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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-170 A.C. No. 46-03140-03507
v.	Hampton No. 3 Prep. Plant
WESTMORELAND COAL COMPANY, RESPONDENT	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The parties move for approval of a settlement of the captioned matter at 80% of the $1,000 amount initially assessed.

The record shows that as a result of the operator's unwarranted disregard for compliance a dangerous accumulation of float coal dust and loose coal was found in the operator's Hampton No. 3 Preparation Plant. The violation was of such a nature that it could significantly and substantially contribute to a mine fire if not promptly abated. The reduction in the penalty is predicated on the parties' claim that the chain of causation was physically attenuated by the absence of any obvious source of an electrical ignition and the ready availability of adequate fire suppression equipment.

Neither of these circumstances would preclude a fire that could result from roller friction and that could propogate an explosion of the float coal dust if the coal dust under and around the belt conveyors were cast into suspension as the result of other unforeseen circumstances. The potential of the violation as a contributing factor to a fire hazard is readily foreseeable, that to an explosion remote if not speculative.

Under the S&S criteria Congress intended an operator be held liable not only for the gravity and negligence involved in the immediate violation but also for its reasonably foreseeable consequences, i.e., its contribution to a significantly and substantially greater hazard or danger. Here, for example, the immediate hazard was a slipping hazard due to the presence of water mixed with the coal sludge. But if roller friction in the coal dust caused an ignition a mine fire could result.

It is possible perhaps even probable that the fire suppression system would render the fire harmless but on the other hand it might not. The redundancy in a protective or safety system cannot excuse a condition that could significantly and substantially contribute to a major hazard. A serious consequence was, therefore, readily foreseeable from the condition found. As I view it, the dispositive issue in applying the S&S criteria is one of reasonable foreseeability of a significant and substantial contribution by the underlying violation to a serious mine health or safety hazard. Reasonable probability that the hazard forseen will actually occur is merely another factor that adds to the substantiality of the hazard, not to its existence.

There is a widespread belief that unless a violation immediately creates a reasonable probability of a reasonably serious injury or illness it cannot be classified as significant and substantial and must perforce be classified as trivial. 30 C.F.R. 100.4. This constitutes a serious misreading not only of the statutory language but also of the Congressional intent. Congress intended violations be cited as significant and substantial where they are of such a nature as "could" significantly and substantially "contribute" to the "cause or effect" of a mine safety or health hazard. Sections 104(d), (e). This does not mean that the violation cited in a 104(d)(1) citation must, standing alone, present a "significant and substantial" hazard or even a "major" hazard or danger to safety and health. The S&S standard, written by miners for miners, was designed to provide an early warning or alert with respect to violations with an incipient potential for disaster. Compare, Scotia Coal Company, 4 FMSHRC 89 (1982); Sen. Rpt. 95-181, 95th Cong. 1st Sess. 32 (1977). Unless violations with the potential for contributing to such disasters as Scotia are prevented they will continue to recur as recent history amply attests.

S&S violations may be either serious or nonserious depending upon their immediate consequences. Thus, while there was little likelihood that the static condition observed in this case would result in a reasonably serious injury it was fully capable of contributing to a hazard with disasterous potential--a potential that was reasonably foreseeable if the condition was not promptly abated. It is precisely for this reason that nonserious violations may be of "such a nature" as to contribute to a serious mine hazard while a serious violation may have no potential for creating anything other than a need for prompt abatement. Here, for example, if it were convincingly shown that the fire suppression system was capable of dousing the fire before it became dangerous the violation would still be serious but would lack the potential for making a significant and substantial contribution to a hazard capable of causing death

or bodily harm. The operator, of course, has the burden of persuasion with respect to rebutting a prima facie violation is S&S. Miller Mining Co. v. FMSHRC, 3 MSHC 1017 (9th Cir. 1983); Old Ben Coal Corp. v. IBMOA, 523 F.2d 25, 39 (7th Cir. 1975).

Gravity always depends upon the potential for adverse consequences and must be evaluated in the light of the potential of a violation for such consequences. The immediate consequence of an ignition in the presence of a small quantity of even a 5% concentration of methane may be negligible but unless the condition, i.e., the "cause" of the ignition or the source of the bleeder, e.g., an impermissibility or a ventilation violation or both is eliminated and prevented the existence of each condition or violation is of "such a nature" as may, i. e., "could" significantly and substantially "contribute" to a much larger ignition, namely an explosion that may take out an entire section or an entire mine.

It is a misnomer and confuses analysis to refer to the "significant and substantial" hazard defined by Congress as an S&S "violation." Congress used the subjunctive mood and the present tense conditional, verb "could" to express its concept of a "hazard" that might materialize at some indefinite time if the underlying "violation," whether serious or nonserious in its immediate consequences were not abated and the hazard aborted.

While an S&S hazard is not an imminent danger because the certainty of its occurrence is less obvious and the time less definite, it is, as the Scotia case so dramatically demonstrated, just as deadly and dangerous. The difficulty in perception when coupled with the consequences of misperception are so grave as to argue strongly for resolving doubts in favor of the evidence or testimony that supports the S&S finding. Consequently, if a hazard is reasonably foreseeable it should be considered significant and if it is of such a nature that it is capable of "contributing" to a condition or practice that could result in serious physical harm it should be deemed substantial.

I firmly believe that if the S&S standard is to have the scope intended by Congress, it must be used to prevent the occurrence of violations that sow the seeds of disaster for either individual miners or groups of miners. Operators owe miners a duty not only to prevent serious violations but all violations of whatever gravity that may contribute to hazards with serious consequences for the health and safety of the industry's most important resource--the miner.

Applying the standard indicated, and based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $800, on or before Friday, November 18, 1983, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge