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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

THE HELEN MINING COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. PENN 88-52-R
Citation No. 2881573; 10/27/87

Docket No. PENN 88-53-R
Citation No. 2881574; 10/27/87

Docket No. PENN 88-54-R
Citation No. 2881575; 10/27/87

Docket No. PENN 88-55-R
Order No. 2881576; 10/27/87

Docket No. PENN 88-56-R
Citation No. 2881577; 10/27/87

Docket No. PENN 88-57-R
Citation No. 2881578; 10/27/87

Homer City Mine
Mine ID 36Ä00926

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

THE HELEN MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-219
A.C. No. 36-00926-03737

Homer City Mine

DECISIONS

Appearances: Ronald B. Johnson, Esq., Volk, Frankovitch, Anetakis,
Recht, Robertson & Hellerstedt, Wheeling, West Virginia,
for the Contestant/Respondent;
Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern six Notices of Contests filed by the Helen Mining Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the validity of four section 104(a) citations, with special "significant and substantial" (S & S) findings, one section 104(a) non-S & S citation, and one section 104(d)(2) order, issued at the mine on October 27, 1987. All of the contested citations and order were issued following a fatal accident investigation conducted by MSHA. A hearing was convened in Indiana, Pennsylvania, on June 21, 1988, and the parties appeared and participated fully therein. The parties waived the filing of any posthearing briefs, and relied on the record made in the course of the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The issues presented in these proceedings are as follows:

1. Whether or not the conditions and practices cited in the citations and order constituted violations of the cited mandatory safety standards and the Act, and if so, the appropriate civil penalty assessments that should be assessed against the Helen Mining Company, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.
2. Whether the inspector's special "significant and substantial" findings should be affirmed, and whether his "unwarrantable failure" finding with respect to the contested order should likewise be affirmed.

Discussion

The essential facts surrounding the fatality which prompted an MSHA accident investigation and resulted in the

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issuance of the contested citations and order are not in dispute. The record reflects that on October 25, 1987, a miner was fatally injured when a runaway locomotive and trip of cars crashed into a parked personnel carrier causing it to jump the track and strike the miner. At the time of the accident, the miner was performing work in connection with the repair of the track in the vicinity of the parked personnel carrier.

Prior to the taking of any testimony in these proceedings, and in the course of a brief bench pre-trial conference with counsel for the parties, they advised me that after further discussions and negotiations, the parties proposed to settle all of the contested citations and order, and they were afforded an opportunity to present their oral arguments on the record in support of their joint proposals (Tr. 5). A discussion concerning the contested citations and order, including the arguments presented by the parties in support of their settlement proposals, follows below.

Docket No. PENN 88Ä56ÄR

In this case the inspector issued a section 104(a) "S & S" Citation No. 2881577, on October 27, 1987, charging an alleged violation of the safeguard requirements of 30 C.F.R. 75.1403, and the condition or practice is described as follows:

Material in the form of a 6' long track rail was being transported on the top of a Galis battery jeep TP7, serial no. 130Ä270115. This information was revealed during a fatal accident investigation.

In issuing the citation, the inspector made reference to a previously issued safeguard Notice No. 0616506, issued on January 30, 1979, pursuant to 30 C.F.R. 75.1403Ä7(o), which provides as follows:

Extraneous materials or supplies should not be transported on top of equipment; however, materials and supplies that are necessary for or related to the operation of such equipment may be transported on top of such equipment if a hazard is not introduced.

MSHA's counsel moved that the contested citation be vacated, and in support of this request, counsel asserted that based on interviews with the miners, as well as further discussions with the operator, the six-foot rail which was being transported on the jeep was securely placed and posed no

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hazard to any of the miners who were also being transported by the jeep. Under the circumstances, counsel asserted that the facts and circumstances presented do not establish a violation of the safeguard provision relied on by the inspector in support of the citation (Tr. 7A8).

After due consideration of the oral motion to vacate the citation, it was granted from the bench, and my ruling is herein reaffirmed (Tr. 9). Accordingly, Citation No. 2881577 IS VACATED, and MSHA's proposal for assessment of a civil penalty IS DISMISSED.

Docket No. PENN 88A57AR

In this case the inspector issued a section 104(a) non-"S & S" Citation No. 2881578, on October 27, 1987, citing a violation of section 103(k) of the Act, and the condition or practice cited is described as follows:

103(k) order no. 2881572 issued 10A25A87 following a fatal accident was not complied with during the 8:01 AM to 4:00 PM shift on 10A26A87 in that a 15 ton Goodman locomotive serial no. 437A366 was moved 500 feet to the motor barn. Galis battery jeep TPS serial no. 130A270116 and W.Va. Armature jeep TP 12 serial no. 2000766 were removed from the accident scene approximately 1,000 feet. In the left bottom 5 supply cars were moved approximately 1,600 feet to the no. 6 side track, and a closed area between no. 3 belt station box and 3C switch along the South main track was entered by unauthorized person and rehabilitation work done at the accident scene. 103 K order no. 2881572 was not modified or terminated to allow any of the above work to be performed.

Section 103(k) of the Act provides as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal

or other mine or return affected areas of such mine to normal.

MSHA's counsel asserted that no proposed civil penalty assessment was filed with respect to the contested citation, and that the citation was subsequently vacated by the inspector on March 22, 1988 (exhibit PÄ1). The justification by the inspector for vacating the citation states as follows:

104(a) Citation No. 2881578 issued on 10Ä27Ä87, for a violation of 103(k) of the Act is vacated. Upon review and discussion it was determined that company personnel could have interpreted that MSHA was in agreement with the State mine inspector that the investigation of the equipment involved in the accident had been completed and the equipment could be moved.

MSHA's oral motion to dismiss this case on the ground that the contested citation has been previously vacated was granted from the bench (Tr. 9Ä10), and my ruling in this regard is herein reaffirmed. This case IS DISMISSED.

MSHA's counsel stated that the remaining contested citations and order were issued as a result of a fatal accident which occurred at the mine on October 25, 1987. He explained that three workers were repairing a track haulage rail when they suddenly discovered that some equipment was moving on the rail toward them. All of the workers, except for the accident victim, were able to get out of the way of the moving equipment. The victim was struck by a TPÄ8 jeep personnel carrier which had been parked on the rail approximately 15 feet from where the work to repair the broken rail was being performed. That particular jeep was struck by a second TPÄ7 jeep parked on the rail, and it was struck by the moving equipment consisting of a trip of five supply cars and a locomotive that were all moving together towards the accident scene. Each of the contested citations and order concern certain alleged violative conditions with respect to each of these vehicles (Tr. 12).

Docket No. PENN 88Ä52ÄR

In this case the inspector issued a section 104(a) "S & S" Citation No. 2881573, on October 27, 1987, citing a violation of the safeguard requirements of 30 C.F.R. 75.1403, and the condition or practice cited is described as follows:

The safety chain for the brake wheel of the 15 Ton Goodman battery locomotive, serial no. 437Ä366, was not attached to the brake wheel when the locomotive was parked on the track haulage at the motor barn area of the shaft bottom. This condition may have been a contributing factor to the cause of a fatal accident that occurred on 10Ä25Ä87. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector made reference to a previously issued safeguard Notice No. 2 TJS, issued on February 5, 1974, (Exhibit GÄ3). That safeguard required that all track locomotives be maintained in a safe operating condition.

MSHA's counsel moved to amend the proposed civil penalty assessment for this violation from \$3,500 to \$500. In support of the motion, counsel stated that the original assessment was based on the conclusions made in MSHA's accident report of investigation that the failure to connect the safety chain to the braking wheel used to prevent the wheel from moving once the brake is engaged caused the accident.

Counsel pointed out that the citation states that the failure to connect the safety chain may have been a contributing factor to the accident, rather than the cause, and that MSHA now concedes that the failure to connect the chain may or may not have been a contributing factor.

Counsel explained further that the locomotive was equipped with three braking systems consisting of an electrical braking system, a pneumatic air-powered system, and a mechanical system similar to an emergency brake on a car. The pneumatic brake would be used to engage the brake shoes to make contact with the locomotive wheels. The mechanical wheel in question would be turned to prevent the brakes from moving. Once this wheel was turned and set, the chain would then prevent it from moving. However, the use of the chain alone would not have prevented the locomotive from moving, and even if it were attached to the wheel, it would not have prevented "a runaway." MSHA now believes that the cause of the accident was the failure to place blocking material to prevent the locomotive and supply trip from moving (Tr. 13Ä17).

Helen Mining's counsel stated that the wheel in question is a self-locking mechanism, and if the wheel is turned tight, it would be impossible for it to turn on its own, and the

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chain simply prevents the wheel from moving further. Since the wheel cannot move on its own, the chain would be meaningless in terms of its relationship to the accident (Tr. 48-49).

MSHA's counsel confirmed that a safety chain was in fact provided for the cited locomotive, but was not used, and that in the case of the underlying safeguard notice issued in 1974, no chain was provided at all (Tr. 49). Counsel also confirmed that aside from the safety chain, the locomotive was inspected by MSHA and found to be in a safe operating condition, and the mechanical braking mechanism was operable. In addition, the brake pads and linkage were also inspected and found to be in proper operational condition (Tr. 51).

Docket No. PENN 88-53AR

In this case the inspector issued a section 104(a) "S & S" Citation No. 2881574, on October 27, 1987, citing a violation of the safeguard requirements of 30 C.F.R. 75.1403, and the condition or practice is described as follows:

There were 5 loaded supply cars consisting of 3 cars of concrete block and 2 cars of wooden crib blocks and a 15 ton Goodman locomotive standing on the track in the chute between the 2 West track and the South main track, and the cars were not blocked. This condition may have been a contributing factor to the cause of a fatal accident that occurred on 10-25-87. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector relied on a previously issued safeguard Notice 1 TJS, December 26, 1983, requiring that standing cars on any track be properly blocked or dragged.

MSHA's counsel took the position that had the locomotive and the 5-car trip been properly blocked there would have been no movement of the equipment and no accident (Tr. 17). However, counsel moved to amend the proposed civil penalty assessment from \$3,500 to \$2,500, and in support of this motion, asserted that contrary to the special assessment narrative findings that the three miners working on the track rail were not normally assigned to those duties, and that the foreman should therefore have instructed them on safe work procedures, including the blocking of the trip of cars, the facts disclosed that two of the miners, including the accident victim R.D. Schaffer, were locomotive motormen with approximately

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18 years of mining experience, and that the other miner was a trackman.

Counsel stated that while it may be true that the three miner's were not normally assigned to do track repair work, their regular work assignments as motormen and trackmen required them to be familiar with the necessity for blocking haulage equipment against possible movement, particularly in the case of the two motormen who had over 18 years of experience. Based on interviews with witnesses, counsel stated that contrary to MSHA's special assessment narrative statement, the miners in question knew that the equipment needed to be blocked, and they failed to insure that this was done either through a mistake or inadvertence. Counsel proffered that if called to testify, one of the witnesses, William Knesh, who was present in the courtroom, would so testify. Mr. Knesh was the locomotive operator when it was parked, and he would testify that he yelled to the accident victim to make sure to block the cars, saw him duck behind the cars while bending over, and he assumed that he had blocked the cars against movement (Tr. 18Ä22).

MSHA's counsel also pointed out that although the investigating team could find no evidence of any blocking material at the time of the investigation, since the equipment had been moved during the rescue of the victim, any blocking materials which may have been present would also have been moved (Tr. 22).

Docket No. PENN 88Ä54ÄR

In this case the inspector issued a section 104(a) "S & S" Citation No. 2881575, on October 27, 1987, citing a violation of the safeguarding requirements of 30 C.F.R. 75.1403, and the condition or practice is described as follows:

The Galis battery jeep TP8 serial no. 130Ä270116 was parked on the track haulage at 4 left crossing and was not blocked when not in use. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector relied on a prior safeguard Citation No. 2254834, April 26, 1984, issued pursuant to 30 C.F.R. 75.1403Ä10(e), and which required positive acting stopblocks or derails for all mine haulage equipment.

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MSHA's counsel proposed no changes for this citation and stated that Helen Mining Company has agreed to pay the full amount of the proposed civil penalty assessment of \$136 (Tr. 23). The parties offered supporting arguments for my approval of this settlement (Tr. 24-27).

Docket No. PENN 88-55AR

In this case the inspector issued a section 104(d)(2) Order No. 2881576, on October 27, 1987, citing the safeguard requirements of 30 C.F.R. 75.1403, and the condition or practice is described as follows:

The Galis battery jeep TP7 serial no. 130-270115 was parked on the track at the motor barn area by Sam Ferguson, Foreman, and was not adequately blocked in that a cap wedge was used for blocking. This condition may have been a contributing factor to the cause of a fatal accident that occurred 10-25-87. This information was revealed during a fatal accident investigation.

