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SOL (MSHA) V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
June 20, 1994

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

v.

MID-CONTINENT RESOURCES, INC.

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

v.

THOMAS SCOTT, employed by
MID-CONTINENT RESOURCES, INC.

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

v.

TERRANCE J. HAYES, employed by
MID-CONTINENT RESOURCES, INC.

Docket No. WEST 91-168

Docket No. WEST 91-594

Docket No. WEST 91-626

BEFORE: Backley, Doyle and Holen, Commissioners(Footnote 1),(Footnote 2)

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issues are whether Mid-Continent Resources, Inc. ("Mid-Continent") violated

1 Commissioner Nelson participated in the consideration of this case but 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 a panel of three members to exercise the powers of the Commission.

2 Chairman Jordan assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. In the interest of efficient decision making, Chairman Jordan has elected not to participate in this matter.

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30 C.F.R. 75.400;(Footnote 3) whether that violation was of a significant and substantial ("S&S") nature and caused by Mid-Continent's unwarrantable failure to comply with the standard; and whether Thomas Scott and Terrance J. Hayes, employed as supervisors by Mid-Continent, were individually liable under section 110(c) of the Mine Act, 30 U.S.C. 820(c), for knowingly authorizing, ordering, or carrying out the violation.(Footnote 4)

Administrative Law Judge John J. Morris concluded that Mid-Continent violated section 75.400, that the violation was S&S and caused by Mid-Continent's unwarrantable failure, and that both Scott and Hayes were individually liable for civil penalty under section 110(c) of the Act. 15 FMSHRC 149 (January 1993)(ALJ). We granted Mid-Continent's petition for discretionary review, which challenged each of the judge's findings.(Footnote 5) For the reasons that follow, we affirm the judge's conclusions that Mid-Continent violated the standard and that the violation was S&S and caused by the operator's unwarrantable failure. We reverse his determinations that Scott and Hayes were liable under section 110(c).

3 30 C.F.R. 75.400 provides:

Accumulation of combustible materials.

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.

4 Section 110(c) of the Mine Act provides:

Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. 820(c).

5 In his decision, the judge also ruled on an order issued to Mid-Continent alleging a violation of section 75.400 on May 1, 1990, and on a related section 110(c) action involving another Mid-Continent employee. Docket Nos. WEST 91-421 and -627. A petition for discretionary review with respect to those aspects of the judge's decision was filed by the Secretary. We are issuing a separate decision on the Secretary's petition. Mid-Continent Resources, Inc., 16 FMSHRC (June 20, 1994).

I.

Violation of 30 C.F.R. 75.400 and Special Findings

A. Factual and Procedural Background

Mid-Continent operates the Dutch Creek Mine, an underground bituminous coal mine in Pitkin County, Colorado. On May 29, 1990, Frank Carver, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 211 longwall section.

In the intake roadway of the number 2 entry, approximately 300 feet from the face, Carver discovered that the No. 18 crosscut was mostly full of material consisting of timbers, lump coal, very dry coal dust, float coal dust, and coal fines. 15 FMSHRC at 162-63. The accumulation was 18 feet wide, 6 feet high and 21 feet long and was lightly "salted and peppered," indicating the application of rock dust. Carver also observed a hanging voltage cable and a non-permissible diesel tractor 20 to 40 feet from the accumulation and considered them to be ignition sources.

Carver found another accumulation of lump coal, float coal dust, and dry coal fines in the first crosscut adjacent to and behind the 211 longwall face in the number 2 entry. He estimated that the second accumulation was 30 feet wide, 6 feet high and 24 feet long.

Carver determined that the accumulations violated section 75.400 and issued a withdrawal order, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814(d)(2), alleging that the violation was S&S and resulted from Mid-Continent's unwarrantable failure to comply with the standard.

The judge credited Carver's testimony that the accumulations were combustibile and concluded that Mid-Continent had violated section 75.400. 15 FMSHRC at 163-65. He determined that the violation was S&S. Id. at 165. The judge concluded that Mid-Continent's move of the longwall power center, which occurred during the Memorial Day weekend (May 26-28), caused the accumulation in the No. 18 crosscut because space was needed to accommodate the equipment at its new location. Id. With respect to unwarrantable failure, the judge noted that the Secretary had cited Mid-Continent numerous times for violations of section 75.400. See Id. at 160; S. Ex. M-3. The judge concluded that the large number of citations established that Mid-Continent's violation of section 75.400 resulted from its unwarrantable failure. Id.

B. Disposition

1. Whether section 75.400 was violated

Mid-Continent submits that the Secretary failed to establish the combustibility of the accumulations and that, in any event, its ventilation plan permits it to maintain accumulations behind the longwall face. The Secretary argues that substantial evidence supports the judge's conclusion that the accumulations were combustibile and that the ventilation plan does not permit accumulations.

