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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
CONTESTANT

v.

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

Contest of Citations

Docket No. PENN 82-203-R
Citation No. 1146664 3/15/82

Docket No. PENN 82-204-R
Citation No. 1146668 3/15/82

Renton Mine

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

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. PENN 82-217
A.C. No. 36-00807-03118

Renton Mine

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Contestant/Respondent, Consolidation Coal
Company:
Agnes M. Johnson-Wilson, Esq., Office of the
Solicitor, U. S. Department of Labor,
Philadelphia, Pennsylvania, for Respondent/
Petitioner, MSHA

Before: Judge Merlin

Statement of the Case

The first two docket numbers captioned above are notices of contest filed by Consolidation Coal Company under section 105(d) of the Act to challenge the validity of two citations issued by an inspector of the Mine Safety and Health Administration for alleged violations of 30 C.F.R. 75.1100-3. The third docket number is a petition for the assessment of civil penalties filed by the Secretary of Labor under section 110(a) of the Act for violations alleged in the citations.

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The hearing was held as scheduled on September 8, 1982. Documentary exhibits and oral testimony were received from both parties. The cases were consolidated for hearing and decision with the consent of the parties (Tr. 4). At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days of receipt of the transcript (Tr. 148).

The Mandatory Standard

Section 75.1100-3 of the mandatory standards, 30 C.F.R. 75.1100-3, provides as follows:

75.1100-3 Condition and examination of firefighting equipment.

All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The Cited Conditions or Practices

Citation No. 1146664 (PENN 82-203-R) cites a violation of 30 C.F.R. 75.1100-3 for the following condition:

The chemical fire extinguisher located in the car shop was not maintained in an operable condition in that the gauge indicated that the extinguisher needed recharged [sic].

Citation No. 1146668 (PENN 82-204-R) cites a violation of 30 C.F.R. 75.1100-3 for the following condition:

The chemical fire extinguisher on the trackmens motor #18 was not maintained in a usable and operative condition in that the gauge indicated the extinguisher needed recharged [sic]. The motor was being operated along the empty track to the North Mains.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5):

1. Consolidation Coal Company is the owner and operator of the Renton Mine.
2. The operator and the Renton Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding administrative law judge has jurisdiction over this proceeding.
4. The inspector who issued the subject citations was a duly authorized representative of the Secretary.
5. A true and correct copy of each of the subject citations was properly served upon the operator.
6. All witnesses are accepted generally as experts in coal mine health and safety.
7. Imposition of any penalties in this proceeding will not affect the operator's ability to continue in business.
8. The violations were abated in good faith.
9. The history of prior violations is noncontributory with respect to determining the amount of the civil penalties.
10. The operator is large in size.
11. The conditions set forth in the citations constituted violations of the cited mandatory standards.

Discussion and Analysis

As appears from the stipulations set forth above, the operator does not contest the finding that the two extinguishers which needed to be recharged were in violation of the Act as alleged.

The issue presented for resolution is whether the subject violations were significant and substantial. I conclude first that a finding that a condition is "significant and substantial" properly may be included in a section 104(a) citation. Judge Broderick so held in *National Gypsum Company*, 1 FMSHRC 2115 (1979) and this holding was not disturbed by the Commission on appeal. *National Gypsum Company*, 3 FMSHRC 822 (1981).

In *National Gypsum* the Commission considered at length what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission held that a violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health, and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of danger to safety or health. 3 FMSHRC at 827.

The record contains a great deal of testimony describing the areas where the two deficient fire extinguishers were located. The first fire extinguisher was in the car shop where there was oil and grease on the floor and some other combustible materials. The car shop itself had a concrete floor and concrete walls and its two entrances had metal doors. The second extinguisher was on the trackmen's motor which was covered with grease, oil and coal dust. In addition, power was going into the motor since the trolley pole was attached to a live wire. Welding and torching routinely occur at both locations. The repair of mine cars in the car shop requires welding which is done with acetylene torches. The trackmen's motor is used to carry equipment for repairing and rejoining rail tracks and cutting rails and bolts all of which is done with torches. Gas bottles and cutting torches were on the motor at the time.

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After a review of the evidence I have concluded that both violations were significant and substantial within the criteria set forth by the Commission. Both deficient fire extinguishers were present at locations where welding and torching were routinely carried out. The danger of fire is inherent and ever present in the performance of these activities. Also to be noted is the presence of some combustible materials in the vicinity of the extinguishers and live power sources on the trackmen's motor. Injury or illness of a reasonably serious nature becomes a reasonable likelihood when firefighting equipment such as extinguishers is not in working condition in such an environment. Accordingly, I determine that the particular circumstances presented here raise the degree of hazard in the cited violations to the level of significant and substantial.

I have not overlooked the operator's evidence regarding the presence of other fire extinguishers within 50 to 100 feet from the extinguishers. Nor have I overlooked evidence regarding the existence of rock dust. Assuming acceptance of this evidence, a finding of significant and substantial still would be appropriate in light of the entire record. An MSHA electrical expert testified that when confronted with a fire, miners often panic, may not do the logical thing and may follow an unexpected course of action. I find the electrical expert's testimony persuasive and indeed, compelling and I accept it. Therefore, even if other fire extinguishers and rock dust were where the operator alleged they were (and overlooking the absence of any evidence showing those extinguishers were in working order), there would be no guarantee that in the event of a fire a miner would go to the next nearest extinguisher or rock dust. As the electrical expert testified, a miner might run in the other direction and the first couple of minutes in any fire is critical with smoke the major problem.

With respect to the amount of penalty to be assessed in accordance with the six statutory criteria set forth in section 110(i) of the Act, I conclude in accordance with the analysis set forth herein that the violations were serious. Based on the evidence I next conclude there was ordinary negligence. Stipulations 7-10 set forth above cover the remaining statutory criteria.

I have reviewed the briefs. To the extent they are inconsistent with this decision they are rejected.

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ORDER

In light of the foregoing, it is Ordered that the operator's notices of contest be DISMISSED.

It is further Ordered that a penalty of \$200 be assessed for Citation 1146664 and that a penalty of \$200 be assessed for Citation 1146668.

It is further Ordered that the operator pay \$400 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge