CCASE:
WESTERN SLOPE V. SOL (MSHA)
DDATE:
19830426
TTEXT:

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

| | |
|---|---|
| WESTERN SLOPE CARBON, INC., APPLICANT | CONTEST OF CITATION PROCEEDING |
| | DOCKET NO. WEST 81-150-R |
| v. | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Order No. 786185 12/17/80 |
| | MINE: Hawk's Nest East |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER | CIVIL PENALTY PROCEEDING |
| | DOCKET NO. WEST 81-286 |
| v. | MSHA CASE NO. 05-00293-03061 |
| WESTERN SLOPE CARBON, INC., RESPONDENT | MINE: Hawk's Nest East |

Appearances:
Katherine Vigil, Esq., and
James H. Barkley Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building, 1961 Stout Street
Denver, Colorado 80294,
For the Secretary

Phillip D. Barber Esq.
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290,
For the Operator

Before: John A. Carlson, Judge

DECISION

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"), arose from a December 17, 1980 inspection of the Hawk's Nest East Mine of Western Slope Carbon, Inc. (Western Slope). On that date Thomas Heuschkel, a federal coal mine inspector, issued an imminent danger withdrawal order under

section 107(a) of the Act. He modified the order on December 24, 1980 to specify that the violation of the float coal dust standard published at 30 C.F.R. 75.400, charged in the withdrawal order, was also a violation of section 104(a) of the Act. These determinations were challenged by Western Slope's Application for Review which was docketed as WEST 81-150-R. The Secretary's proposal of a civil penalty of $960.00 for the alleged violation was also contested. The Commission docketed the penalty matter as WEST 81-286, which was consolidated for hearing with the earlier matter.

Following a Denver, Colorado hearing, both parties submitted briefs. The jurisdiction of the Commission is conceded by the operator.

## REVIEW AND DISCUSSION OF THE EVIDENCE

### I

The inspector issued his imminent danger withdrawal order because of what he perceived to be an excessive accumulation of float coal dust in the return entries from a longwall section in the mine. This condition, he charged, violated the mandatory safety standard set forth at 30 C.F.R. 75.400. It 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.(FOOTNOTE 1)

The inspector testified that he observed a deposit of "very black" float coal dust "in excess of an eighth of an inch deep" over a distance of about 500 feet in the number 1 and 2 entries, 7 west section (transcript 10-11). The 500 feet in question were between crosscuts 51 and 56, he stated, and the dust accumulation represented a "very explosive condition." He enlarged upon the hazard by explaining that the dust could be put in suspension, and thus made potentially explosive, by any air disturbance in the entries. A roof fall in the gob area behind the longwall face, he said, could release methane and also stir up the dust, creating a situation "... where the slightest spark would set off a tremendous explosion" (Tr. 23). Concerning ignition sources, he testified that two electric motors used to drive the conveyors could generate sparks. The motors, he stated, were located at the tailgate of the conveyor, near the intersection of the longwall face and the entries. Also, according to the inspector, sparks could be generated by the longwall mining machine, or could result from rocks falling on metal machinery during the mining process.

Inspector Heuschkel also maintained that the presence of methane enhanced the fire and explosion hazard posed by the coal dust. His inspection notes showed readings ranging from .35% to 2% at various points in the area of the entries where the coal dust lay. He also testified that he achieved a reading of 5% (the top of the monitor he was using) in the gob area, behind the longwall face. This area was isolated from work areas by danger boards. The inspector went behind the boards to take the high reading.

The inspector maintained that an explosion of the coal dust, or a combination of the dust and methane, could result in fatal injuries to all miners in the west side of the mine (Tr. 15). The undisputed evidence shows that no miners were in the entries in question, but that a crew was working on the longwall machine, and a total of eight or nine miners were in the general area. None was closer than 300 feet to the coal dust area. (Tr. 32, 50, 64).

Under cross examination the inspector acknowledged that he saw no coal dust in suspension during his inspection, and that he could have been mistaken about the number of motors at the end of the conveyor - there may have been but one. He also acknowledged that the methane readings recorded in his inspection notes were all within acceptable limits under applicable standards. The 5% reading, he admitted, was taken in an area where the operator was not obliged to take readings, and was not recorded in his notes (Tr. 34).

The inspector first maintained that his withdrawal order covered the longwall, but later conceded that it did not. It covered the entries only; work could continue on the longwall.

II

Western Slope presented evidence through Ronald E. Neil, foreman in the area in question, and Ralph Audin, safety director for the mine.

Neil disagreed with the federal inspector about the quantity of coal dust present. He acknowledged that a "gray film" of coal dust was present over rock dust(FOOTNOTE 2) on the floor. The rock dust, he said, was visible in "most places."

Most of Neil's testimony, however, went to the issue of the likelihood of an explosion (Tr. 51, 55). He stressed that no production was taking place at the time of inspection because the stage loader which feeds the coal to the conveyor was under repair. He substantiated the claim with a copy of his daily report which showed no production of his shift on the date of inspection (Western Slope's exhibit 5). Work on the stage loader took place at the far or headgate end of the conveyor, some 428 feet from the entries cited by the inspector (Tr. 50).

Neil also emphasized that there were no ignition sources within the entries in question. The entries contained no machines; and no cables, wires, or other electrical conductors ran through the area. Concerning the motor at the tailgate of the longwall conveyor, Neil testified that it was not operating at the time of inspection because there was no production at the face. Moreover, there was but one motor at the tailgate, not two as indicated by the inspector. He further asserted that methane readings are taken before the belt is started. If the readings exceed 1 percent, start-up does not occur. Beyond that, a detector device installed about 15 feet from the machine automatically "kicks the power off of everything" if the methane level exceeds 2 percent.

Western Slope's safety director, Mr. Audin, did not observe the conditions underground at the time of the inspection. His testimony added little of substance to that of the foreman.

III

Having considered all the evidence, I must conclude that it establishes a violation of 30 C.F.R. 75.400. The existence of an accumulation of float coal dust was in some dispute, but I find the inspector's evidence on this issue generally credible. Western Slope had a rock dusting program which involved use of a mechanical trickle duster supplemented by hand dusting. Foreman Neil, however, admitted that the trickle duster had not been in operation at the time of inspection, and he was vague about when it last worked. He was also unsure as to when the entries in question were last dusted by any method. Neil did concede the presence of some coal dust, but claimed it was not as thick as the 1/8 inch estimated by the inspector.

In Old Ben Coal Company, 1 FMSHRC 1954 (1979), the Commission made clear that a violation of the standard occurs whenever "an accumulation of combustible materials exists." In doing so it rejected the prior view of the Interior Department's Board of Mine Operations Appeals that the crux of the violation is the operator's failure to clean up an accumulation "within a reasonable time." Later, in a case involving the same operator, Old Ben Coal Company, 2 FMSHRC 2806 (1980), the Commission held that measurements or other precise evidence of the depth or extent of accumulation were unnecessary to show violation. It declared that "... an accumulation exists where the quantity of combustible materials is such that, in the judgment of an authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." (Footnotes omitted.) I am convinced that an accumulation existed.

IV

For the reasons which follow, however, I am not convinced that the violative condition constituted an imminent danger. Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or

other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The commonly used test for determining the existence of an imminent danger can be found in Old Ben Coal Corporation v. Interior Board of Mine Operation's Appeals, 523 F. 2d 25, 32 (7th Cir. 1975). There the Court said:

> [W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

Western Slope argues that the government's evidence in support of the immediacy aspect of an imminent danger charge was weak. I must agree. There is no dispute that several elements beyond an accumulation must be present before float coal dust can burn or explode. First, the dust must be in suspension. Second, there must be an ignition source, a fire or spark. The parties agree that at the time in question no dust was in suspension. The Secretary argues that the evidence shows that small adjustments in the mine's mechanical ventilation, or even a miner walking down the entry, could raise dust from the floor, quickly changing that situation. To that extent, the Secretary makes out an arguable case, even granting that the evidence shows that miners rarely had occasion to walk in the return entries cited.

The true difficulty lies in the evidence concerning the potential for a spark. The inspector professed a belief that the presence of excessive methane gas intensified the coal dust hazard, because a methane ignition away from the dust area could put the dust in suspension and at the same time ignite it. On this issue I must share Western Slope's skepticism since none of the inspector's notes taken contemporaneously with the inspection mention the 5 percent methane figure which he stressed in his testimony. All the figures recorded in the notes were within admittedly acceptable (and presumably non-explosive) limits.(FOOTNOTE 3) The inspector may have achieved a high reading in the gob area behind the machine, but I must wonder why it was not significant enough to record at the time it was taken, when much lesser figures were written down in the inspection notes.

The evidence plainly indicates that there were no ready sources of ignition in the cited entry proper. There were no machines or equipment, no electrical wires or cables, and no miners had reason to walk through the entries. The most likely ignition sources were in the longwall area which intersected the entries. An undetected defect in the longwall mining machine itself, or in the electric motors driving the conveyor, could presumably generate a spark. I must find, however, that the likelihood of an ignition from ongoing mining was not great at the time of the order because the longwall equipment was down for repairs. The operator's evidence on that point is convincing.(FOOTNOTE 4)

There is a possibility, of course, that repair activities could somehow have generated a spark. Foreman Neil indicates that some welding was necessary at the stage loader at the far end of the longwall (Tr. 50). The stage loader, however, was 428 feet from the nearest dust accumulation. Furthermore, had the inspector believed that the repair activities posed an immediate ignition danger, his withdrawal order surely would have encompassed the longwall area. It did not, however. Only the entryways were covered; he allowed work to continue at the longwall.

The Secretary did not argue that the circumstances in this case offer a parallel to the case where an inspector issues a withdrawal order even though an operator has already withdrawn its miners voluntarily. Such orders are proper because of the possibility that a voluntary withdrawal, which lacks the force of law, may be revoked at any time by the operator. Eastern Associated Coal Corp. v. IBMA, 491 F. 2d 277 (4th Cir. 1974). Had the inspector in the case at hand closed down the longwall area, a similar argument could be made. He did not, however, and there is thus no parallel.

From all the evidence I must conclude that while there was an improper accumulation of float coal dust, such accumulation, under all the circumstances, did not constitute an imminent danger. The possibility that the dust would be both raised into suspension and ignited was simply too remote to create a likelihood of an explosion or fire "at any moment."(FOOTNOTE 5)

V

The Secretary alleges that the accumulation of float coal dust constituted a "significant and substantial" violation under the Act.(FOOTNOTE 6) The Secretary may appropriately allege such a special finding in connection with a section 104(a) violation. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). That case also defines a significant and substantial violation as one where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The "imminent danger" and "significant and substantial" concepts share a common element: the degree of possibility that a hazard will result in a death or serious injury. That is not to suggest, however, that the tests are the same; clearly, they are not. The hazard constituting an imminent danger must offer a momentary likelihood of an accident if mining continues. In the hierarchy of hazards, the significant and substantial finding requires considerably less: simply a reasonable likelihood that a serious injury may occur. No element of immediacy is necessary.

In the present case, had the accumulated float dust exploded, death or severe injury would have been probable for any miners in the west side of the mine. The potential for severe injury, if an explosion were to occur, is therefore plain.

Although I found insufficient evidence of an impending or momentary likelihood of a suspension and ignition of the dust, I must conclude that the evidence meets the lesser test of a "reasonable likelihood" of such an event. Some element of danger is present whenever an unlawful accumulation of coal dust exists. Congress recognized this by forbidding accumulations in the 1969 Coal Act itself, rather than leaving the matter to the Secretary's mandatory standards alone. I am convinced that the presence of a sizeable repair crew working in the longwall created a reasonable, though not an imminent, likelihood of an accident.

VI

We now consider an appropriate penalty for the violation itself.7 Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

Stipulations of record show that at the time of violation the mine employed 239 persons, and at the time of hearing 90; that it had a history of 27 prior assessed and paid violations; and that assessment of a reasonable penalty would not impair its ability to remain in business. These elements weigh against Western Slope in the penalty calculation, as does its moderate negligence in allowing the accumulation to exist for at least those hours since the last mining took place.

The evidence also shows, however, that the operator rapidly abated the hazard by rock dusting. More important, the record demonstrates that the gravity of the violation was considerably less than alleged. The amount of accumulation, though violative, was not extensive. The likelihood of an impending or momentary accident was remote because there was only the slim possibility of a simultaneous suspension and ignition of explosive quantities of dust.

For this last reason I must conclude that the $960.00 penalty sought by the Secretary is excessive. On balance, I hold that a penalty of $250.00 is appropriate.

CONCLUSIONS OF LAW

Upon the entire record, and in consonance with the factual findings embodied in the narrative portion of this decision, it is concluded:

(1) That the Commission has jurisdiction to decide this matter.

(2) That Western Slope violated the mandatory standard published at 30 C.F.R. 75.400.

(3) That the violation was "significant and substantial."

(4) That $250.00 is the appropriate penalty for the violation.

(5) That the violation found to exist did not constitute an imminent danger under the Act.

ORDER

Accordingly, the withdrawal order issued December 17, 1980 is ORDERED VACATED; the Secretary's 104(a) citation alleging violation of 30 C.F.R. 75.400 is ORDERED AFFIRMED; and Western Slope is ORDERED to pay a civil penalty of $250 in connection with such affirmed citation within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

FOOTNOTES START HERE-

1 This section duplicates the language of section 304(a) of the 1969 Coal Act.

2 Rock dusting is one of the acceptable methods for abatement of float coal dust hazards. See 30 C.F.R. 75.402.

3 The mandatory standards at 30 C.F.R. 75.308 and 30 C.F.R. 75.309(a) require withdrawal of miners when monitoring reveals 1.5 volume percentum of methane at the face or in a split of air returning from a working section. It is apparent from the record that the inspector did not believe that the circumstances warranted action under these sections. Rather, he regarded the entries where he recorded readings as return air courses under 30 C.F.R. 315-2(d), which permits a maximum of 2.0 volume percentum (Tr. 29).

4 In so finding, I do not overlook the inspector's testimony that although the conveyor motor was not running, it had been running recently because it was warm to the touch. I question whether such a detail would have been noted when the inspector was confused as to whether there were two motors or one.

5 Perhaps the lack of convincing evidence supporting an imminent danger was due to the inspector's apparent belief that every float dust violation is per se an imminent danger. I find no support in the law for such a belief.

6 Section 104(d) of the Act provides that where an inspector finds "... a violation of any mandatory health and safety standard, and if he also finds that, while the conditions created by such violation do not cause an imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard ... he shall include such finding in any citation given to the operator under this Act." (Emphasis added.) Section 104(e) of the Act permits a withdrawal order after a series of significant and substantial violations which establish a "pattern of violations."

7 Despite the fact that the withdrawal order was unwarranted, the underlying float coal dust violation alleged

under section 104(a) of the Act was proved, and a penalty must therefore be imposed. Cf. Island Creek Coal Company, 2 FMSHRC 279 (1980).