented it, during cross-examination of Inspector Milburn. Tr. 87-8. Mr. Mullins asked whether the inspector would agree that the

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5 The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

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6 Dale Mullins testified that production had not been ceased because Mullins did not think conditions were "all that bad." Tr. 192.

accumulations "would have been quite a bit for a man to have to do by hand." Id.7 This question was not answered by the inspector and Mr. Mullins offered nop testimony that the accumulations xould not have been removed by hand. In fact, Mr. Mullins stated, in an exchange with the judge, that to remove the accumulations "with a shovel, ... would have [taken] several shovels." Tr. 88-89.

Substantial evidence is also lacking for the judge's finding that the accumulations had existed for only three hours. Inspector Milburn testified that the accumulations had existed for at least three hours based upon the fact that, at the time of his 10:00 a.m. inspection, coal had been in production since 7:00 a.m. that morning. Tr. 69, 133-34. He also testified, however, that he believed the accumulations had existed since the previous Friday, because of the quantity and nature of the accumulations and based on his conversations with the operator, in which he was informed that the section had been behind in cleaning and rock dusting since the previous Friday because the scoop used for such purposes had been "down."(Footnote 8) Tr. 24-25, 69-72. Dale Mullins also testified that they were not able to "catch up" during the maintenance shift on Saturday because the scoop was "down." Tr. 176-77, 184. More importantly, the parties stipulated that the preshift entry noting the accumulations had been entered in the preshift book at approximately 6:00 a.m. on Monday, June 17. Tr. 11. Since production had not commenced until approximately 7:00 a.m. on that day and no coal had been produced over the weekend, all or a large portion of the accumulations must have existed since the previous Friday. Tr. 194-95.

Accordingly, we vacate the judge's finding of no unwarrantable failure and remand the proceeding for further consideration consistent with our decision. The judge should review the record evidence and consider it in light of the factors set forth in Peabody, including the extensiveness of the accumulations, the length of time that they had existed and Mullins' efforts to eliminate them. If he determines that the violation was the result of Mullins' unwarrantable failure, he should reassess the civil penalty.

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7 In his question, Mr. Mullins indicated that the six entries contained about 20,000 square feet of accumulations. Tr. 87. Based on his estimate that the accumulations were 180 feet long and 6 inches wide in each of the 6 entries, it would appear that they were closer to 540 square feet. See Id.

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8 The inspector documented this conversation in the contemporaneous notes that he took during his inspection:

> I held a mini close-out [conference] with Dale Mullins & Tony Mullins. Both ... remarked that they were behind on permanent stoppings, that [the] scoop was down on Saturday and that they were behind on cleaning & rock dusting also since Friday's shift.

G. Ex. 1, pp. 40-41.

C. Violation of section 75.402

The Secretary argues that the judge erred in concluding that Mullins' violation of section 75.402 was not unwarrantable because Mullins intended to remove the accumulations rather than rock dust as soon as the scoop used for such purposes was operable. The Secretary requests that the Commission vacate the judge's determination and remand for reconsideration. We agree that such action is appropriate.

The judge determined that, because Mullins intended to clean up the accumulations as soon as the scoop was placed in service, Mullins' failure to rock dust them was not an unwarrantable failure. 15 FMSHRC at 1065. The judge held that "rock dusting is an alternative method of neutralizing combustible accumulations that are not removed with a scoop...." Id. He based this conclusion, in part, on Inspector Milburn's testimony that "it would serve no purpose to rock dust accumulations that were going to be cleaned." Id.

Section 75.402 does not exclude from its rock dusting requirement areas containing accumulations that will be cleaned up. The safety standard states that "[a]ll underground areas of a coal mine ... shall be rock dusted to within 40 feet of all working faces...." The only exception is for "areas in which the dust is too wet or too high in incombustible content to propagate an explosion." Dust samples taken by the inspector indicate that the accumulations did not fall within this exception. Tr. 111-12.

The judge erred to the extent that he concluded that rock dusting is an alternative method of complying with the clean-up requirements of section 75.400. Although the inspector acknowledged that rock dusting the accumulations would serve no purpose if the operator were going to immediately remove them, he clarified that operators are required by the safety standards to clean up accumulations and then to rock dust the area. Tr. 150-51, 152-53. In any event, it would appear that Mullins was not planning to remove the accumulations immediately, but, instead, intended to remove them at an indefinite time in the future when the scoop became operable.

Moreover, the rock dusting citation was not limited to the area of the accumulations but included the roof, ribs and other floor areas in the entries and the connecting crosscuts. Joint Ex. 2. Thus, the fact that Mullins was planning to remove the accumulations does not excuse its failure to rock dust the roof, ribs and floor in those areas.

Accordingly, we vacate the judge's finding that Mullins' violation of section 75.402 was not caused by its unwarrantable failure and remand for reconsideration in light our decision. In determining whether the violation was the result of unwarrantable failure, the judge should review the record and consider such factors as the extensiveness of the area that was not rock dusted, the length of time that the violation had existed and Mullins' efforts to comply with the safety standard. If he determines that the violation was the result of Mullins' unwarrantable failure, he should reassess the civil penalty.

III.
Conclusion

For the reasons discussed above, we vacate the judge's determination that Mullins' violations of sections 75.400 and 75.402 were not caused by its unwarrantable failure. We remand for reconsideration on this record consistent with this decision, and for the reassessment of civil penalties, if appropriate.

Arlene Holen, Chairman

Joyce A. Doyle, Commissioner

Commissioner Backley, concurring in part, and dissenting in part:

I am in complete agreement with the analysis of this case as set forth by my colleagues. However, in view of the referenced */ compelling record evidence regarding the issue of unwarrantable failure as to both violations, I have concluded that no useful purpose is served by remanding that issue to the administrative law judge. In my opinion both violations resulted from an unwarrantable failure by the operator. Therefore, I would reverse the judge on the unwarrantable failure issue as to both violations, and remand the case only for the purpose of reassessment of civil penalties, as appropriate.

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Richard V. Backley, Commissioner

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*/ Additionally and significantly, I note that, as to the violation of 75.402, Inspector Milburn testified that the entries and crosscuts were black and appeared never to have been rock dusted. Tr. 75, 110-111, 118, 123-24, 146-48.