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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 PROCEEDINGS
	Docket No. WEVA 86-217-R
v.	Order No. 2713945; 2/25/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 86-218-R Order No. 2713946; 2/25/86
	Docket No. WEVA 86-219-R Order No. 2713952; 2/25/86
	Docket No. WEVA 86-220-R Order No. 2713953; 2/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-277 A.C. No. 46-01867-03678
v.	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe & Johnson, Clarksburg, West Virginia, for Contestant/ Respondent; William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant Consolidation Coal Company (Consol) has filed notices of contest challenging the issuance of four separate orders during February 1986 at its Blacksville No. 1 Mine. The Secretary of Labor (Secretary) has filed petitions seeking civil penalties for the violations charged in the contested orders. The proceedings were consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on July 22 and 23, 1986.

The general issues before me concerning each of the individual orders and its accompanying civil penalty petition are whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. The Consolidation Coal Company, Inc., owns and operates the Blacksville No. 1 Mine and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91Ä173, as amended by Public Law 95Ä164 (Act).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

3. The subject orders (Nos. 2713945, 2713946, 2713952, 2713953) and terminations thereto were properly served by a duly authorized representative of the Secretary.

4. Copies of Order Nos. 2713945, 2713946, 2713952, 2713953 (attached to the Petition for Adjudication of Civil Penalty) are authentic copies of the original orders.

5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

6. The operator has been assessed 852 violations for the two-year period prior to February 25, 1986.

7. 1985 annual production for the Blacksville No. 1 Mine was 1,609,803 tons of coal. 1984 annual production was 1,775,322 tons of coal.

I. DOCKET NO. WEVA 86Ä217ÄR; ORDER NO. 2713945

Order No. 2713945, issued pursuant to Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act) alleges a violation of the regulatory standard at 30 C.F.R. 77.205(b) (FOOTNOTE 1) and charges as follows:

> In the Slurry Pump House, located on the surface facility of the underground mine, the travelways in the housing were not being maintained free of slipping hazards. Water was flowing freely from a pump on to the floor where a sediment had built up over a long period of time approximately 1 1/2 inches in depth. Little or no effort was being made to maintain these work areas. A trough to catch run off from the pumps had its end cut off allowing this material to run onto the floor and across the facility floor and out the door. The work-travel areas were approximately 20' feet in length overall. This condition was obvious and should have been identified by management.

FINDINGS OF FACT

1. The order was issued at 9:40 a.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection at the slurry pumphouse located on the surface of the Blacksville No. 1 Mine.

2. The slurry pumphouse is a 15' long x 10' wide building which functions as a recycling facility for coal residue (slurry) emitted from coal cleaning operations.

3. During this aforementioned inspection, Inspector Migaiolo observed water approximately 1/4 inch deep, exiting the front doorway of the pumphouse, at a rate he estimated to be five (5) gallons per minute.

4. Inside the pumphouse, the entire floor was covered with slurry sediment, consisting of fine coal particles, oil shale and water. However, the water and slurry materials were concentrated along the back wall of the pumphouse where the depth of the mixture near Pump No. 4 on Exhibit No. GÄ5 was three inches. The mixture was one and one-half inches deep at Point "C" on Exhibit No. GÄ5.

5. There was an open-ended water trough on the floor of the pumphouse at Point "C" on Exhibit No. GÄ5 at which point water was freely flowing onto the floor, adding to the wetness of the slurry sediment mixture as well as completely submerging two insulation mats which were on the floor near two electrical devices. Water was also flowing onto the floor from Pump No. 2 towards the back wall of the pumphouse due to a defective packing around the "drive shaft".

6. I specifically find that this slurry-water mixture created a slipping hazard on the floor of the pumphouse.

7. While the slurry pumphouse is not a high travel area, the facility is inspected on each shift to ensure the proper functioning of the pumps and to detect any existing hazards.

8. The presence of the slurry-water mixture on the pumphouse floor created a reasonably-likely risk of a slip and fall type injury to any employee entering the building or maneuvering around the equipment inside. Furthermore, the presence of the two submerged insulating mats on the floor created a somewhat higher risk of a slip and fall injury in the somewhat less likely event an employee were to step on one of them.

9. The type of injuries that would likely be involved if such an accident occurred would be back injuries, concussions, and/or broken bones.

10. Shift foreman Jack Yost observed water flow from the pumphouse approximately sixteen inches wide and a quarter-inch deep the day before the issuance of the instant order.