We conclude that substantial evidence supports the judge's determination that the accumulations were combustible.(Footnote 6) We note that several of the judge's findings are based on credibility resolutions and that Mid-Continent has not offered sufficient grounds to justify the extraordinary step of reversing those resolutions. See generally, e.g., Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987).

The Commission has held that section 75.400 "is violated when an accumulation of combustible materials exists." Old Ben Coal Co., 1 FMSHRC 1954, 1956 (December 1979); see also Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The Commission has further explained that a prohibited "accumulation" refers to a mass of combustible materials that could cause or propagate a fire or explosion. Old Ben, 2 FMSHRC at 2808.

Carver estimated that the accumulation in the No. 18 crosscut was 18 feet wide, 6 feet high and 21 feet long. S. Ex. M-1. He testified that the accumulation contained "some float dust mixed in, and some coal fines, and lump coal throughout the pile." Tr. 188-89; see also Tr. 205. He also noted that the accumulation was "dry to the touch" and contained combustible timber wedges. Tr. 188, 189. The judge credited Carver's description of the accumulation. 15 FMSHRC at 163-64. The inspector's testimony is corroborated in part by the examiners' books. Coal accumulations in the No. 18 crosscut were reported in one onshift and two preshift examinations on May 27 and in a preshift examination on May 28. S. Ex. M-16; see also Tr. 259-61. According to the inspector, the float coal dust and the dust fines were a fire and explosion hazard. Tr. 192. See also Tr. 213. He was especially concerned that the dust could contribute to a secondary explosion following an explosion at the face. Tr. 192-93. John Reeves, Mid-Continent's president, acknowledged that coal dust, loose coal and chunks of coal can contribute to the propagation of a methane ignition. Tr. 482-84.

Mid-Continent raises three objections to Carver's testimony. First, it relies on the testimony of Bruce Collins, its geologist, that the cited accumulation was not coal but non-combustible carbonaceous siltstone. The judge rejected Collins' testimony, reasoning that Mid-Continent would not have applied rock-dust if the materials were not combustible. 15 FMSHRC at 164. See Tr. 188. See also Tr. 268, 281. The judge noted that Collins failed to explain how such large masses of siltstone could have accumulated. Id. at 164. Indeed, the record contains no evidence that Collins had ever been to the 211 longwall section. See Tr. 531.

Second, Mid-Continent argues that the coal in question will not spontaneously combust and, indeed, is not combustible. The evidence, however,

6 The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing factual determinations in an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "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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suggests only that the coal is not highly combustible. See, e.g., Tr. 410-12, 461-62, 470-71, 481. Spontaneous combustibility is not a prerequisite to the creation of an ignition or propagation hazard in a coal accumulation.

Third, Mid-Continent argues that the material in the No. 18 crosscut was wet below the surface and, therefore, incombustible and not subject to section 75.400. The Commission has held that accumulations of damp or wet coal, if not cleaned up, can dry out and ignite. Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985); Utah Power & Light Company, Mining Division, 12 FMSHRC 965, 969 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991) ("UP&L"). A construction of section 75.400 that excludes wet coal defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist. Black Diamond, 7 FMSHRC at 1121; see also UP&L, 12 FMSHRC at 970.

With respect to the second coal accumulation behind the longwall face, Mid-Continent preliminarily argues that Carver failed to testify about it. While Carver's testimony primarily addressed the accumulation in the No. 18 crosscut, Mid-Continent's own witnesses acknowledged the existence of the other accumulation. See Tr. 606, 636, 646. This accumulation was also reported in various reports in the examiners' books on May 27 and 28, 1990. S. Ex. M-16. The withdrawal order indicates that the second accumulation was similar in composition to the first. S. Ex. M-1.

Mid-Continent's main contention with regard to the second accumulation is that its approved ventilation plan, as modified (M. Ex. R-13), allowed it to maintain accumulations behind the longwall face as it advanced. The judge rejected that argument, finding that MSHA had not directly or implicitly authorized Mid-Continent to violate section 75.400. 15 FMSHRC at 164-65. We agree. The judge found that the modification relied on by Mid-Continent approves only "the lengthening and extension of two crosscuts to allow for advance of the face." Id. at 164-65. The plan's language cannot reasonably be construed to allow Mid-Continent to maintain accumulations behind the longwall face. See M. Exs. R-11, 12, and 13.

We conclude that the second accumulation was not permitted under Mid-Continent's ventilation plan. The cited accumulations of both coal and other materials were the kind of combustible and hazardous accumulations prohibited by the standard and either accumulation alone would have constituted a violation of section 75.400. Accordingly, we affirm the judge's determination of violation.

2. Whether the violation was S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. 814(d), and refers to a more serious type of violation. A violation is S&S if, based on the particular facts surrounding the 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, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor 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, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held that the third Mathies element "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

With regard to the first element of the Mathies test, we have affirmed the judge's finding of violation. 15 FMSHRC at 165. As to the second element, the judge found that there was a measure of danger contributed to by the violation and he further found that a mine fire would cause serious injuries, thus establishing the fourth element. *Id.* The operator does not dispute these two findings on review but, rather, objects to the judge's findings concerning the third Mathies element, that the hazards posed by the violation were reasonably likely to cause injury.

Mid-Continent argues that its coal burns only with great difficulty and, thus, there was only an extremely remote possibility that an ignition source would spark a fire. Mid-Continent asserts that, because the 211 longwall face was not producing coal and all pertinent ignition sources were deenergized at the time of the citation, the accumulation in the No. 18 crosscut, which was rock dusted and wet below the surface, did not present a reasonable likelihood of resulting in an injury-producing event.

Carver testified that, if the violative accumulation in the No. 18 crosscut continued, it was reasonably likely that an injury would occur. 15 FMSHRC at 163-65; Tr. 193, 213. He indicated that there were several ignition sources present, including the hanging power cable and the diesel tractor. Tr. 155, 192, 195. Because the air travels from the No. 18 crosscut to the working face, a fire or explosion would affect all miners in the section. Tr. 194. The inspector and other witnesses also expressed concern about propagation of an explosion at the face, explaining that coal dust, loose coal, and chunks of coal can contribute to the propagation of a methane ignition. Tr. 192-93, 297-99, 482-84. This is a gassy mine, emitting more than one million cubic feet of methane in a 24-hour period. 30 U.S.C.

813(i). See Tr. 28, 29-30, 193

Mid-Continent's argument that there was only a remote possibility of these hazards occurring fails to account for the risks emanating from continued normal mining operations once the power center move was completed and the section resumed operating. We also reject Mid-Continent's arguments based on the low combustibility of its coal and the dampness in the accumulation.

We conclude that substantial evidence supports the judge's determination that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. Accordingly, we affirm the judge's conclusion that Mid-Continent's violation of section 75.400 was S&S.

3. Whether the violation resulted from unwarrantable failure

Mid-Continent argues that it was impossible to clean up the accumulations in a timely manner due to unexpected mechanical and electrical problems, including the failure of the gearbox on the face conveyor, which prevented the removal of accumulations on that conveyor. Mid-Continent also asserts that most, if not all, of the accumulation in the No. 18 crosscut was the result of floor heave. The Secretary responds that conveyor problems do not excuse the delay in cleaning up because the power center move caused the accumulations to be dumped in the No. 18 crosscut and that move was undertaken after the gearbox failure was known to Mid-Continent. The Secretary further argues that Mid-Continent's long history of accumulation violations placed it on notice that greater efforts were necessary for compliance.

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (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. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. *Id.*

In reaching his conclusion as to Mid-Continent's unwarrantable failure, the judge relied heavily on the fact that, between October 1, 1988, and March 18, 1992, Mid-Continent received 215 citations and orders for violations of section 75.400. 15 FMSHRC at 160, 165; S. Ex. M-3. Mid-Continent properly questions the relevance of such violations after May 29, 1990, the date of the order in issue. The judge's error in relying on post-violation incidents was, however, harmless. Between October 1, 1988, and May 28, 1990, Mid-Continent was cited for 170 alleged violations of section 75.400, which should have engendered in the operator a heightened awareness of a continuing accumulation problem. S. Ex. M-3. Cf. *Peabody Coal Co.*, 14 FMSHRC 1258, 1259, 1264 (August 1992); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987).

The cited accumulations were extensive and were noted in reports of various examinations conducted on May 27 and 28. S. Exs. M-9, M-16. Cf. Peabody, 14 FMSHRC at 1262. There is no evidence of attempts to remove the accumulations during two idle shifts on May 28 or at the time of Carver's inspection. See S. Ex. M-16. Cf. Peabody, 14 FMSHRC at 1262. As to Mid-Continent's argument that it was impossible to remove the accumulations from the mine via the conveyor belts due to unexpected mechanical problems and the power center move, as noted by the judge, the move itself resulted in the accumulation in the No. 18 crosscut because its implementation required additional space.(Footnote 7) 15 FMSHRC at 165. See also Tr. 155-57, 270.

Accordingly, we affirm the judge's determination that Mid-Continent's violation of section 75.400 resulted from its unwarrantable failure to comply with the standard.

II.

Thomas Scott's Liability under Section 110(c)

A. Factual and Procedural Background

Thomas Scott was the mine's underground superintendent in May 1990, and usually worked the day shift, from 7:00 a.m. to 3:00 p.m. Upon learning on Friday evening, May 25, that the face conveyor gearbox on the 211 longwall face had gone out, he ordered the power center move. Tr. 631-32, 646. Scott did not work during the Memorial Day weekend but on Monday evening, May 28, he called the mine and learned that the 211 gearbox was not yet ready for installation and that the power center move had not been completed. When Scott returned to work at 6:30 a.m. the following day, he did not review Mid-Continent's examination books immediately. He was notified of Carver's order at approximately 8:30 a.m.

Following an investigation, the Secretary alleged that Scott had knowingly authorized, ordered or carried out the violation within the meaning of section 110(c) of the Act.

The judge found that, because Scott should have known from the examination books that the accumulation existed in the No. 18 crosscut, he was liable under section 110(c). 15 FMSHRC at 167. The judge found Scott negligent and assessed a civil penalty of \$200. Id..

7 Mid-Continent also cites electrical problems with another belt, but does not explain the nature or extent of the problems, or any efforts to restart the belt. Thus, we do not address this argument.

Mid-Continent's additional argument that the accumulation was caused by floor heave is rejected. Substantial evidence supports the judge's determination that the accumulation occurred in connection with the power center move. 15 FMSHRC at 164-65.

B. Disposition

Scott argues that he did not actually know of the accumulations and that the judge found him only negligent, as distinguished from having engaged in more aggravated conduct. The Secretary responds that Scott knew or had reason to know that accumulations would occur during the power center move and that they could not be cleaned up in a timely manner because the gearbox had been removed for repairs.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty.

The accumulations occurred during Scott's three-day absence. The judge emphasized that, upon returning to work, Scott did not review the mine's examination records. 15 FMSHRC at 167. MSHA's order was issued within approximately two hours of his return. Scott's testimony was uncontradicted that he had directed the power center to be moved to a crosscut on the high side of the roadway, to an area that he had ordered to be cleared of the tools and equipment that had been stored there in order to accommodate the power center, but that the longwall coordinator moved the power center to the low side of the No. 18 crosscut without consulting Scott. Tr. 634-35, 646-47. At that location, excavation was necessary to accommodate the power center. Thus, Scott's testimony reflects that, when he left on May 25, he had no reason to expect accumulations in connection with the move.

We conclude that substantial evidence does not support the judge's conclusion that Scott knowingly authorized, ordered or carried out the violation. Accordingly, we reverse the judge's section 110(c) determination and vacate the civil penalty assessed against Scott.

III.

Terrance J. Hayes's Liability under Section 110(c)

A. Factual and Procedural Background

Terrance J. Hayes was shift foreman for the 211 longwall area of the mine. He normally worked on the C shift, from 11:00 p.m. to 7:00 a.m., but did not work May 26 or 27. He returned to work on Monday at 11:00 p.m., May 28. Hayes was briefed on the power center move and directed that it be completed. Hayes reviewed and countersigned the production and maintenance reports. He did not observe any coal accumulations. On May 29, Tuesday night, he became aware of MSHA's order.

Following its investigation, MSHA alleged in a petition for assessment of civil penalty that Hayes knowingly authorized, ordered or carried out the May 29 violation. The judge determined that Hayes knew or should have known of the accumulations yet failed to take remedial action. 15 FMSHRC at 168-69. The judge found Hayes negligent and assessed a civil penalty of \$200. Id. at 169-71.

B. Disposition

Hayes and the Secretary raise essentially the same arguments made regarding Scott. Hayes additionally argues that the relevant examination records for the No. 18 crosscut did not indicate the presence of accumulations.

An earlier preshift report for May 28 and other reports for May 27 indicated coal accumulations in crosscut 18 and inby the longwall face. S. Ex. M-16. However, the preshift examination for the C shift on May 28 -- the shift on which Hayes worked -- did not reference the accumulations that formed the bases for MSHA's enforcement actions. S. Ex. M-9. Inspector Carver testified that, if one noticed a cited condition in the examination book that was not reflected in a subsequent examination, it could be assumed that the cited condition had been remedied. Tr. 243-46. Thus, according to Carver's testimony, Hayes may have reasonably assumed that the accumulations had been removed by the commencement of his shift. As the judge noted, Hayes may have simply not observed the contents of that crosscut. 15 FMSHRC at 164; Tr. 617. Hayes' testimony to that effect was uncontradicted.

We conclude that substantial evidence does not support the judge's conclusion that Hayes knowingly authorized, ordered or carried out the violation. Accordingly, we reverse the judge's section 110(c) determination and vacate the civil penalty assessed against Hayes.

IV.

Conclusion

For the reasons set forth above, we affirm the judge's determinations that Mid-Continent violated section 75.400, that the violation was S&S, and that it resulted from the operator's unwarrantable failure. We reverse the judge's determinations that Thomas Scott and Terrance J. Hayes were individually liable for the violation under section 110(c) and vacate the civil penalties assessed against them.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner