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SOL (MSHA) V. CONSOLIDATION COAL
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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 88-197 A.C. No. 46-01455-03699
v.	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Consolidation Coal Company (Consol) with two violations of regulatory standards. The general issue before me is whether Consol violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Order No. 2944627 issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the mine operator's Methane and Dust Control Plan, the "Plan", under the regulatory standard at 30 C.F.R. 75.316, and charges as follows:(FOOTNOTE 1)

At the 4 Butt belt drive head roller there is no water spray at the belt to belt transfer point. There was no operating spray for the top belt at any location along this belt.

The relevant provisions of the Plan (See Exhibit G-3 page 2) provide that at belt to belt transfer points dust control practices are to be "fresh air and water sprays." Inspector Spencer Shriver, an Electrical Engineer for the Federal Mine Safety and Health Administration (MSHA), was conducting a spot electrical inspection on January 7, 1988, at Consol's Osage No. 3 Mine when he noted that a violation previously cited in the 4 Butt belt drive area for failure to have operable water sprays had apparently not been abated. Company Safety Inspector Dan

Serge stated that water sprays presumably for the coal on the belt had been installed two blocks inby the transfer point but had not yet been hooked up. Inspector Shriver observed that the sprays had been installed as stated but were indeed not hooked up and that the inside of the pipe was dry. He also observed that the belt was operating and that the top of the belt was completely dry. While Shriver could not recall whether coal was being transported on the belt Inspector-Trainee Michael Kalich who accompanied Shriver, did not see any coal on the belt or coal being dumped at the transfer point.

Consol does not dispute that it did not have operable water sprays for the coal on the beltline as charged but argues that a spray located 25 to 40 feet from the section tail-piece directed to the underside of the top belt was sufficient to meet the Plan's requirments. It is clear from the plain language of the Plan, however, that the requirement for water sprays at "belt to belt" transfer points is in addition to the specific requirements in the Plan for sprays directed to the "underside of the belt". These are separate and distinct requirements and each must be independently complied with (See Exhibit G-3 p.2). Clearly water sprays that do not spray the coal being transported on the beltline would not meet the need to assure that such coal is sufficiently wet to prevent the accumulation of respirable dust and float coal dust. The violation is accordingly proven as charged.

Inspector Shriver opined that without water sprays functioning in accordance with the Plan there was a possibility of generating respirable dust and accumulating float coal dust. He noted that float coal dust could lead to an explosion resulting in lost time injuries. He thought that the hazards were "reasonably likely". There was already some dust in the area according to Shriver although not sufficient to constitute a violation. Shriver found the area to be "neither too wet nor to dry."

On the other hand William Kun, the Safety Supervisor at the Osage No. 3 mine, testified that he arrived at the cited area within 1 1/2 hours of being notified of the order and found the roof and ribs in the area to be white with rock dust and damp.(FOOTNOTE 2) He found no float coal dust. He also observed that there had been no problem with float coal dust at this transfer point. He opined that there was no hazard existing as a result of the cited conditions. Kun also observed that there had been a spray located 150 feet inby the transfer point but it had been taken out more than a week before the order was issued because it made the coal "overwet".

Greg Yanak, Consol's Regional Supervisor for Respirable Dust and Noise Control also testified that he had taken coal samples from the cited area and concluded, based on those samples, that additional water sprays were not needed at the cited transfer point. The evidence also shows that the coal itself is moist when extracted and may still be wet at the cited transfer point obviating the need for additional water sprays. Indeed subsequent to the issuance of the order at bar the Plan was modified and approved by the Secretary to allow operator discretion as to the need for water sprays upon the coal at belt to belt transfer points.

In light of this evidence, the contradictory testimony regarding the source of any coal dust and the apparent absence of coal on the beltline at the time of the violation from which it could be determined whether, indeed, the coal was dry and dusty or sufficiently wet to prevent the spread of coal dust, I cannot find that the Secretary has met her burden of proving that the violation was "significant and substantial". See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). For the same reasons the Secretary has failed to prove that the violation was anything but of low gravity.

However in light of the undisputed testimony that a violation of the same nature had been cited the previous November and in light of the evidence that requirements of the Plan for water sprays near belt to belt transfer points was discussed with mine officials at that time, it is clear that the violation was caused by an aggravated failure to act amounting to more than ordinary negligence and therefore by the "unwarrantable failure" of the operator to comply. See Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007 (1987). More specifically the evidence shows that following the November 17, citation for the same type of violation, Shriver had discussed with management the need for a belt spray at all the transfer locations. Six weeks had thereafter elapsed however and no appropriate functional sprays were in place. Since it has been stipulated that there were no intervening clean inspections between the issuance of the precedential section 104(d)(1) order and the order at bar it is clear that the order must be sustained as an order under section 104(d)(2) of the Act. See fn.1 supra, Secretary v. United States Steel Corporation, 6 FMSHRC 1908 (1984). In addition, considering all of the criteria under section 110(i) of the Act I find that a civil penalty of $300 is appropriate.

Order No. 2944628, also issued pursuant to section 104(d)(2) of the Act, alleges a violation of the standard at 30 C.F.R. 75.810 and charges as follows:

> At the 5 Butt construction power center the 7,200 volt energized cable was found to contain a damaged area that was not properly repaired. The cable [sic] outer jacket was cut back for a distance of 18 inches exposing the ground schielding and phase conductors. One phase conductor was damaged exposing the bare conductor and the ground shielding was partially broken. . . .

At the conclusion of the Secretary's case-in-chief, Consol moved for a directed verdict on the grounds that the Secretary's evidence did not support a violation of the cited standard. The Motion for Directed Verdict (See Fed. R. Civ. P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b)) was granted at hearing and the decision supporting that ruling is set forth below with only non-substantive corrections:

> The motion to amend is too late. The motion for directed verdict has been filed. That is the matter that is before me and clearly from the undisputed evidence presented by the government there is no violation of the cited standard, the standard with which we have been hearing evidence throughout the government's case and upon which the operator has been conducting its cross-examination.
>
> The cited standard 30 C.F.R. 75.810, reads as follows: "In the case of high-voltage cables used as trailing cables temporary splices shall not be used and all permanent splices shall be made in accordance with section 75.604. Terminations and splices in all other high voltage cables shall be made in accordance with the manufacturer's specifications."
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> The evidence in this case is that the cable at issue was neither spliced nor terminated. Clearly then the standard cited is not applicable to these proceedings and there has been no violation of that standard based on the evidence presented. The Motion for Directed Verdict is therefore granted.

ORDER

Order No. 2944628 is vacated. Order No. 2944627 is affirmed as a "non-signficiant and substantial" order issued under section 104(d)(2) of the Act. The Consolidation Coal Company is directed to pay civil penalties of $300 for the violation charged in Order No. 2944627 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. Section 104(d) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

~FOOTNOTE_TWO

2. Inspector-Trainee Kalich agreed that the area around the belt was in fact damp.