11. The operator, through its shift foreman, Yost, had actual knowledge of the condition of the pumphouse at least the day before the instant order was issued and likewise knew or should have known and appreciated the slipping hazard presented by the aforementioned conditions on the floor of the slurry pumphouse.

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding. [This finding applies to all the orders considered in this proceeding.]

2. The evidence as set out above in the Findings of Fact establishes a violation of 30 C.F.R. 77.205(b) due to the existence of a slippery slurry-water mixture on the entire floor of the slurry pumphouse including those areas where persons are required to travel and work.

3. The violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard, and I accept the testimony of Inspector Migaiolo that there was a reasonable likelihood that that hazard could have resulted in serious injury to a person or persons. I therefore conclude that the violation was significant and substantial and serious. Mathies Coal Company, 6 FMSHRC 1 (1984).

4. I further find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard. Based on the same evidence, I find that the mine operator was negligent. In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). It is not disputed that Mr. Yost's knowledge is attributable to the operator and he knew of the violative condition on the day before the inspector saw it. The failure to correct these conditions reflects indifference to them or a serious lack of reasonable care to see that they are abated.

5. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $800, as proposed, is appropriate.

II. DOCKET NO. WEVA 86Ä218ÄR; ORDER NO. 2713946

Order No. 2713946, issued pursuant to Section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. 77.1104 (FOOTNOTE 2) and charges as follows:

> In the hoist house, located on the surface facility of the underground mine, the drum pit was saturated with a layer of oil. Such area had this condition for a long period of time due to a bucket placed beneath the structure to catch the drippings (3 to 6" in depth). However the portion not collected by the bucket had layered on the metallic structure of the base area. In addition the elevated break reservoir had a leak of oil which had spread over the base structure and was being delivered to the pit area. This condition was obvious and had been previously identified by management as having parts on order and that leaks from the pit metallic oil connections were just a special connection that leaks normally. Accumulations of combustible materials which can start fires are not permitted.

FINDINGS OF FACT

1. The order was issued at 9:20 a.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the hoist house facility located on the surface of the Blacksville No. 1 Mine.

2. Situated in the hoist house is a 20' long x 15' wide x 7' deep concrete pit, called a "drum-pit" which houses a drum hoist and an electric motor driving a hydraulic pump for the hydraulic brakes which in turn control movement of the drum.

3. A brattice-type cloth was spread over the floor of the pit to catch dripping noncombustible graphite rope dressings. However, due to hydraulic fluid leaks from the various hydraulic connections existent in the pit, two-thirds of the brattice cloth was saturated with hydraulic fluid, and the adjacent floor areas were covered with a thin layer of hydraulic fluid.

4. Consol was aware of the hydraulic fluid leakage, evidenced by the fact that a five gallon bucket was on the pit floor to catch hydraulic fluid leaks from the hydraulic hose fittings. Further, it is undisputed that the bucket had failed to catch all the leakage and these amounts accumulated on the brattice-type cloth.

5. Consol's management personnel were generally familiar with the leakage, but did not consider it a safety hazard.

6. Before a fire could result from this accumulation of hydraulic fluid, a flame or electrical arc must first reach the brattice cloth. The only possible ignition source was a motor located in the front left-hand corner of the pit.

7. A flame or an electrical arc from this motor could possibly, although not very likely, reach the brattice cloth if it overheated from an overcurrent condition.

8. Most importantly, however, this electric motor was equipped with both circuit breakers and a power suppression system for overcurrent protection. Accordingly, I find it to be unlikely that an ignition source existed in the drum pit. In so holding, I specifically reject Inspector Migaiolo's suggestion that the solenoid located in the pit could be a second potential source of ignition.

9. The possible employee exposure to whatever hazard existed, if any, was very limited. A single employee would visit the hoist house once or twice a day to spend a few minutes inspecting the area.

CONCLUSIONS OF LAW

1. On February 25, 1986, the operator violated 30 C.F.R. 77.1104 due to the accumulation of combustible hydraulic fluid in the drum pit of the hoist house facility at the Blacksville No. 1 Mine. No matter the likelihood or unlikelihood of a fire actually resulting from this accumulation, the hydraulic fluid was allowed to accumulate where it could create a fire hazard. Therefore, it is a violation of the regulatory standard.

2. The violation was not of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard. There was no reasonable likelihood that the presence of the hydraulic fluid on the brattice cloth or the floor of the pit generally would significantly contribute to a fire hazard because there was no reasonably likely ignition source. Further, there was no

showing of a reasonable likelihood, that in the unlikely event of a fire, there would be an injury of any type, let alone an injury of a reasonably serious nature. Mathies Coal Company, supra.

3. The violation was nonetheless caused by an unwarrantable failure to comply with the standard in question. It is uncontroverted that the operator knew the violative condition existed. The operator's belief that the brattice cloth did not create a fire hazard and was not a violation of the mandatory standard cited was in error. My holding herein is that any appreciable accumulation of hydraulic fluid on the floor of the drum pit, regardless of the likelihood of ignition (so long as that likelihood is not absolute zero), can create a fire hazard, and is therefore a violation. That violation is "unwarrantable" if the operator fails to abate a condition that he knew existed, as here. Zeigler Coal Co., supra. In the instant case the violative condition had existed for a long time. A bucket was being utilized to catch some of the fluid drippings, but did not contain all. The brattice cloth that was found saturated by Inspector Migaiolo was purportedly routinely changed when it became saturated. It appears to me that this was a condition management simply had decided to live with rather than repair. This apparent attitude reflects indifference or at least a serious lack of reasonable care to abate. United States Steel Corp., supra. For example, the leakage from the accumulator was eliminated by simply tightening four bolts on the side of the accumulator cylinder subsequent to the issuance of the instant order.

4. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $400 is appropriate.

III. DOCKET NO. WEVA 86Ä219ÄR; ORDER NO. 2713952

Order No. 2713952, issued pursuant to Section 104(d)(2) of the Act alleges a violation of 30 C.F.R. 77.205(e) (FOOTNOTE 3) and charges as follows:

> On the second floor travelways, in the preparation plant on the surface, approximately 75 feet of toe-boards were not provided in these

elevated walkways. In addition a railing was not properly maintained. Such had been cut apart, hinged so as to make an opening. However the hinged door was not bolted together at the middle. Such could cause persons to fall to the main floor approximately 12 feet. These conditions are obvious and should have been identified by management. In addition two other travelways on the same floor had segments of railing missing approximately 36 inches in length.

FINDINGS OF FACT

1. The order was issued at 12:15 p.m. on February 25, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the preparation plant located on the surface of the Blacksville No. 1 Mine. During this inspection, Inspector Migaiolo inspected the second floor travelway of the said plant.

2. The travelway on the second floor of the preparation plant lacked fifty-seven (57) feet of toeboard.

3. Numerous activities taking place on the ground floor of the preparation plant place individuals, at times, underneath the second floor travelways. At any one time, at least two workers may be found on the ground floor.

4. Two storage rooms are located on the second floor and materials and supplies are transported on the second floor travelway. In addition to these storage areas, the company maintains the superintendent's and the shift boss's offices on the second floor.

5. Toeboards are necessary on the second floor travelway because an object being carried or otherwise transported could fall onto the travelway, roll off and strike a worker directly underneath on the ground floor.

6. The operator was aware of the absence of toeboards on the second floor travelway and should have known of the potential danger to its employees working below on the ground floor. Curiously, toeboards were installed on every other floor of the preparation plant except the second floor.

7. The two-door loading gate located on the second floor travelway was satisfactorily constructed. I am satisfied that this gate would open inward, as designed, but would not open outward because of the sturdy construction of the hinges on the gates. In this regard, I specifically credit the testimony of Mr. Gross over that of Inspector Migaiolo.

8. The inspector also cited two 3Äfoot sections of walkway on the second floor where the operator had not installed handrails. I find that the missing railing located in these areas was situated where crossbeams and vertical I-beams served in place of handrails and adequately served to satisfy the regulatory standard.

CONCLUSIONS OF LAW

1. On February 25, 1986, the operator violated 30 C.F.R. 77.205(e) by its failure to provide toeboards on fifty-seven (57) feet of travelway on the second floor of the preparation plant at the Blacksville No. 1 Mine.

2. This violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard. When the storage room "D" was moved to the second floor, there was a concomitant increase in the amount of foot traffic on the second floor travelway and increased movement of tools and supplies along this travelway in addition to that transported via the elevator. It is therefore, I find, reasonably likely that during the course of this transportation objects can and will be dropped onto the travelway from whence it is likewise reasonably likely that they could have rolled off the travelway in those areas which were unprotected by toeboards. If an item, such as a ballbearing, weighing up to twenty-five pounds, were to fall off the travelway onto the ground floor below, there is the distinct possibility that a worker would be struck. Obviously, such an occurrence could result in a serious injury.

