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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 PROCEEDINGS

Docket No. WEVA 83-202
A.C. No. 46-01283-03513

v.

Docket No. WEVA 83-203
A.C. No. 46-01283-03514

WESTMORELAND COAL COMPANY,
RESPONDENT

Docket No. WEVA 83-204
A.C. No. 46-01283-03515

Docket No. WEVA 83-205
A.C. No. 46-01283-03517

Hampton No. 3 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

Based on an independent evaluation and de novo review of the circumstances set forth in the solicitor's well crafted motion, I concluded that two of the violations of 75.400 (Citations Nos. 2141405 and 2141406) were under assessed. Thereafter, in a teleconference the operator and the solicitor presented their respective positions. I found their arguments unpersuasive and adhered to my original view. This was that it was reasonably foreseeable that these violations considered either singly or in concert could significantly and substantially contribute to a mine hazard, namely a mine fire or explosion.(FOOTNOTE 1)

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Applying this criteria, I found the two violations in question had a high potential for triggering a hazard of greivous proportions. Finally, I advised the parties that in order to deter such violations and encourage voluntary compliance I could not approve their settlement unless the penalties were in the case of Citation 2141405 increased to

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\$300 and in the case of Citation 2141406 to \$200. The parties agreed to this and thereupon orally amended their motion to increase the amount of the penalties proposed for each of these citations.

Accordingly, it is ORDERED that the motion, as amended, be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$4,091, on or before Friday, November 18, 1983, and that subject to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

FOOTNOTE START HERE-

1 I recognize that under the Commission's Gypsum decision, 3 FMSHRC 822 (1981), it is arguable that to be S&S it must be found that the "hazard contributed to will result in an injury or illness of a reasonably serious nature." Id. at 825. If that is correct, I must respectfully disagree. I cannot agree that a requirement that a violation "could ... contribute to a cause and effect of a mine hazard" is the functional equivalent of a requirement that "the hazard contributed to will result in an injury or illness of a reasonably serious nature." In my view, the Commission definition changes the focus of Congressional concern from the capacity or ability of the contributory violation (the underlying violation) to act as a catalyst or synergist for the creation of a recognizable mine safety or health hazard to the gravity of the consequences if the hazard perceived and contributed to were to actually occur. This is not a distinction without a difference unless the difference between life and death is a distinction without a difference. I simply cannot agree that if the consequences or fall out of the hazard contributed to are not "reasonably serious" there is no need to be concerned about deterring the contributory or underlying violations. From an enforcement standpoint, the difficulty with this post hoc reasoning is that it requires the parties, as well as the trial judge, to enter an arena of speculation where the operator's guess is as good as the inspector's.

Under the statutory definition this speculation is avoided as it is only necessary to show that the contributory violation could be a meaningful and important factor in the creation of a recognizable hazard, not what the consequences of that hazard might be. For example, the presence of float coal dust on rock dusted surfaces or around electrical connections in an area where the power station is not adequately ventilated into the return air course leads me to conclude we have an accident, if not a disaster, waiting to happen. Each of these violations whether singly or in combination could be a meaningful, i.e., significant and important, i.e., substantial factor in the creation of a recognizable ignition, fire or explosion hazard whether or not I find that the "hazard contributed to will result in an injury or illness of a reasonably serious nature."

I am persuaded that the pattern of readily recognizable

violations that contributed to the disaster at the Scotia Mine is the lodestar that should guide our understanding of the Congressional purpose that underlies and illuminates the meaning of the S&S finding. I think that until the enforcement authorities recognize that purpose and firmly reject the view that violations with such a vast potential for magnifying the inherent and unavoidable hazards of the mine environment are not to be treated lightly miners will continue to suffer deaths and disabling injuries at rates that should be unacceptable to a civilized society.