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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-34
A.C. No. 42-01697-03607

v.

Bear Canyon No. 1 Mine

C. W. MINING COMPANY,
RESPONDENT

DECISION

Appearances: Robert Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging C.W. Mining Company (C.W. Mining) with five violations of mandatory standards and proposing civil penalties totaling \$1,450 for the violations. The general issue before me is whether C.W. Mining violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Citation No. 3296377 issued July 5, 1989, pursuant to Section 104(d)(1) of the Act alleges a violation of the mandatory standard at 30 C.F.R. 75.512-2 and charges as follows:

The weekly examination of electrical equipment was not conducted for all the electrical equipment being used underground at the Bear Canyon No. 1 Mine. The equipment involved consisted of all outby equipment in both working sections' electrical equipment. The last recorded date of an examination recorded in the book for such purpose was 6-22-89. Management is aware of this requirement and the chief electrician Nathan Atwood is responsible to make sure the examinations are complete and recorded.

In questioning a mine electrician who does the electrical examination, Mr. John Tucker, stated he did not check all the equipment due to break downs last week.

Management removed equipment from service after coming aware of the violation. It was noted during the examination on several pieces of equipment on the North Mains working section that several deficiencies [sic] existed on the equipment (Miner 10, Roof Bolter 5, std. shuttle car 2, off standard car 1)

The cited standard, 30 C.F.R. 75.512-2 provides as follows:

The examinations and tests required by 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.

30 C.F.R. 75.512 provides as follows:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such a examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Donald Gibson, a Coal Mine Inspector for the Federal Mine Safety and Health Administration (MSHA) and an electrical specialist with extensive experience as a miner and electrician, inspected the Bear Canyon No. 1 Mine on July 5, 1989. Early in the course of his inspection he examined the log books in which weekly examinations of electrical equipment are required to be recorded. It is not disputed that the last date then recorded in the log book for electrical examinations was June 22, 1989. According to Gibson, John Tucker, the mine electrician in charge of conducting the electrical examinations, at first admitted that he had not completed the examinations on all the electrical equipment because there had been several break downs on other electrical equipment that he had been directed to repair. Upon further questioning Tucker could not remember which equipment he had already examined and could not produce a checklist to show which equipment had already been checked. According to Gibson, Tucker then admitted that he had not performed examinations on any of the electrical equipment.

Twenty-two year old electrician John Tucker testified that he became a certified electrician at age 20 and had been performing nearly all of the electrical inspections at the subject mine since then. In apparent contradiction to his earlier admissions to Gibson, Tucker testified that he now believed that he in fact did perform an electrical inspection on the Thursday following June 22, because "that's the day we always do it". Tucker admitted telling Inspector Gibson that he had not completed the exam but claimed at hearing that he meant only that he had not entered the record of the examinations in the log book. He "completely forgot" to enter the results of his alleged examination in the log book. Tucker nevertheless did concede at hearing that the electrical examination he did perform failed to include areas of the electrical equipment where lids have to be removed.

Tucker could not recall at hearing that Inspector Gibson had asked which machines had already been checked. He admitted that there had been equipment breakdowns at the time he was supposed to be conducting his electrical inspection. According to Tucker, reporting the results of electrical inspections is a "less important duty" and admitted that he had not reported the results of the examination he purportedly made on June 27, even as of the date of Gibson's inspection on July 5.

C.W. Mining's Chief Electrician Nathan Atwood conceded that they had a history of failing to record electrical examinations at the Bear Creek Mine. Atwood also claimed that he was unaware that his electrician was not using a checklist to perform his electrical inspections and never asked Tucker whether he was in fact using a checklist. Atwood maintains that Tucker now uses a checklist.

Based on the undisputed record evidence alone it is clear that the violation is proven as charged. The testimony of electrician John Tucker is moreover without credibility. The credible evidence shows that not only did Tucker fail to report the weekly electrical inspections but he indeed failed to inspect any of the electrical equipment as required. The evidence that this is a recurrent problem at this mine and that even when the electrical inspections are performed they are done in a careless and slipshod manner adds to the aggravated nature of the violation and the negligence causing it. The obvious lack of training and supervision over Tucker by Chief Electrician Atwood also supports a finding of serious negligence.

In order to find that a violation is "significant and substantial" the Secretary has the burden of proving the existence of an underlying violation of a mandatory standard, the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

Clearly the failure to conduct required electrical examinations is a most serious violation. In this case in particular Inspector Gibson found serious unreported violative conditions in various electrical equipment available for use in the subject mine. According to Gibson these uncorrected conditions could have caused fires or methane or dust explosions triggered by the electrical violations. In addition the violations in themselves could create a serious hazard of injuries or fatalities from electrical shock. The violation was therefore clearly of high gravity and "significant and substantial".

The violation was also the result of "unwarrantable failure" and high negligence. C. W. Mining has a history of failing to perform and record electrical examinations. With such a negligent history the failure of C.W. Mining's chief electrician to properly supervise and train the electrician in charge of the weekly electrical inspections is particularly egregious. The testimony of the electrician that even when he conducted examinations he did not bother to examine all parts of the electrical equipment during required weekly inspections e.g. areas where "lids" have to be removed, shows that even when examinations were performed they were performed in a grossly deficient manner. Under all the circumstances, I find in this case such aggravated conduct, omissions and gross negligence that I conclude the violation was a result of "unwarrantable failure". Emery Mining Co., 9 FMSHRC 1997 (1987), appeal pending (D.C. Circuit No. 88-1019).

Order No. 3411644, also issued pursuant to Section 104(d)(1) of the Act, alleges five violations of the standard at 30 C.F.R. 75.503 and charges as follows

The Lee Norse Miner, 2G-3653A-0 being used on the North Mains working section was not maintained in permissible condition.

An unauthorized field change was made on the machine. Also observed was [sic] several other conditions listed below:

1. The field change was the installation of an MCI Model 27434, Approval BFE-1047-87, fluorescent luminize lighting system consisting of (4) four lights.

Management was aware of filing the proper papers as having been informed by an MSHA inspector on or around June 29, 1989, who observed the miner located in the underground shop at the mine

The MSHA inspector, Mr. Robert Baker, informed Mr. Ken Defa, Superintendent, that any field changes should have the necessary paper work submitted for approval prior to operating the machine.

The machine was taken to the North Mains working section and put into production without notifying MSHA of any changes.

2. A packing gland on the inby end of the main controller was closer than the allowable 1/8 inch clearance. The gland was flush with the controller box.

3. An opening in excess of .005 inch was present in the pump motor cover lid and junction box.

4. A packing gland on the electric tram

controller was closer than the 1/8 inch allowable

~630

clearance. Measured to be 1/16 inch from the controller box.

5. The hose conduit covering the inner machine cable on the left cutter motor was not secured under the packing gland clamp. The cable appeared not to have been inserted far enough in the motor junction box and was taped over to obtain the same protection as the conduit.

The cited standard, 30 C.F.R. 75.503 provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine."

According to Inspector Gibson, upon his return to the subject mine on July 10, 1989, around 6:40 a.m., he observed the cited Lee Norse Miner in the working section in the North Mains area with the noted conditions. The miner was then energized and he believed that it had just been used on a production shift because it was "warm".

It is not disputed that the subject miner was the type of equipment required to be "permissible" by law. It is likewise not disputed that if the conditions cited by Inspector Gibson in the subject order actually existed then the cited equipment would not have been in a "permissible" condition and therefore would have been in violation of the cited standard.

As noted, the order alleges five separate and distinct permissibility violations any one of which (assuming that it was a "significant and substantial" and an "unwarrantable failure" violation) would be sufficient to sustain the order. In this case I find that all five allegations of violations are proven as charged and that each was "significant and substantial" and the result of "unwarrantable failure".

The first violation charged in the order was that an unauthorized field change was made on the Lee Norse Miner being used in the North Main working section in that a fluorescent lighting system consisting of four lights was installed on the machine without prior MSHA approval.

30 C.F.R. 18.81(a) provides as follows:

An owner of approved (permissible) equipment who desires to make modifications in such equipment shall apply in writing to make such modifications. The application, together with the plans of modifications, shall be filed with Approval and Certification Center, Box 201B, Industrial Park Road, Dallas Pike, Triadelphia, West Virginia 26049.

It is not disputed that C.W. Mining failed to apply to MSHA for the field modification at issue. The violation is accordingly proven as charged. MSHA Inspector Robert Baker testified moreover that on June 29, 1989, while performing duties at the subject mine he was informed by Mine Superintendent Kenneth Defay about anticipated changes to be made on a continuous miner then in the shop including changes to the lighting system. Baker testified that he cautioned Defay to check to see whether he needed approval from MSHA for a field modification for the changes.

Defay acknowledged that Baker told him that he would need MSHA approval for field modifications for electrical changes but Defay testified that he thought Baker said that approval was needed only for "major" electrical changes. Defay claims that he thought lighting system changes needed no MSHA approval. Defay also claimed ignorance of the provisions of 30 C.F.R. 18.81 (requiring MSHA approval for field modifications on permissible electrical equipment).

Chief electrician Nathan Atwood also claimed ignorance of the requirements of 30 C.F.R. 18.81. Atwood maintains that in any event since the field change was subsequently approved by MSHA there was no hazard in failing to get its prior approval.

The record also shows however that the Co-op Mining Company, the predecessor operator of the Bear Canyon Mine and parent organization of C.W. Mining, previously corresponded with MSHA requesting approval for the installation of lighting systems at least five times in 1979 and 1980. Indeed two of the letters requesting modifications were authored by Mr. Stoddard who was then and is now president of the subject company.

Within the above framework it is clear that C.W. Mining Superintendent Kenneth Defay was specifically advised, only 10 days before the subject order was issued, of the need to verify whether prior MSHA approval was needed before making the anticipated field modifications. While there is some question as to whether MSHA Inspector Baker specifically told Defay that prior MSHA approval was necessary for a field modification to the lighting system, it is clear that Defay was placed on such notice from which he certainly had the obligation to verify whether or not such prior approval was necessary. His claims of ignorance cannot therefore be given any weight either toward negating the violation or in mitigating his negligence. The evidence is clear moreover that it was within the collective knowledge of C.W. Mining management that prior MSHA approval was indeed necessary for field modifications to the lighting system on the subject miner because that management had previously made such requests to MSHA. Under the circumstances the failure to

~632

seek and obtain prior MSHA approval for the field modification was the result of negligence of such an aggravated nature as to constitute "unwarrantable failure". Emery Mining Co., supra.

The violation was also "significant and substantial". While it turned out in this case that indeed the modifications as made were subsequently approved by MSHA the purpose of the standard is to foreclose the possibility of dangerous conditions. Considering normal mining operations it may reasonably be inferred that failure to obtain prior MSHA approval for field modifications to permissible electrical equipment would reasonably likely lead to reasonably serious injuries in the mining environment. Mathies Coal Company, supra.

The second and fourth violations charged in the subject order concern insufficient packing in packing glands at two locations on the subject miner. The requirements for packing are set forth in 30 C.F.R. Part 18 Appendix II Figure 8. It is not disputed that without sufficient packing an arc or flame could reach the outside atmosphere and ignite coal dust or methane or that an electrical cable could become damaged. By way of defense to the charges C.W. Mining maintains only that the packing was indeed sufficient.

In light of the prior deficiencies found in the credibility of the operator's principal witness however I give greater weight to the unimpeached testimony of Inspector Gibson and find that indeed there was a deficiency in the packing as charged. In light of the undisputed evidence concerning the hazard involved with insufficient packing I also conclude that the violations were "significant and substantial". Mathies Coal Co., supra.

Insufficient packing of the packing glands is also the type of violation that should be discovered during an appropriate weekly electrical inspection. The failure of C.W. Mining to have conducted a weekly electrical inspection (a finding I have made in reference to Citation No. 3296377) supports the finding that these violations were also the result of gross negligence and aggravated conduct constituting "unwarrantable failure". Emery Mining Co., supra.

The order charges, thirdly that an opening in excess of .005 inch was present in the pump motor cover lid and junction box. Under 30 C.F.R. Part 18 Sub-Part D Appendix II Figure 5, a maximum clearance of .004 inch is allowed. C.W. Mining does not deny the existence of this violation as charged but maintains (through electrician John Tucker) that such a gap in excess of .005 inch does not involve any danger. However in light of this electrician's notable lack of

~633

experience and established deficiencies in credibility I can give this opinion but little weight.

On the other hand I find the testimony of Inspector Gibson, a highly qualified and experienced electrician, completely credible. According to Gibson with such a gap in the pump cover lid and junction box there was a real danger that a short circuit or arc within the motor could escape into the outside mining atmosphere igniting methane or coal dust thereby inferentially causing flash fire or explosion. The violation was clearly therefore "significant and substantial". Mathies Coal Company, supra.

The violation was also the result of negligence of such an aggravated nature as to constitute "unwarrantable failure". Emergy Coal Co., supra. The electrician responsible for inspecting this electrical equipment has been found not to have even conducted the weekly electrical inspection that, if properly done, would have led to the discovery of this most serious violation. It is apparent moreover that even when the weekly inspections were performed not all parts of the electrical equipment were inspected, e.g. area where lids had to be removed such as the pump motor lid here involved. This violation was extremely serious and the cavalier and negligent attitude of the electrician responsible for these inspections is most disturbing.

Finally, the fifth violation charged in the subject order concerns the failure to have secured the hose conduit covering the inner machine cable on the left cutter motor under the packing gland clamp. According to the allegations the cable appeared not to have been inserted far enough into the motor junction box and was taped over to obtain protection similar to that provided by a conduit. For the reasons already noted I accord the testimony of Inspector Gibson full credibility.

According to Gibson the tape covering the cable did not afford the same degree of protection as the hose conduit and indeed the cable could produce an ignition source for a methane or dust explosion. The violation was therefore clearly "significant and substantial" and serious. Inasmuch as the violation was caused by the affirmative act of a worker and was subject to electrical inspections, the failure to have located and corrected this violation constitutes gross negligence and "unwarrantable failure".

Order No. 3411646 also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. 75.400 and charges as follows:

Accumulations of loose Coal, coal pieces and coal fines were permitted to accumulate in the #20

Room on the 2nd West working section. The accumulations began at the section feeder breaker and extended approximately 332 feet in by and measured to range between 2-12 inches deep x 11 feet wide. This entry was the shuttle car roadway. The shuttle cars are supplied 480VAC.

Also in the last open cross cut to the left of the #20 Room, accumulations of coal fines (first cuttings) was [sic] observed on the left and right ribs approximately 90 [sic] in length x 16 inches deep x 29 inches wide (measured).

The joy shuttle cars were observed running over these accumulations.

The graveyard foreman, Gaylon Atwood, was present on the section at this time. Also present on the section were the two(2) day shift foremen, Shin Stoddard and Randy Defa.

These accumulations were very obvious. Mr. Atwood stated, "the area around the feeder breaker had been cleaned around 1:30 a.m. this date but the entry was not cleaned. He also stated he observed the accumulations but did not feel they were (accumulations) that bad until the cleaning up of the accumulations was under way"

Mr. Atwood also performed the pre-shift examination of this section and these conditions were not observed at that time. (*Note a separate violation was issued for an inadequate preshift).

The cited, standard 30 C.F.R. 75.400 provides that "[c]oal 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." Inspector Gibson testified that he in fact found the conditions cited in the above order during the course of his inspection on July 12, 1989. Although the accumulations were found in several areas he issued only one citation for the conditions. According to Gibson much of the material consisted of coal "fines" which he defined as pulverized coal that would not pass through a No. 20 seive. It is not disputed that coal fines are more dangerous than other coal accumulations because they are more readily ignitable and would increase the intensity of any ignition. The violations were particularly hazardous according to Gibson because the shuttle cars were continuing to run over the accumulations thereby further crushing and pulverizing the coal dropped from the cars and the fact that the shuttle cars were electrically powered with trailing cables laying in the coal dust. Gibson opined that the accumulations were extensive and with the ignition sources present injuries and or fatalities were likely. Based on this credible testimony I

~635

find the violation to be "significant and substantial" and serious. Mathies Coal Co., supra.

According to Gibson, Shane Stoddard the day shift oncoming foreman also admitted that the accumulations "looked bad". Stoddard informed Gibson however that he did not plan to clean the accumulations for another two hours and that is when Gibson issued the order at bar.

Gibson also concluded that the violation was the result of the operator's "unwarrantable failure". He observed that on his first day inspecting the subject mine he told Defa about the necessity for the clean-up of first cuttings. The cited accumulations were in his opinion also "very obvious". In light of this credible evidence I agree that the violation was indeed the result of "unwarrantable failure."

Order No. 3411647, also issued under Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. 75.303(a) and charges as follows:

An inadequate preshift examination was conducted on the 2nd West working section on 7-12-89, by the graveyard foreman, Gaylon Atwood, for the oncoming day shift. Accumulations of loose coal, coal pieces and coal fines and first cuttings was [sic] permitted to accumulate in the No. 20 Room and last open crosscut to the left off No. 20 Room. These accumulations were obvious and very extensive.

The standard at 30 C.F.R. 75.303(a) provides in relevant part as follows:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall . . . examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; . . . and examine for such other hazards and violations of the mandatory health or safety standards as an authorized representative of the Secretary may from time to time require. . . . Upon completing his examination, such mine examiner shall report the the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the before other persons enter the

underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

In essence, the basis for this order was the failure to report in the preshift examination books the accumulations that were cited in Order No. 3411646 discussed supra. Gibson observed that the accumulations existed between 5:00 and 7:00 a.m. when the preshift examination was required to be performed and that the accumulations were not reported in the preshift book. According to Gibson, Foreman Atwood reportedly had performed the preshift examination in the cited roadway and 20 room but failed to report the the cited conditions in the examination book. Gibson concluded that the violation was "significant and substantial" because the hazardous condition caused by the massive accumulations would not likely be corrected in the absence of a report in the preshift examination book and would therefore fail to assure miners of a safe working environment. I find Gibson's testimony credible in this regard and sufficient to support the violation and its "significant and substantial" findings.

Gibson also concluded that the violation was the result of "unwarrantable failure" for the reason that an experienced section foreman such as Atwood should not overlook such conditions. Again I find Gibson's testimony to be credible in this regard and that it fully supports the conclusions reached. Particularly because of the massive size of the accumulations the failure to have reported them constitutes aggravated negligence and "unwarrantable failure".

Order No. 3411648 also issued pursuant to Section 104(d)(1) of the Act, also charges a violation of the standard at 30 C.F.R. 75.400. The order charges as follows:

Accumulations of dry coal pieces, loose coal, and float coal dust was [sic] permitted to accumulate on the Joy Miner 2G-2519A-25(S/NJM1868), being used on the 2nd West working section.

These accumulations were present and observed on top of and under the covers of the entire machine.

These accumulations of float dust ranged from a film 1 inch deep x 18 inches wide x 60 inches long on top of the miner. Under the covers a film up to 5 inches deep x 9 inches wide x 60 inches long.

The accumulations of float coal dust and coal pieces under the shields (covers) were on, under, and around the electrical compartments and electric motors.

The miner was observed cutting coal before this condition was addressed. The graveyard section foreman, Gaylon Atwood was present on the section while this condition existed.

Also present on the section were the (2) two day shift foremen, Shane Stoddard and Randy Defa. These accumulations were very obvious and very extensive.

The miner is supplied 950VAC and is capable of producing sparks during the normal cutting of coal.

Gibson testified that the conditions cited in the above order were indeed present at the time of his inspection on July 12, 1989. He observed that the miner was in the act of cutting coal when he observed the accumulations. Gibson opined that a spark from an electrical component or the cutter head itself with the amount of float coal dust present would act like "gunpowder" they were so explosive. Indeed the conditions were so obvious that, according to Gibson, Foreman Atwood admitted that "I can't argue about that -- it's obvious".

Gibson also took samples of the coal dust which passed through a No. 20 sieve and tagged and labeled it. He later mailed the sample to the MSHA Analysis Center and received in return a one-page analysis (Exhibit G-4) indicating that the material was 88 percent combustible. This credible evidence clearly supports a finding that the violation occurred and was of high gravity and "significant and substantial".

I also accept the credible findings of Inspector Gibson that the accumulations were obvious and readily observable to the section foreman working in the area. Under the circumstances I agree that the violation was the result of aggravated conduct constituting gross negligence and "unwarrantable failure".

Considering all of the criteria under section 110(i), including the significant history of similar violations at this mine, I consider the following civil penalties appropriate: Citation No. 3296377-\$950, Order No. 3411644 \$1,500, Order No. 3411646-\$900, Order No. 3411647-\$850, Order No. 3411648-\$900.