3. The operator knew of the violative condition, i.e., the lack of toeboards, and by serious lack of reasonable care failed to abate that condition. I therefore find that the aforementioned violation constituted an unwarrantable failure to comply with the standard.

4. Those portions of Order No. 2713952 that allege similar violations of the mandatory standard concerning the loading gate and the handrails are vacated for the reasons enumerated above in Findings of Fact Nos. 7 and 8. These conditions, as described in the record, do not constitute a violation of the mandatory standard at 30 C.F.R. 77.205(e), or considering the alternative, 30 C.F.R. 77.204 either.

5. Considering the criteria in Section 110(i) of the Act, I conclude that a penalty of $500 is appropriate for the remaining portion of the order for which I have found a violation.

IV. DOCKET NO. WEVA 86Ä220ÄR; ORDER NO. 2713953

Order No. 2713953, issued pursuant to Section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 77.205 and charges as follows:

> On the third floor of the preparation plant, adequate barriers or handrails were not present to prevent persons who may accidently fall through. An opening divided into two sections by a set of conduit pipes existed: the first opening adjacent to the other was approximately 65 to 56 inches in height, 22 inches in width and 16 inches in depth, the second was 56 inches in height, 50 inches in width and 16 inches in depth. This was a very obvious hazard and should have been detected by management. Similar violations of this type had been cited the previous day on the floor below. No apparent record of this opening was available by management. Persons falling through such opening could fall approximately 12 feet to the floor below.

The petitioner subsequently moved to amend Order No. 2713953 to allege a violation in the alternative of 30 C.F.R. 77.204 (FOOTNOTE 4) or 77.205(e). I granted this motion on the record at the hearing of this case and therefore will consider herein whether the record establishes a violation of either of the above standards.

FINDINGS OF FACT

1. The order was issued at 10:00 a.m. on February 26, 1986, by MSHA Inspector Joseph Migaiolo during a "AAA" inspection of the third floor of the preparation plant at the Blacksville No. 1 Mine.

2. During this inspection, Inspector Migaiolo noted two areas on the third floor of the preparation plant which lacked handrailing. One of the areas was approximately 22 inches wide between four steel conduits and a vertical I-beam. For an individual to fall the 12 feet through to the floor below, he would have to first negotiate his way through that 22 inch opening and then through a 16 inch wide opening to the floor. The other area was similar. It was 50 inches wide and 16 inches deep in to the coal chute.

3. I find both of these aforementioned areas were adequately protected by a crossbeam which acted as a barrier across the lower portion of the openings and a second crossbeam which acted as an adequate barrier across the upper portion of the openings. This pre-abatement arrangement of I-beams satisfactorily served as railing. I specifically find that no safety hazard existed at either of these openings. My impression after carefully reviewing the record concerning this alleged violation, particularly the photographic evidence submitted, is that it would fairly take an acrobat to fall through either one of these openings.

CONCLUSIONS OF LAW

1. The cited absence of handrails in Order No. 2713953 is not a violation of either 30 C.F.R. 77.204 or 77.205(e). Accordingly, Order No. 2713953 will be vacated.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2713945, contested in Docket No. WEVA 86Ä217ÄR, properly charged a violation of 30 C.F.R. 77.205(b) and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2713945 IS AFFIRMED.

2. Order No. 2713946, contested in Docket No. WEVA 86Ä218ÄR, IS AFFIRMED as a non-S & S violation of 30 C.F.R. 77.1104. Further, the order properly concluded that the said violation resulted from Consol's unwarrantable failure to comply with the standard involved,

3. Order No. 2713952, contested in Docket No. WEVA 86Ä219ÄR, properly charged a violation of 30 C.F.R. 77.205(e) and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2713952 IS AFFIRMED.

4. Order No. 2713953, contested in Docket No. WEVA 86Ä220ÄR, IS VACATED.

5. The Consolidation Coal Company is hereby ORDERED TO PAY a civil penalty of $1,700 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

FOOTNOTES START HERE-

1 30 C.F.R 77.205(b) provides as follows:

Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

2 30 C.F.R. 77.1104 provides as follows:

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

3 30 C.F.R. 77.205(e) provides as follows:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided.

4 30 C.F.R. 77.204 provides as follows:

Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices.