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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 88-214 A.C. No. 46-01455-03702
v.	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Respondent Consolidation Coal Company (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks penalties for three alleged violations of mandatory safety standards, which were charged in separate withdrawal orders issued under section 104(d)(2) of the Act on January 15, 1988, January 29, 1988 and February 12, 1988. Each order alleged that the violation cited was significant and substantial, and that it resulted from the unwarrantable failure of Consol to comply with the safety standard involved. Consol denies that the violations occurred, and asserts that if violations are established they were neither significant and substantial, nor were they the result of its unwarrantable failure. Pursuant to notice, the case was called for hearing in Morgantown, West Virginia, on November 15, 1988. Ken J. Fetsko testified on behalf of the Secretary; Daniel Serge, William A. Kun, William Keith Fox, and Larry Allen Bragg testified on behalf of Consol. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties, on the bases of which I make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. FINDINGS COMMON TO ALL VIOLATIONS

At all times relevant to this proceeding, Consol was the owner and operator of an underground coal mine in Osage, West Virginia known as the Osage No. 3 Mine. The mine has products which enter interstate commerce. Osage is a large mine with an annual production of more than 800,000 tons of coal. Consol is a large operator and annually produces more than 10 million tons of coal. Consol had 503 violations over 472 inspection days in the 24 month period prior to the issuance of orders 2707304 and 2707314. It had 480 violations over 456 inspection days in the 24 month period prior to the issuance of order no. 3104904. This history of prior violations is not such that penalties otherwise appropriate should be increased because of it. The assessment of penalties will not affect Consol's ability to continue in business. Each of the cited conditions was abated promptly and in good faith after the contested orders were issued.

2. ORDER NO. 2707304

On January 15, 1988, Federal mine inspector Ken Fetsko issued an order under section 104(d) of the Act, in which he alleged that a belt transfer drive was inadequately guarded to prevent persons from contacting the moving roller. There was a chain link guard in front of the drive which had been raised approximately 21 inches apparently to change perma-lube cannisters on the belt drive motor. The raised guard was attached to a J-hook. When the inspector arrived at the area, the belt was started up to resume production. A light coating of coal dust was present on the surface of the guard. The drive was located on a travel way. The mine floor in the area was damp. The hazard cited in the order was the possibility of a person contacting the roller: the chain and the motor themselves did not have unguarded moving parts. The roller was set back approximately 24 inches from the chain guard and was at an angle away from the guard.

30 C.F.R. 75.1722(a) provides in part that ". . . exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." Although I believe it is unlikely that a person could accidentally put his hand through the raised guard and come in contact with the roller, I conclude that such an event "may" occur. Therefore, I conclude that a violation of 30 C.F.R. 75.1722(a) has been established.

To establish that a violation is properly designated significant and substantial, the Secretary must show that it

contributes to a measure of danger to safety, and that there is a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984). The evidence in this record does not establish the likelihood that the violation will result in injury, because of the position and location of the roller behind the raised guard.

A violation is caused by unwarrantable failure if the evidence establishes that it resulted from the mine operator's aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (1987). Although management personnel were present when the belt was reactivated with the guard partially raised, there is no evidence that they were aware of the raised guard, nor can I conclude that their conduct was reckless, inexcusable, or otherwise aggravated with respect to the violation.

Therefore, I conclude that the Secretary improperly characterized the violation was significant and substantial, and improperly determined that it resulted from Consol's unwarrantable failure.

The violation was not serious, was the result of negligence, and was abated in good faith. I conclude that a penalty of $75 is appropriate for the violation.

3. ORDER NO. 3104904

On February 12, 1988, Inspector Fetsko issued a 104(d)(2) order, alleging a violation of 30 C.F.R. 75.523 because the deenergizing device on a continuous miner was disconnected and lying on the deck of the miner. The miner was being operated just prior to the issuance of the order. The evidence clearly establishes that the "panic bar" on the deenergizing device had come loose or had been disconnected and was lying in the deck in the operator's compartment of the miner. The inspector concluded that it had been there for some time because of rust on the bar and the fact that part of it was covered with coal dust. The miner operator, however, testified that he checked the panic bar at the beginning of the shift and it was attached. He also tested it and it effectively shut off the power. He began operating the miner, cutting rock and coal from the top for an overcast. After a short time, the conveyor on the miner became inoperative, and the miner was shut down. It was not operated again before the order was issued. The miner operator did not check the panic bar after he began cutting the coal and rock. I accept the miner operator's testimony as truthful and accurate, and therefore conclude that the panic bar was connected and operative at the beginning of the shift.

30 C.F.R. 75.523 requires that electric face equipment be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. Although the miner operator testified that he customarily deenergized his miner by turning off the switch and never used the panic bar located below his left elbow, I conclude that the standard requires that the panic bar be attached and operative. The panic bar enables the operator to deenergize the motor with his knee or elbow even though both hands may be occupied with the controls. Therefore, I conclude that the evidence establishes a violation of 30 C.F.R. 75.523.

Inspector Fetsko concluded that the violation was significant and substantial because it was reasonably likely that crushing injuries would occur as a result of the continuous miner striking a worker because of failure to deenergize the miner. These conclusions, however, failed to consider the other deenergizing devices on the miner, including the on-off switch, and the foot pedal which runs the tramming motor. I conclude that the Secretary failed to establish that there was a reasonable likelihood that the hazard he described would result in a serious injury.

I credit the miner operator's testimony that the panic bar arm was in place and operated properly at the beginning of his shift. There is no evidence that Consol knew that the arm was disconnected prior to the time the order was issued. Therefore, the Secretary has not established that the violation resulted from aggravated conduct constituting more than ordinary negligence.

The violation was moderately serious, and resulted from moderate negligence. It was abated in good faith. I conclude that $100 is an appropriate penalty for the violation.

4. ORDER NO. 2707314

On January 29, 1988, Inspector Fetsko issued a section 104(b) order charging a violation of 30 C.F.R. 75.1105 because an enclosed pump house was not ventilated to the return air course. The pump was enclosed in a fireproof cinder block structure with a metal door. There was no tubing in place to vent the pump, which was in operation at the time the order was issued. The inspector testified that "1/21", ("a fireboss date"), was marked on the door. He further testified that John Mogus, the foreman told him on January 29 that the pump housing was built a week previously. Mogus was not called as a witness. The violation was abated by installing a vent tubing from the pump housing through an outby permanent stopping, across a belt

entry to a return aircourse. Consol's safety director, William Kun, testified that he was in the area with Inspector Fetsko on January 27, and that the pump in question was not housed at that time. He further testified that the pump was intended to be a temporary one and to be moved up as the work advanced. The pump was a large Gorman pump, and required four people to move it. Consol had a substantial problem with water in the area. It had a number of small sump pumps in the entry, in addition to the large Gorman pumps. All of the latter were housed in fireproof structures; none of the former were. All of the housed Gorman pumps, except the one cited in the order, were vented to the return aircourse.

30 C.F.R. 75.1105 requires, inter alia, that "permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return."

I conclude that the pump which was the subject of the order involved herein was a permanent pump. Since the air ventilating the pump was not coursed directly into return air, a violation of the standard has been established.

The Inspector testified that the heat generated by the pump motor could cause smoke which would travel up into the construction section and on up through the main line where miners were working. He concluded that there was a reasonable likelihood that injury or illness could result from the violation, but he also seemed to agree that something would have to be wrong with the pump or the motor to cause the smoke. There is no evidence that at the time the order was issued, the pump or pump motor were defective in any way. I conclude that the Secretary failed to establish that there was a reasonable likelihood that a serious injury would result from the violation.

I am persuaded that the pump had been housed in the permanent fireproof structure for some days prior to the issuance of the order. I do not accept Consol's contention that this was done inadvertently. Management was clearly aware (Foreman Mogus) that the air ventilating the pump was not being coursed into the return. I conclude that the violation resulted from Consol's aggravated conduct consisting of more than ordinary negligence.

Therefore, I conclude that the Secretary improperly characterized the violation as significant and substantial, but properly determined that it resulted from unwarrantable failure.

The violation was moderately serious, was the result of aggravated negligence, and was abated in good faith. I conclude that a penalty of $500 is appropriate for the violation.

ORDER

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

1. Order No. 2707304 is MODIFIED to a section 104(a) citation. The special findings contained in the order that the violation was significant and substantial, and resulted from unwarrantable failure are not sustained.

2. Order No. 3104904 is MODIFIED to a section 104(a) citation. The special findings contained in the order that the violation was significant and substantial, and resulted from unwarrantable failure are not sustained.

3. Order No. 2707314 is AFFIRMED, including its finding that the violation resulted from Consol's unwarrantable failure. However, the finding that the violation was significant and substantial is not sustained.

4. Consol shall, within 30 days of the date of this decision, pay the sum of $675 as civil penalties for the violations found herein.

James A. Broderick
Administrative Law Judge