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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-167 A.C. No. 46-06557-03539
v.	
ONEIDA COAL COMPANY, INC., RESPONDENT	Oneida Mine No. 11

DECISION

Appearances: Anita D. Eve, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia, Pennsylvania,
for the Petitioner;
W.T. Weber, Jr., Esq., Weston, West Virginia,
for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," in which the Secretary has charged the Oneida Coal Company (Oneida) with two violations of the mandatory safety standards. Prior to the commencement of taking testimony in this case, however, the parties moved to settle that portion of the case concerning 104(d)(1) Order No. 2901009, alleging a violation of 30 C.F.R. 75.400 and proposing a $1000 civil penalty. There was no reduction in the assessed penalty proposed and based upon the representations made at the hearing and in the record, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act

The remaining section 104(d)(1) citation, alleging a violation of the mandatory safety standard found at 30 C.F.R. 75.200 and proposing to assess a civil penalty of $950 was tried before me at a scheduled hearing on July 15, 1988, at Slatyfork, West Virginia.

The general issues before me are whether Oneida violated the cited regulatory standard, and, if so, whether that violation was of such a nature as could significantly and substantially

contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation is "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. An additional issue in this case is whether the inspector's "unwarrantable failure" finding should be affirmed.

DISCUSSION

Citation No. 2700376 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.200 and specifically charges as follows:

> There was a violation of the approved roof control plan, in that only 5 breaker post and no turn post were installed in the No. 2 block pillar split, AÄ5 panel section, where coal was being mined by continuous miner. Dan Matz, was the Section Foreman. The approved plan requires eight (8) breaker post and four (4) turn post be installed prior to taking the first cut from the pillar split. The Foreman knew or should have known of this requirement.

Oneida does not dispute the factual allegations set forth in the citation at bar nor does it dispute that such allegations constitute a violation of its roof control plan and therefore the cited standard. Oneida maintains, however, that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with its roof control plan.

Inspector Veith testified that the operator's roof control plan required that they have eight breaker posts and four turn posts installed prior to starting the pillar split. He observed five breaker posts installed and no turn posts. He asked the continuous miner operator if he knew what the roof control plan required and the miner ostensibly replied that yes, he did, but he did not have any posts available.

The inspector further opined that every time you split a pillar block, you increase the chance of a roof fall and therefore the chance of serious injury. The risk of serious injury in this case being to the miner operator who was right beside the machine even though this particular continuous miner had remote control capability.

It was also the inspector's opinion that this violation was "unwarrantable" because the section foreman knew or should have known that this miner operator was going to start mining in the

affected area before the roof control plan had been complied with. He testified at (Tr. 30):

> It's the section foreman's responsibility to see to that, and he should have known. It should have been checked to be sure that the proper amount of roof support had been installed. That's part of his responsibility.

Mr. Bauer, Director of Safety and Training for Oneida, also testified. He stated that he investigated this incident and found by interviewing Randell Mullins, the continuous miner operator, that he (Mullins) had moved the miner to the number two block and was mining there for approximately five to ten minutes when the inspector came up and issued the citation. He further stated that Danny Matz, the section foreman, knew about the roof control plan requirements.

Danny Matz also testified. He stated that before the inspector arrived he personally had checked the area around the number two block and at that time all the breaker posts were in and standing. Later, he returned to the area with Inspector Veith and observed that three of the eight breaker posts had been knocked down by falling material. He acknowledged, however, that there were no turn posts in number two, either earlier or when he came back with the inspector, which was okay as long as no mining was taking place there.

Foreman Matz maintains that he did not instruct the miner operator to make a pillar split or cut on the number two block and he did not know that the miner operator would be mining on the number two block without his prior approval. He states the miner operator should have let him know that there were no "timbers" in there prior to starting that pillar cut. However, on cross-examination he admitted that he would not have routinely had to be there for the miner operator to start cutting on the number two block and he would ordinarily just assume the miner operator would put up the required turn posts.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or

illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

I conclude and find that a violation of the cited standard did occur as alleged in Citation No. 2700376, and as admitted by Oneida. Furthermore, a discrete safety hazard in the form of an increased danger of a roof fall was contributed to by the violation. Additionally, I accept and find credible the inspector's opinion that there was a reasonable likelihood that the hazard contributed to could result in a reasonably serious type injury, which is usually the case in a roof fall type accident. I therefore conclude that the violation was "significant and substantial," and serious.

The Unwarrantable Failure Issue

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

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). And more recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

In this case, Foreman Matz testified and I specifically find that testimony to be credible, that when he inspected the area all eight of the required breaker posts were then in place. However, none of the required turn posts were installed. At this point in time, Matz knew the turn posts were not installed and he also knew that the number two block was scheduled to be cut on that shift. Now theoretically, the miner operator was supposed to tell Matz that he was going to start cutting on the number two block and this would have given Matz the opportunity to make sure the required turn posts were installed, as both he and the continuous miner operator knew they should be prior to the start of any mining. For whatever reason, this did not happen and as Matz candidly admitted, this did not completely surprise him. In effect, Matz totally relied on and expected the miner operator to install the turn posts before he started cutting. I find this to be an abdication of Matz' responsibilities as the section foreman, and a serious lack of reasonable care on his part to see that the standard was complied with. This negligence is clearly

imputable to the operator. Accordingly, I conclude and find that that portion of the violation pertaining to the missing turn posts was an "unwarrantable failure" to comply with the standard cited. With regard to the missing breaker posts, I accept the operator's explanation that three of the eight posts had been knocked down since Matz had earlier that shift observed them standing in place. This last finding is reflected in the civil penalty assessed by me for this violation.

Civil Penalty Assessment

In assessing a civil penalty concerning this citation, I have also considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act, including the fact that the operator is small in size and does not have a significant history of violations. Under these circumstances, I find that a civil penalty of $750 is appropriate.

ORDER

Citation No. 2700376 and Order No. 2901009 ARE AFFIRMED, and Oneida Coal Company is hereby directed to pay a civil penalty of $1750 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge