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CONSOLIDATION COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST OF CITATION
v.	DOCKET No. PENN 82-89-R Citation No. 1143985 2/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW COMMISSION, PETITIONER	CIVIL PENALTY PROCEEDING DOCKET No. PENN 82-208 A.C. No. 36-00807-03113
v.	
CONSOLIDATION COAL COMPANY, RESPONDENT	Renton Mine

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

Before: Judge Melick

These consolidated cases are before me, pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act") to contest a citation issued to the Consolidation Coal Company (Consol) pursuant to section 104(a) of the Act and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for the violation charged in that citation. The general issue before me is whether Consol violated the regulatory standard at 30 CFR 75.1725(a) as alleged in Citation No. 1143985 and, if so, whether that violation was "significant and substantial" as defined in the Act and interpreted by the

Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822. An appropriate civil penalty must also be assessed if a violation is found. Evidentiary hearings on these issues were held in Falls Church, Virginia.

The cited regulatory standard, 30 CFR 75.1725(a) provides as follows:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The citation at issue reads as follows:

> The emergency escape hoist at Center Beach intake shaft was not maintained in a safe operating condition in that when the conveyance was lowered to the shaft bottom landing, the conveyance was being pulled under the shaft collar. Subsequently, when the conveyance was raised to the surface, it would contact the shaft collar and be jerked back and forth in the shaft.

The essential facts in this case, as alleged in the citation and as amplified by MSHA inspector Dennis Swentosky, are not in dispute. Consol argues only that those facts do not constitute a violation of the cited standard, and that even if those facts do constitute a violation of the standard, that the violation was not "significant and substantial". Inspector Swentosky testified that on February 12, 1982, he was helping MSHA Inspector Gerald Davis check the emergency escape hoist at the Center Beach intake shaft. Swentosky observed the capsule being raised three times. Because of the high velocity of the mine ventilation, each time the capsule was raised, it moved under and contacted the shaft collar. The capsule then proceeded to swing back and forth in the shaft (though not striking the shaft) as it was raised.

Inspector Davis testified that he had observed the same problem with the capsule during seven or eight trips on October 2, 1980. A citation was issued at that time under the regulatory standard at 30 CFR 75.1704. According to Davis, various modes of corrective action could have been taken to prevent the capsule from striking the shaft collar. He observed that rails could have been placed on the platform, a guiderope could have been run down the full length of the shaft, wire ropes or a grating could have been placed across the entry to prevent the capsule from deviating off course, or the platform itself could have been raised to elevate it above the effect of the ventilation.

While not disputing this evidence, Consol argues that the cited standard addresses only the maintenance, in safe operating condition, of mobile and stationary machinery and equipment. More specifically, Consol argues that the standard protects only against intrinsic defects in machinery and equipment that would affect safe operation. Thus, Consol argues that since the only

defects alleged by MSHA in this case were factors extrinsic to the escape capsule itself, there was no violation of the cited standard. Indeed, all of the cases involving this standard cited by the Secretary in his brief involve inherent defects in the equipment itself. See Mid-Continent Coal and Coke Company, FMSHRC 1501 (1979), aff'd, 2 MSHC 1450 (10th Cir., 1981) in which an airlock door was found to have been maintained in an unsafe condition due to a frayed cable and faulty lever on the hoist assembly used to open the door; Peabody Coal Co., 3 FMSHRC 2410 (1981) in which a conveyer was found to have been maintained in an unsafe operating condition due to faulty belt rollers; and Amherst Coal Co., 2 FMSHRC 597 (1980) in which a scoop was found to have been maintained in an unsafe operating condition due to an inoperative emergency switch and exposed lead wire.

However, even assuming, arguendo, that the standard is limited in application to intrinsic defects in machinery or equipment, I would nevertheless find a violation in this case. There does not seem to be any dispute, and in any event I find, that the movement of the escape capsule into the shaft collar was not safe (whether or not it was a "significant and substantial" hazard). Inspector Davis implied moreover, that one method of correcting the unsafe condition would be to modify the capsule itself by attaching it to a guide rope running the full length of the shaft. Thus, one method of abatement implicitly called for modifications to what may be considered defects intrinsic to the capsule itself. The fact that other options for abatement also existed which were extrinsic to the escape capsule and that the operator indeed may have chosen one of those modes of abatement is immaterial.

In any event, it is apparent that the citation charges that the emergency escape hoist system (not merely the escape capsule as an isolated piece of equipment or machinery) was unsafe. Thus, if any part of that integrated system of machinery and equipment was not being maintained in a manner in which the entire system could have been safely operated, then there was a violation of the cited standard. Here the evidence shows that there were intrinsic defects in that system of machinery and equipment that allowed the capsule to strike the shaft collar. The system was therefore in an unsafe condition in violation of the cited standard.

Whether that violation is "significant and substantial", however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in a injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., supra. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. In this regard, it is interesting to note that the same condition cited in this case had on a prior occasion been found by MSHA not to have been "significant and substantial" under the more liberal definition of that concept then in effect. In any event, I find MSHA's evidence concerning the alleged hazards associated with the cited

conditions to be highly speculative. For example, Inspector Swentosky speculated that a person in the capsule strapped to a stretcher with serious neck injuries could

possibly sustain further injuries if the capsule struck the collar with sufficient force. He also speculated that someone might receive knee injuries from bouncing against the side of the capsule. While he thought knee injuries could "possibly" occur, he was not aware that any such injury had ever occurred. Moreover, Swentosky agreed that he did not consider the use of the capsule in the condition cited to be imminently dangerous nor did he deem it necessary to have it removed from service. He did not know whether the emergency hoist at issue had ever previously been used or whether the rate of ascent could be controlled at a slow rate of speed --factors important to ascertaining the probabilities.

Inspector Davis also speculated that if the capsule got caught under the collar, the bridle chain might be stretched and damage the wire rope at that location. There is no evidence, however, that the capsule ever did get caught under the collar in spite of extensive testing. Moreover, since the top of the capsule was tapered, it appears unlikely that it could get caught under the collar. While Davis also observed that the capsule once hit the side of the shaft so hard that it severed the communications cable -- a cable about as thick as standard house wire -- I am unable to translate that incident to any probable hazard of a serious nature.

There is also divergence of opinion as to the severity of the hazard. Mine Superintendent Andrew Hathaway testified for example that during tests on February 13, 1982, he saw the capsule scrape the shaft collar, but not violently, and only "about 50% of the time or less". Moreover, according to Hathaway the capsule had been used only three times since 1975 and had never been used in an emergency.

Within this framework of evidence, it does not appear likely that the hazard contributed to would have resulted in any serious injuries. Accordingly, I do not find that the violation in this case was "significant and substantial". For the foregoing reason, I also do not find a high level of gravity associated with the violation. I find, however, that Consol was negligent in allowing the unsafe condition to have existed without apparent correction for more than a year. The evidence shows that the operator did abate the condition in a timely manner after the citation herein was issued. There is no dispute that the operator is large in size and that the mine at issue has a fairly substantial history of violations. Under the circumstances, I find that a civil penalty of $250 is appropriate.

Order

Citation No. 1143985 is affirmed, however, the "significant and substantial" findings made therein are hereby stricken. The Consolidation Coal Company is ordered to pay a civil penalty of $250 for the cited violation within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

December 21, 1982

AMENDED DECISION

The decision in these cases is hereby amended so that the docket number in the above-captioned Civil Penalty Proceeding shall become PENN 82-208A. New docket number PENN 82-208B will include Citations No. 840955 and 840956 (2/1/82), and all pleadings corresponding to those citations heretofore filed by the parties in Docket No. PENN 82-208 are hereby incorporated in Docket No. PENN 82-208B.

Gary Melick
Assistant Chief Administrative Law Judge