FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-51 A. C. No. 46-01318-03849
v.	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, Respondent	

DECISION

Appearances: Ronald Gurka, Fsq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for Petitioner;
Michael R. Peelish, Esq., Consolidation -Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), for two alleged violations of the Act.

A hearing was held on May 10, 1989, and the parties have filed post hearing briefs.

Order No. 3117607

Order No. 3117607 dated August 16, 1988, charges a violation of 30 C.F.R. § 75.202(a), for the following condition or practice:

> Condition: There was loose, hanging, unsupported pieces of mine roof between the wire screen and the rib along the bolted rib lines in the 3 West section belt conveyor entry.

30 C.F.Q. §75.202(a), 53 F.R. 2354, 2355, 2375 (January 27, 1988), provides as follows:

> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Also in question is whether the alleged violation which was cited in a withdrawal order issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), resulted from unwarrantable failure. Additional issues are whether the asserted violation was significant and substantial and the appropriate amount of civil penalty, if any, to be assessed.

In accordance with the stipulations agreed to by the parties and in light of other information submitted by them at the hearing I find (1) T have jurisdiction in this matter; (2) the operator's size is large; (3) the operator's history is as set forth by the Solicitor; (4) imposition of a penalty will not affect the operator's ability to continue in business; and (5) the alleged violation was abated in good faith.

The cited belt conveyor entry was in an area that was being rehabilitated (Tr. 17, 94, 100-101). Tt had originally been mined several years previously (Tr. 17, 99). The top had deteriorated and fallen (Tr. 17, 77, 79, 99). The operator had mined over the old roof falls, cleared them up with a continuous mining machine and was in the process of installing a new roof support system (Tr. 17, 98-99, 145). The intent was to rehabilitate the area for the life of the mine, opening up the cited entry for travel and installation of a belt so as to reach coal in another area (Tr. 17, 99-100).

There is a dispute between MSHA's witnesses and the operator's witnesses over the portion of the belt conveyor entry involved, the condition of the roof, and the effect of posted danger signs. The issuing inspector testified that from the No. 18 block extending inby for 200 feet, including the No. 19 block, there was a roof cavity from 7 to 12 feet high (Tr. 15, 16; "C" to "D" on Jt. Sxhs. 1, and 2). At this location wire screening had been installed pursuant to the roof control plan along the center of the entry in the roof cavity to catch loose or broken materials that might fall (Tr. 18). However, according to the inspector the screening did not extend to the rib lines (Tr. 15, 19). Rather there was a 20" gap on each side where there was no support for the roof (Tr. 15, 19, 20). Irregularly shaped pieces of broken rock were caught in crevices, in the ribs, and at the edge of the wire on both sides of the entry (Tr. 21, 22).

The issuing inspector's description of the condition was corroborated by an MSHA supervisory inspector who accompanied him on the inspection (Tr. 76, 87). The supervisor walked on the opposite side of the belt entry while the inspector walked on the

side toward the adjacent track entry. According to the supervisor, loose rock was present on both sides of the entry and that the track side was worse (Tr. 79, 80). He further said that not only were 20" not screened but there was an additional 20" on the sides which extended past the last roof support (Tr. 84).

The issuing inspector testified that two danger signs were hung at each end of the No. 18 block (Tr. 24). The roof condition he cited extended further inby than the danger signs (Tr. 26; Jt. Fxhs. 1 and 2). According to the inspector, the signs which were 6" x 12" x 12" were installed about 5' from the ground on the track side of the entry (Tr. 26, 30). Each sign was attached to a cable or wire which draped across the entry until it was lying down on the floor on the opposite side of the entry (Tr. 27-30). In the inspector's opinion the signs were meant to danger off the entire entry (Tr. 30). The MSHA supervisor stated that the cable from the danger sign did not extend to the opposite side and would not impede anyone's travel on that side of the belt (Tr. 80).

Contrary to MSHA's witnesses, the operator's safety escort testified that the only affected area was 119 feet from the end of the No. 16 block to the middle of the No. 18 block where there was a roof cavity (Tr. 102). He maintained that in this area screening was installed tight against roof held with bolts and planks (Tr. 96-98). He said that the distance from the screen to the rib was only 6" to 12" (Tr. 105-106). In his opinion, nothing remained to be done in the screened area which was safe (Tr. 116). According to the escort, from the middle of the No. 18 block and through the No. 19 block there was no roof cavity and the top was in good condition (Tr. 97-98). The escort testified that there were two danger signs anchored to the rib on the track side of the entry by a wire which went across to the belt structure (Tr. 107-108).

After listening to the witnesses and reviewing the transcript, I accept the extent of the area involved and the description of the condition given by MSHA witnesses. The escort's contention that the screened area was safe cannot be reconciled with the many pre-shift examiner's reports, beginning August 12, all of which reported bad top (Resp. Exh. 2). So too, the escort's delineation of the affected area is at odds with the pre-shift examiner's reports which give the affected area as the Nos. 18 and 19 blocks. On cross-examination the-escort stated he disagreed with his own pre-shift examiners who reported bad top and said he would have removed this condition from the fire boss book and reported only an obstructed roadway (Tr. 119). Finally, if the area were safe, as the escort asserted, there would have been no need for any danger signs.

It is clear that the pre-shift examiners were correct. The escort offered no support for his opinion that everything that could fall, had fallen (Tr. 117). If the area was completely safe, as the escort said, it would not have taken rive shifts to install the planks necessary to abate (Tr. 120). The mine foreman testified that the planks used to abate were to prevent falling materials from coming down into the entry (Tr. 153).

In addition, I find that references to the walkway in the pre-shift examiner's reports encompass both sides of the entry and that, as the MSHA supervisor stated, the track side was worse (Tr. 80). I also accept MSHA's evidence that rocks do not always fall straight down and that a rock falling from the roof on the track side of the entry could injure someone walking on the opposite side (Tr. 33, 83, 84). As set forth above, loose rock was present on both sides of the entry indicating the existence of danger throughout the entry. Since a hazard existed on both sides of the entry, the entire entry should have been dangered off. By all accounts the signs were only present on the track side (Tr. 26, 30, 80, 107, 108, 150-152). The wire holding the signs just draped across the entry ranging from 5 feet off the floor on the track side down toward the opposite side where it was no impediment to travel. I accept the inspector's statement that the wire did not extend across the whole width of the entry (Tr. 28). Accordingly, I find the signs did not danger off both sides of the entry.

I also accept the inspector's testimony regarding location of the signs at each end of the No. 18 block (Tr. 23, 25). Therefore, the signs did not cover the No. 19 block where the screening also was inadequate and rocks had fallen.

Based upon the foregoing, I conclude that a violation of 30 C.F.R. § 75.202(a) existed because the roof and ribs of the cited area where the pre-shift examiner and belt cleaner worked and travelled, were not supported or controlled to protect persons against roof falls.

The next issue is whether the violation was significant and substantial. The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that 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, 3-4 (January 1984), the Commission explained.

> 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.

The Commission subsequently explained 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 PMSHRC 1834, 1836 (August 1984).

The danger of falling rock from the roof through the gaps in the mesh screening presented a discrete safety hazard. The roof had deteriorated. There were stress cracks on both sides of the entry which increased the potential of a roof fall (Tr. 82-83). Jagged pieces of rock already were caught in ribs and crevices at the edge of the screening (Tr. 20-21). B'ased upon this evidence, I find there was a reasonable likelihood that the feared hazard of falling rock, would occur. There *was also a reasonable likelihood the hazard of falling rock would result in a reasonably serious or fatal injury. The hanging rocks weighed 30-35 pounds, with some heavier and some lighter (Tr. 211. Although men were not working in the area at the time, I accept the inspector's testimony that the machinery was energized and that the operator intended to use the belt (Tr. 34, 35-36). The operator's escort admitted the belt was used periodically (Tr. 130-131). Moreover, pre-shift examiners and belt cleaners travelled the area (Tr. 36).

The foregoing evidence also demonstrates that the violation was serious. Roof falls have long been recognized as a major cause of serious injury and fatality in the mines, Consolidation Coal Company,. 6 FMSHRC 34 (January 1984).

The violation was not the result of unwarrantable failure on the part of the operator. Unwarrantable failure has been interpreted by the Commission as *'aggravated conduct constituting more than ordinary negligence." Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The supplies necessary to correct the cited condition would have had to be brought in through the track entry (Tr. 153). However, the track entry was closed down from August 9 until 9 a.m. August 15 due to a section 104(d)(2) order relating to shelter holes (Tr. 114, 120-121). The order in this case was issued 25 hours later on August 16. The operator's escort did not notify the mine foreman until 3 p.m. that the track order had been lifted (Tr. 125). After the order on the track was terminated, flat cars which were needed to transport the supplies, were used to transmit supplies to abate a third order previously issued on August 3 which involved venti-

lation (Tr. 121-122, 128). It appears that despite the effort involved in abating the ventilation order, other flat cars were still available to correct the cited roof condition. Cars were being used at that time to deliver rock dust and other supplies so that mining could continue (Tr. 130, 156-157). Nevertheless, the 25-hour interval was not sufficiently attenuated to justify a finding of unwarrantable failure, especially since the operator was engaged in abating the ventilation order. Also, nothing in the record suggests that the failure to extend the danger signs to control the entire entry was due to aggravated conduct of the sort required by Commission precedent. The finding of unwarrantable failure must be vacated.

The operator was guilty of ordinary negligence. The operator's escort should have notified the mine foreman as soon as the track entry became available to transport supplies instead of waiting several hours. Also flat cars should have been used to transport materials to correct the roof, instead of carrying rock dust and other supplies. The operator also was negligent in not insuring that the danger signs controlled both sides of the entry.

The post-hearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

In light of the foregoing and in accordance with the six statutory criteria set forth in section 110(i) of the Act. I conclude that a penalty of $900 is appropriate.

Order No. 3117438

This 104(d)(2) order dated August 9, 1988, was issued for a violation of 30 C.F.R. § 75.1403(g). The order recites that under the applicable safeguard, shelter holes were not provided at the required 105 foot intervals. This is the order which shut down the track entry, as described above.

The original assessment was $1,200 and at the hearing the parties proposed a settlement of $950 (Tr. 164-165). The Solicitor explained that the violation was not as serious as originally thought, because most miners in the area would be in cars and not walking. Also, miners would have adequate warning a car was coming because the entry was long and straight (Tr. 166).

I accept the Solicitor's representations and approve the recommended settlement, which remains a substantial amount, as consistent with the criteria set forth in section 110(i) of the Act, 30 U. S. C. § 820(i).

ORDFRS

No. 3117607

It is ORDERED that the finding of a violation be AFFIRMED.

It is further ORDERED that the finding of significant and substantial be AFFIRMED.

It is further ORDFRFD that the finding of unwarrantable failure be VACATED.

Tt is further ORDFRFD that the subject 104(d)(2) order be MODIFIED to a 104(a) citation.

It is further ORDERED that a penalty of ***$900*** be ASSESSED.

No. 3117438

It is ORDERED that the proposed settlement of ***$950*** be APPROVFD.

ORDER TO PAY

It is further ORDFRFD that the operator PAY $1,850 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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