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ROCHESTER & PITTSBURGH COAL V. SOL (MSHA)
SOL (MSHA) V. ROCHESTER & PITTSBURGH COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROCHESTER & PITTSBURGH COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS Docket No. PENN 88-152-R
v.	Order No. 2885050; 2/25/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 88-153-R Citation No. 2885051; 2/25/88 Greenwich Collieries No. 2 Mine Mine I.D. No. 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. PENN 88-188 A.C. No. 36-02404-03707
v.	Docket No. PENN 88-189 A.C. No. 36-02404-03708
ROCHESTER & PITTSBURGH COAL COMPANY, RESPONDENT	Greenwich Collieries No. 2 Mine

DECISION

Appearances: James Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor;
Joseph A. Yuhas, Esq., Pennsylvania Mines Corporation, Ebensburg, Pennsylvania for Rochester & Pittsburgh Coal Company.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" to challenge five citations and one imminent danger withdrawal order issued by the Secretary of Labor against the Rochester and Pittsburgh Coal Company (the Company) and for review of civil penalties proposed by the Secretary for the related violations.

Citation No. 2879226 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.1707 and charges as follows:

> The designated intake escapeways for the Maint, TÄ6, TÄ4, TÄ1, and PÄ9 active working sections were not separate from the Main P and Main T belt haulage entry. Air readings were taken in the belt entries of Main T, TÄ6, TÄ4, TÄ1 and PÄ9 for a total air quantity of 60,236 cfm air readings taken at the intake regulator 2xÄcuts inby the portal between the belt and track entry together with an air reading take [sic] at the second overcast in the belt entry outby the portal resulted in 14,591 cfm of air available to ventilate the belts. Subtracting this total from the total air on the belts indicates 45,645 cfm air entering the belt entries from the intake escapeways.

The cited standard provides as follows:

> In the case of all coal mines opened on or after March 30, 1970, and in the case of all new working sections opened on or after such date in mines opened prior to such date, the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section, except that the Secretary or his authorized representative may permit such separation to be extended for a greater or lesser distance so long as such extension does not pose a hazard to the miners.

The parties do not disagree that in the context of the above regulatory requirement (that the "intake air shall be separated from the belt and trolley haulage entries") it is understood in the mining industry that the separation need only be "reasonably airtight" (See Exhibit 0Ä2 page 2). The disagreement in this case concerns the definition of the term "reasonably airtight". The Secretary maintains that based upon the undisputed volume of air entering the belt entry from the intake, calculated by MSHA Inspector and ventilation specialist Samuel Brunatti at 45,645 cubic feet per minute (cfm), the separation was not "reasonably airtight". The Secretary's experts, Brunatti and supervisory MSHA Inspector James Biesinger (formerly a ventilation specialist himself) support this view. While the Company does not dispute the calculations of air "leakage" it argues that 45,645 cfm of

air entering the belt entry from the intake does not prove that the separation was not "reasonably airtight". Not surprisingly the testimony of its experts, Paul Enedy and Michael Ondeco, both graduate mining engineers with significant underground mining experience, support the Company's view.

To further muddy the waters, the Secretary acknowledges that she has not established any standard of measurement of air leakage for determining whether a separation is "reasonably airtight". Moreover there is significant divergence of opinion, even between the MSHA experts, as to the amount of air leakage necessary to show that a separation is not reasonably airtight".

Within this framework it appears that even reasonably prudent persons familiar with the mining industry widely disagree over what constitutes a "reasonably airtight" separation. See Alabama ByÄProducts, 4 FMSHRC 2128 (1982) and U.S. Steel Corp., 5 FMSHRC 3 (1983). Accordingly there is no standard of air leakage by which a violation herein may be measured. I have also observed that none of the 155 stoppings within the affected area were found not to be "reasonably air tight". Indeed the Company had examined each of these stoppings applying inspection standards accepted by the Secretary in reaching this conclusion.

Finally, I note that in abating this citation the Company was not required, and did not need, to alter any of the stoppings separating the intake and belt entries and was permitted to actually increase the "leakage" of air onto the belt entry by further opening an air regulator. Under all the circumstances I cannot find that the Secretary has sustained her burden of proving a violation of the cited standard. Citation No. 2879226 is accordingly vacated.

Citation No. 2885015 was the subject of a Motion for Settlement filed in this proceeding in which a reduction in penalty from $168 to $120 was proposed. As grounds for the reduction the Secretary stated as follows:

> Further investigation has revealed that the operator's negligence in this matter should be reduced from moderate to low. This bar [for deenergizing the motor on a was regularly tested during weekly electrical equipment examinations and had been tested the previous week. There was no indication in the electrical examination books that the bar would not deenergize the motor. The chief electrical engineer has explained that the bar did

> in fact depress the button (stop switch) which would deenergize the motor. Immediately after the citation was issued, he depressed the bar and the bar hit the button which deenergized the motor. He was able to do this without a lot of pressure. It is undisputed that in view of the inspector's test, that the bar would not hit the button fully when hit at certain angles. The bar did have the capacity to work, however it is uncertain how often it would not fully operate. It appears as though there was a judgment call as to the capacity of this bar to work. In view of the foregoing the operator's negligence should be reduced to very low.

I have considered the representations and documentations submitted with respect to this proposed settlement and I conclude that it is appropriate under the criteria set forth in section 110(i) of the Act.

Dockets No. PENN 88Ä189, PENN 88Ä152ÄR and PENN 88Ä153ÄR

Citation No. 2885051 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1722(a) and charges as follows:

> Observed Robert Coy (UMWA) working under the Main T No. 1 belt conveyor (near the belt head) along the Main T belt/track entry. The belt conveyor was in motion exposing Mr. Coy to possible injury if contacted in that a guard was not provided for the bottom belt conveyor. The clearance between the bottom of the belt and the coal accumulation on the mine floor is 64 inches. This citation was one of the factors that contributed to the issuance of Imminent Danger Order No. 2885050 dated 02Ä25Ä88; therefore, no abatement time was set.

The cited standard, 30 C.F.R. 75.1722(a), provides as follows:

> Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

According to Gerry Boring an MSHA coal mine inspector, the unguarded moving machine part here at issue was the

moving belt coal conveyor. Boring was concerned that the subject miner in proceeding beneath the exposed moving belt might be struck if the belt should break or that he might be dragged into a roller by a bad splice. The evidence shows that this miner was about 67 inches tall and that the belt was between 72 to 79 inches above the solid mine floor, considering the 8 to 15 inches of wet accumulations on the floor beneath the belt and that it was 64 inches from the top of these accumulations to the bottom of the belt.

The Company maintains that the cited conveyor belt was not a "similar exposed moving machine part" within the meaning of 30 C.F.R. 75.1722(a) and that therefore there was no violation of that standard. In Secretary of Labor v. Mathies Coal Co., 5 FMSHRC 300 (1983), the Commission observed that this regulatory standard applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed. In the Mathies case the Commission found that an elevator cage did not meet the definition of "similar" within the scope of the standard. It quoted the definition of the word "similar" as "1) having characteristics in common; very much alike... 2) alike in substance or essentials...3a) having the same shape; differing only in size and position...." citing Webster's Third New International Dictionary at p. 2120 (unabridged 1971).

Applying this definition to the conveyor belt at issue I observe that although a conveyor belt has a common characteristic with the enumerated items i.e. motion, it is not "very much alike", "alike in substance or essentials" or of the "same shape" as the others. Indeed a conveyor belt clearly does not resemble, in form or function, those machine parts specifically listed in the standard. Under the circumstances I must agree with the Company that the conveyor belt at issue is not a "similar exposed moving machine part" under 30 C.F.R. 75.1722(a) and that therefore there was no violation of that standard in this case. The citation is accordingly vacated.

Related Order of Withdrawal No. 2885050, issued pursuant to section 107(a) of the Act, reads as follows:

> Observed Robert Coy (UMWA) standing under the operating Main T No. 1 belt conveyor (near the belt head). The clearance between the bottom of the belt and the coal accumulation on the mine floor is 64 inches. Mr. Coy had been repairing a water line and was retrieving a block from underneath said belt when observed. Exposed machine parts which

> may be contacted by persons, and which may cause injury to persons shall be guarded, 30 C.F.R. 75.1722(a).

Section 107(a) of the Act provides in part as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The limited issue herein is whether such a condition or practice existed at the time this order was issued.

According to MSHA Inspector Boring, the imminent danger order was issued because of a "condition" in which he observed coal miner Robert Coy proceed beneath the belt conveyor and retrieve a cement block. Inspector Boring maintained that this "condition" constituted an "imminent danger" because the belt might break and slap the miner, a defective splice in the belt might catch the miner and drag him into the rollers or belt structure, the miner might contact the belt (presumably by extending an arm) and break a finger or be knocked against a wall and sustain serious eye injuries from debris falling off the belt. While there is no evidence in this case that the belt was worn or otherwise likely to break or that any of the splices were deficient, I nevertheless find that the other hazards were such that the cited condition "could reasonably be expected to cause serious physical harm" if not discontinued. Accordingly I find that there was an imminent danger and affirm Order No. 2885050.

Citation No. 2885053 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1713Ä7(c) and charges as follows:

> The first-aid supplies being maintained along the RÄ1 intake entry near survey station No. X1710 in the active TÄ4 (011) working section are not being kept sanitary, dry and clean. The metal box housing the first-aid supplies is wet (1/4 inch deep water near middle with the remainder of the floor damp and dirty).

The cited standard provides that "[a]ll first-aid supplies required to be maintained under the provisions of paragraphs (a) and (b) of this section 75.1713Ä7 shall be stored in suitable, sanitary, dust tight, moisture proof containers and such supplies shall be accessible to the miners".

It is undisputed that splints are first-aid supplies under section 75.1713Ä7(b)(12). It is also undisputed that the cited metal box housing the first-aid supplies had water inside and that the inflatable splints inside the box were also wet. It may therefore reasonably be inferred that first aid supplies required to be maintained by section 75.1713Ä7 were not stored in a moisture proof container. The violation is accordingly proven as charged.

The Secretary has failed however to sustain her burden of proving that the violation was "significant and substantial". At best Inspector Boring could conclude only that the wet splints, if used over an open wound "could have led to the possibility of infection". The mere "possibility" of infection does not meet the test of reasonable likelihood that the wet splints could result in injuries of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC 1 (1984). In any event I find it highly unlikely that a splint would be applied directly upon an open wound where clean and dry bandages are available. Under the circumstances the contemplated hazard of infection would be too remote to warrant a "significant and substantial" finding herein.

I also find that the violation was the result of but little negligence. Inspector Boring observed that there is no regulatory requirement that first-aid supplies be regularly examined or inspected and it is not a part of the face boss examination to check such supplies. Under the circumstances a penalty of $100 is appropriate.

At hearing the parties agreed to a settlement of Citation No. 2884901 proposing a reduction in penalty from $259 to $205. I have considered the representations and documentation submitted concerning that citation and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

Citation No. 2885051 is vacated and Contest Proceeding Docket No. PENN 88Ä152ÄR is granted. Order No. 2885050 is affirmed and Contest Proceeding Docket No. PENN 88Ä153ÄR is dismissed. Citation No. 2879226 is vacated. Citations No. 2885015, 2884901 and 2885053 are affirmed and the Rochester and Pittsburgh Coal Company is directed to pay civil penalties of $120, $205, and $100 respectively, for the violations charged in those citations within 30 days of the date of this decision.

Gary Melick
Administration Law Judge
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