CCASE:
SOL(MSHA) V. U.S. STEEL MINING
DDATE:
19840130
TTEXT:

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. PENN 82-305 A.C. No. 36-05018-03501
v.	
U.S. STEEL MINING CO., INC., RESPONDENT	Cumberland Mine
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et. seq., the "Act," for four violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc. (U.S. Steel), has violated the regulations as alleged and if so whether those violations are "significant and substantial" within the meaning of the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If violations are found, it will also be necessary to determine the appropriate penalty to be assessed.

Citation No. 1146090 charges a violation of the standard at 30 C.F.R. 75.503 and specifically alleges as follows: "[T]he S/S scoop battery tractor serial No. 486-1128 approval 2G operating in the 121 main west section was not maintained in permissible condition in that the battery covers were not secured."

The standard at 30 C.F.R. 75.03 reads as follows: "[T]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

The Secretary argues that in order for the scoop tractor, which is admittedly electric face equipment, to be "permissible" within the meaning of the cited standard, it must comport with the construction and design requirements set forth in the standard at 30 C.F.R. 18.44(c). Even assuming, arguendo, that those construction and design requirements are a prerequisite to permissibility, I do not find a violation herein. 18.44(c) requires only that "battery-box covers shall be provided with a means for securing them in an enclosed position." Admittedly the battery box covers in this case were equipped with tabs and holes which clearly provided a means for securing those covers in a closed position. In addition to the tabs and holes, the covers were interlocking and were provided with lips that fit over the edge of the battery box.

Since the battery box covers in this case fully comported with the requirements of 18.44(c), I cannot find that a violation has occurred. Citation No. 1146090 is accordingly vacated. If the Secretary indeed deems that battery box covers should be locked and secured at certain times for certain specified safety reasons, rulemaking procedures should be employed to provide an appropriate regulatory standard. The Administrative Law Judge cannot be used as a substitute for such rulemaking.

Citation 1146093 charges a violation of the standard at 30 C.F.R. 75.606 and specifically alleges as follows: "The continuous miner trailing cable was under the left front tire of a parked Torkar shuttle car serial No. 4275 in the east main section [and] therefore was not adequately protected from damage by mobile equipment." The cited standard requires that "trailing cables be adequately protected to prevent damage by mobile equipment."

It is not disputed that the conditions cited by MSHA Inspector Clarence Moats in fact existed. The trailing cable for the continuous miner was in fact found under the left front tire of the cited shuttle car. Moreover there is no dispute that trailing cables can be damaged if run over by heavy mining equipment. The cable in this case had not been blocked or moved out of the roadway to protect it from being run over. In fact the cable had been lying in the roadway three feet from the left rib. Under

the circumstances, it is clear that the violation has been proven as charged. The evidence also shows however that the ground beneath the cable was soft, that the cable was not in fact damaged, and that there was no power in the cable at the time it was cited. Moreover it is undisputed that even if there had been internal damage to the cable, the circuit breaker would most likely have cut off power before injuries would occur.

A violation is "significant and substantial" if, "based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature." National Gypsum, supra. The evidence shows herein that the hazard contributed to by damaging trailing cables is electrical shock and electrocution. It is not disputed that these may lead to injuries which are reasonably serious. The evidence further shows that such electrical shock could occur if the cable is damaged in such a way that exposed wire would protrude outside the insulation and a miner picked it up with his hands. It is common for the cables to be moved by hand. Although the wire in this case was not found in such a condition, I find a reasonable likelihood that if the cited condition remained uncorrected, the wire would become exposed in the described manner and would result in an injury of a reasonably serious nature. Under the circumstances I conclude that the violation was "significant and substantial" and constituted a serious hazard. Secretary v. Mathies Coal Co., 6 FMSHRC %y(6)6D (January 6, 1984). I observe that the operator had three previous similar violations and another similar violation the same day. This pattern shows a careless disregard on the part of management in preventing violations of this nature. Accordingly, I also find the operator to have been negligent. The violation was abated in a timely manner.

Citation No. 1146094 was issued five minutes after the above citation for another violation of the same standard, i.e. 30 C.F.R. 75.606. In this case, the shuttle car located in the belt entry of the east main section was parked on top of its own trailing cable. The unchallenged evidence shows that the trailing cable was lying beneath the left rear tire of the shuttle car approximately five feet from the rib. The cable had not been anchored to keep it out of the roadway and protect it from being run over. The remaining facts are the same as existed in connection with the previous citation, noted above. Under the circumstances, I find that the violation has been proven as charged. I further find that the violation was "significant and substantial" and serious for the reasons already set forth in regard to the prior citation. Because of the pattern of previous violations of

a similar nature, I find that the violation herein was the result of a careless disregard for compliance with this standard. The violation was abated in a timely manner.

Citation No. 990131 issued May 4, 1982, charges a violation of the standard at 30 C.F.R. 70.100(a) alleging more particularly that the "average concentration of respirable dust based on results of five samples submitted by the operator in the working environment of designated occupation 044 for MMU012-0 was 2.4 milligrams per cubic meter exceeding the dust standard of 2.0 milligrams per cubic meter for this work unit."

The cited standard reads as follows: "Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations)." Respondent does not dispute the existence of the violation as charged but claims that the violation was not "significant and substantial" within the meaning of the National Gypsum decision.

