

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 23 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA) : Docket No. WEVA 89-20
Petitioner : A. C. No. 46-01433-03848
: :
v. : Loveridge No. 22 Mine
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Ronald Gurka, Esq., 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 a civil penalty for an alleged violation filed by the Secretary of Labor against Consolidation Coal Company, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. An evidentiary hearing was held on September 12, 1989. The parties have filed post-hearing briefs.

Citation No. 3106116. dated August 29, 1988, charges a violation of 30 C.F.R. § 75.401 for the following condition or practice:

"Excessive coal dust (visual) can be seen during mining operations in the air over the continuous mining machine, the dust is coming back to the operators compartment, through the miner boom and out both side's where the mounted roof bolters are located. Tom Chickerell is the foreman in charge."

30 C.F.R. § 75.401 which is a restatement of section 304(b) of the Act, 30 U.S.C. § 864(b), provides as follows:

§ 75.401 Abatement of dust; water or water with a wetting agent.

Where underground mining operations in active workings create or raise excessive amounts of dust, water or water with a wetting agent added to it, or other no less effective methods approved by the Secretary or his authorized representative shall be used to abate such dust. In working places, particularly in distances less than 40 feet from the face, water, with or without a wetting agent, or other no less effective methods approved by the Secretary or his authorized representative, shall be applied to coal dust on the ribs, roof, and floor to reduce dispersibility and to minimize the explosion hazard.

30 C.F.R. § 75.401-1 defines "excessive amounts of dust" as follows:

The term "excessive amounts of dust" means coal and float coal dust in the air in such amounts as to create the potential of an explosion hazard.

At the prehearing conference prior to going on the record counsel for both parties agreed to several stipulations which were placed on the record at the hearing (**Tr. 4**). These stipulations are as follows:

1. The operator is the owner and operator of **the** subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. I have jurisdiction in this case.
4. The inspector who issued the subject citation was a duly authorized representative of **the** Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. Copies of the subject citation and termination are authentic and may be admitted in evidence for purpose of establishing their issuance but not for the purpose establishing the truthfulness or relevancy of any statements asserted therein.
7. Imposition of a penalty will not affect the operator's ability to continue in business.
8. The alleged violation was abated in good faith.

9. The operator's history of violations reveals 999 assessed violations and 978 inspection days in the 24-month period preceding the subject violation, which is an average of 1.02 violations per inspection day.

10. The operator's size is large.

The MSHA inspector testified he was at the mine on the day in question to conduct a regular inspection (Tr. 11). Upon arrival on the six left section he checked a new conveyor system (Tr. 12). He then proceeded to a continuous miner which was being operated in a cross-cut (Tr. 12). According to the inspector a lot of coal dust was being generated from the cutting bits of this continuous miner (Tr. 12). He determined there was one-half inch of dust on the right side of the continuous miner near the roof bolter (Tr. 16). The inspector described how the dust was coming off the front of the miner, the right and left sides, and the hinge points (Tr. 18). The dust rolled back from the face to the point where the roof bolter was located and then further back past the cab of the continuous miner operator (Tr. 16). The coal was soft and because it was not virgin coal, it was dry (Tr. 28). These characteristics created more dust (Tr. 59). The inspector said the dust was so thick it was like a sandstorm (Tr. 62).

Contrary to the inspector's testimony, the operator's safety escort who accompanied him stated the dust was normal (Tr. 98). He agreed the dust rolled back to where the roof bolter was, but said this was normal (Tr. 103). He could not remember whether the dust went as far back as the continuous miner operator (Tr. 105). The operator's respirable dust supervisor who did not visit the scene until the day after the citation was issued, did not see much difference between the cited continuous miner and other machines that were in operation elsewhere (Tr. 75). He agreed that the coal was extremely soft, but said that because of this it produced less dust (Tr. 70-71).

This case therefore, presents the not unusual situation of a conflict between the inspector and the operator's witnesses regarding the cited condition. After a review of all the evidence I find the inspector's testimony more persuasive. As set forth above, his description regarding depth, location, and movement of the dust was more precise and detailed than that of the operator's witnesses. The operator's safety escort did not offer any specifics to support his conclusion that the dust was normal. In fact, his statement written at the time the citation was issued contradicted his testimony at the hearing by reporting the condition of the area as "excessive accumulations of visual dust on the miner." (Resp. Exh. No. 2). On the crucial point of whether the dust was carried as far back as the continuous miner operator, the escort testified he could not remember (Tr. 105). The operator's dust supervisor was not present on the day the citation was issued and he offered nothing concrete to support

his statement that on the next day he saw nothing unusual (Tr. 75). Then too, conditions in a mine change from day to day and shift to shift (Tr. 106). Accordingly, the inspector's description of the cited situation is accepted.

As set forth above, "excessive dust" is defined as coal dust in such amounts as to create the potential of an explosion hazard. In this connection I accept the inspector's testimony that the dust in suspension in the face area was sufficient to ignite and that friction from the bits on the continuous miner as well as electrical components on the miner constituted ignition sources (Tr. 25, 39). In addition, heat itself could ignite the dust (Tr. 25, 73). Mining was going on while the inspector was present (Tr. 15-16). In light of these circumstances, I conclude the dust created the potential of an explosion hazard and that therefore, a violation has been proved. See Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120-1121 (August 1985).

I have not overlooked the fact that in attempting to abate, a second set of extra sprays installed by the operator did not help and were removed (Tr. 47, 79). This circumstance does not affect the existence of a violation as found herein and it does not alter the fact that as the inspector stated, the first set of additional sprays made the situation **alot** better (Tr. 45, 47-49). I also take note of the operator's argument that no violation existed because it was in compliance with its respirable dust plan. This assertion cannot be accepted. The record shows only that no citation was issued for respirable dust, not that there was compliance (Tr. 55). In fact, the respirable dust records submitted by the operator were for different dates and places than those involved in this case (Resp. Exh. No. 1, Tr. 89-91). Finally, although respirable dust and excessive dust violations may involve consideration of the same **or** similar facts they **are** by no means synonymous and one can exist without the other.

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--contri-**

buted 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 FMSHRC 1834, 1836 (August 1984).

As set forth above, a violation existed. As explained herein the evidence establishes the potential of an explosion hazard. Potential means possible. See Websters Third International Dictionary (1986) and Random House Dictionary, Second Edition (1987). The possibility of a frictional dust ignition presented a discrete safety hazard. However, the evidence does not rise to the level of establishing a reasonable likelihood that the dust hazard would result in an event in which there would be an injury. The inspector described possible ignition sources and dust ignition from heat but he did not explain why an ignition would be reasonably likely. The inspector said an ignition was "highly probable" with this type of equipment but he failed to support this assertion (Tr. 39). Finally, although the inspector estimated ignition as probable or "highly probable" he also portrayed it as "possible" (Tr. 25, 39, 55). In light of the foregoing, the finding of significant and substantial is vacated.

As I have previously held, significant and substantial is not synonymous with gravity. Secretary of Labor v. A. H. Smith Stone Company, 11 FMSHRC 1203 (1989). A violation may not rise to the level demanded by the Commission for significant and substantial, but still possess a degree of gravity. This is such a case. The amount of dust was serious because it presented the possibility of explosion or fire. I find gravity was moderate.

The operator was guilty of ordinary negligence. I accept the inspector's testimony that the foreman was in a position to see what the inspector saw (Tr. 42). Although the sprays had been cleared at the start of the shift it was obvious they were not doing the job when the inspector arrived (Tr. 32-33).

In assessing an appropriate civil penalty good faith abatement is one of the factors to be considered under section 110(i) of the Act. 30 U.S.C. § 820(i). As set out above, the parties stipulated to good faith abatement. But particular note is taken of the great effort expended by the operator in this respect.

The remaining 110(i) criteria are covered by the stipulations.

In light of the foregoing, I determine a penalty of \$175 is appropriate.

The post hearing briefs of the parties have been reviewed and were very helpful in reaching a decision. The efforts of counsel are much appreciated. To the extent the briefs are inconsistent with the decision, they are rejected.

ORDER

It is ORDERED that the finding of a violation in Citation No. 3106116 be AFFIRMED and that the Citation be AFFIRMED.

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

It is further ORDERED that a penalty of \$175 be ASSESSED.

It is further ORDERED that the operator PAY \$175 within 30 days from the date of this decision.

A large, stylized handwritten signature in black ink, reading "Paul Merlin". The signature is written in a cursive, flowing style with a prominent horizontal stroke at the beginning.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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