In support of the order, the inspector relied on a previously issued safeguard Notice No. 2254834, April 26, 1984, requiring the blocking of all haulage equipment when it is not in use. This safeguard was issued when an inspector found that a shuttle car was not provided with positive active stopblocks.

MSHA's counsel pointed out that this violation concerns inadequate blocking for the TP-7 jeep, and that the jeep was in fact blocked with a cap wedge. Counsel conceded that the cited condition may or may not have contributed to the accident. Counsel also pointed out that the safeguard upon which the order was based applied to a shuttle car, and it did not specify the appropriate method for blocking a jeep. Under the circumstances, counsel moved to modify the order to a section 104(a) citation, and to amend the proposed civil penalty assessment from \$3,500 to \$500.

In support of the motions, counsel asserted that the lack of any specific notice in the underlying safeguard as to the type of blocking which would be considered adequate for the jeep does not support the unwarrantable failure order. Further, counsel asserted that the facts establish that a wooden wedge was used under the wheel of the jeep, and that coupled with the fact that the jeep was braked, it was highly unlikely

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that the jeep would have moved on its own had it not been struck by the runaway trip of cars (Tr. 28Ä38).

MSHA's counsel confirmed that the inspectors who issued the citations and order and conducted the accident investigation were present in the courtroom, and that they concurred with the settlement proposals advanced by the parties (Tr. 41Ä42). The parties also confirmed that the arguments presented on the hearing record in support of their joint settlement proposals in these proceedings would be corroborated by their respective witnesses who were present in the courtroom in the event they were called to testify (Tr. 51).

The parties submitted information concerning Helen Mining's history of prior violations, mine production information, and the size and scope of its mining operation (Tr. 57; Exhibits GÄ4, GÄ5, and GÄ6), and I have considered this information in approving the proposed settlements. I have also considered the inspectors' negligence and gravity findings as reflected by the contested citations and amended order, and take note of the fact that all of the contested violations were timely abated in good faith by the mine operator.

After due consideration of the arguments presented by the parties, MSHA's oral motions for approval of the settlements and to amend its civil penalty proposals for Citation Nos. 2881573, 2881574, and 2881576, and to modify section 104(d)(2) Order No. 2881576 to a section 104(a) citation were granted from the bench (Tr. 43Ä44, 54). With regard to the settlement proposal for Citation No. 2881575, requiring Helen Mining Company to pay the full amount of the \$136 civil penalty assessment for the violation in question, the settlement proposal was likewise approved from the bench (Tr. 43).

Conclusion

Pursuant to the requirements of Commission Rule 30, 29 C.F.R. 2700.30, and after careful consideration of the pleadings and arguments in support of the proposed settlement dispositions agreed to by the parties, I conclude and find that they are reasonable and in the public interest and they are approved. Accordingly, my bench decisions in this regard ARE REAFFIRMED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2881577, October 27, 1987, 30 C.F.R. 75.1403, Docket No. PENN 88Ä56ÄR, IS VACATED, and MSHA's

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proposed civil penalty assessment IS DISMISSED. Helen Mining Company's Notice of Contest IS DISMISSED.

Section 104(a) Citation No. 2881578, October 27, 1987, Docket No. PENN 88Ä57ÄR, citing an alleged violation of section 103(k) of the Act has been previously vacated by MSHA and no proposed civil penalty assessment was filed. Accordingly, Helen Mining Company's Notice of Contest IS DISMISSED.

All of the remaining contested and settled citations not otherwise dismissed or vacated ARE AFFIRMED, and Helen Mining Company IS ORDERED to pay the following civil penalty assessments in satisfaction of the violations in question within thirty (30) days of the date of these decisions and order:

Docket No.	Citation No.	Date	30 C.F.R. Section	Assessment
PENN 88Ä52ÄR	2881573	10/27/87	75.1403	\$ 500
PENN 88Ä53ÄR	2881574	10/27/87	75.1403	\$2,500
PENN 88Ä54ÄR	2881575	10/27/87	75.1403	\$ 136
PENN 88Ä55ÄR	2881576	10/27/87	75.1403	\$ 500

In view of the settlement disposition of the aforementioned dockets, Helen Mining Company's Notices of Contest ARE DISMISSED.

George A. Koutras
Administrative Law Judge