The evidence shows that the respirable dust samples were taken from the longwall tailgate operators as required by MSHA. The sampling device is placed upon the miners in this occupation because it is expected that they will be the ones exposed to the highest concentrations of respirable dust. The Secretary argues that based upon the British studies in evidence (Ex. P-1), and the testimony of Thomas K. Hodous, M.D., a Board-certified expert in internal and pulmonary medicine (Ex. P-2), nearly 1% of the miners exposed over a 35 year working period to an average concentration of 2.4 milligrams per cubic meter of respirable dust will develop Category 2/1 simple pneumoconiosis or greater if they had begun working with normal Category 0/0 X-rays.1

It is not disputed that pneumoconiosis is a disease of a reasonably serious nature. The issue as presented is whether, based upon the particular facts surrounding this violation there

exists a reasonable likelihood that the hazard contributed to will result in pneumoconiosis or massive fibrosis. National Gypsum, supra. In Secretary v. United States Steel Mining Company, Inc., 5 FMSHRC %y(5)6D, Docket No. WEVA 83-31 (January 30, 1984), I found on the particular facts of that case that such a reasonable likelihood existed. In that case, five respirable dust samples taken on three consecutive days in the cited bimonthly sampling cycle from the longwall tailgate operators showed an average exposure of 3.6 milligrams of respirable dust per cubic meter. Based on the same British studies cited in this case, Dr. Hodous projected that up to 2.4 per cent of miners starting with normal Category 0/0 X-rays exposed over a 35 year working period to that concentration of respirable dust would develop Category 2/1 or greater pneumoconiosis. The evidence in that case also showed that from the 197 samples taken from that occupation over a period of three and one half years, there was an average concentration of respirable dust of 3.12 milligrams per cubic meter. In addition, in that case the cited longwall unit had been consistently unable to meet the 2.0 milligram per cubic meter standard during its entire history of operation. It was considered to be technologically infeasible to operate that unit consistently within compliance of the standard. There was moreover insufficient evidence in that case to show whether the high risk tailgate operators were regularly wearing personal protective equipment which would have reduced their actual exposure to respirable dust.

The evidence in this case shows that the Cumberland Mine began its longwall operations in February 1980. During 1980, of the 118 valid samples taken from the cited occupation, the longwall tailgate operator, the average concentration of respirable dust was 1.828 milligrams per cubic meter. The mine operator was in violation of the cited standard only once during the year. Twenty-nine valid samples taken in 1981 showed an average respirable dust concentration of 1.605 milligrams per cubic meter. In 1982, there were forty valid samples taken with an average concentration of 2.02 milligrams per cubic meter. The mine operator was apparently out of compliance with the standard once that year. To the date of hearing in 1983, ten samples had been taken showing an average concentration of respirable dust of only 1.30 milligrams per cubic meter.

According to longwall miner Gregory King, called as the Secretary's witness, the high risk occupations at the longwall (those exposed to the highest concentrations of respirable dust, namely the headgate and tailgate operators) customarily wore personal respiratory protection (either Airstream helmets or Dustfoe 8.8 respirators) about 20% of the time and usually during periods

of heaviest dust concentration. In accordance with the stipulation of the parties, if properly worn, the respirators would correspondingly reduce the amount of dust inhaled by 20%, representing the time the miners were wearing such protection. It may reasonably be inferred from this evidence that the actual respirable dust inhaled by the tailgate operators, the cited occupation, was about 20% less than the reported concentrations.

The evidence in this case thus shows that the longwall tailgate operators at the Cumberland Mine have in the past only rarely been exposed to respirable dust concentrations above the 2.0 milligram per cubic meter standard. There is also a clear record at the mine of progressively decreasing concentrations of respirable dust as new dust suppression measures have been taken. No violations of the dust standard have been found since 1982 and the average concentration of respirable dust since then has been below the proscribed level. It may therefore reasonably be inferred that the longwall tailgate operators will continue to be exposed to dust concentrations below the proscribed level and that they will continue to use respirators at least part time. Within this framework, I find that the assumptions necessary to the risk determination made by Dr. Hodous and based upon the cited British studies cannot reasonably be inferred in this case.

Accordingly, on the facts of this particular case, I do not find that the cited violation is "significant and substantial" nor of high gravity. Inasmuch as the Respondent had been, prior to the issuance of the citation at bar, operating its longwall unit generally in compliance with the 2.0 milligrams per cubic meter standard and followed no independent testing procedures, I do not find it was negligent in exceeding the prescribed dust levels in this instance.

In determining the appropriate penalties to be assessed in this case, I am also considering the evidence that the operator has continued to cooperate with the Bureau of Mines in developing new dust control techniques at its Cumberland Mine, that it has furnished personal protective equipment to each of its mining crews, and has since the date of this violation, maintained relatively low respirable dust levels. I also note that the operator is large in size and has a moderate history of violations.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 1146090 (vacated)	
Citation No. 1146093	$125
Citation No. 1146094	125
Citation No. 9901311	75

Gary Melick
Assistant Chief Administrative Law Judge

1 The International Labor Organization classifies X-ray evidence of simple pneumoconiosis based on the profusion of dots appearing on the lung films. There are four major categories from 0 to 3, each further subdivided into three categores, 0 to 2. Category 0 would be a normal film and Category 3 would indicate a high profusion of dots suggestive of a severe disease process.