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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. PENN 90-47-R
v.	Order No. 3098641; 12/14/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Dilworth Mine Docket No. WEVA 90-50-R Order No. 3311391; 12/6/89 Blacksville No. 2 Mine

DECISION

Appearances: Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Page H. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Respondent.

Before: Judge Maurer

These cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., hereinafter the "Act".

Pursuant to notice, these cases were called for hearing in Morgantown, West Virginia on March 21, 1990, and were heard at that time. On June 1, 1990, the parties filed post-hearing briefs which I have considered along with the entire record in making this decision.

At the hearing, the contestant moved to withdraw the application for review in Docket No. PENN 90-47-R based on the fact that section 107(a) Order No. 3098641 had been vacated. The Secretary had no objection and I granted that motion on the record and therefore dismissed the contest proceeding.

Docket No. WEVA 90-50-R; Order No. 3311391

Order No. 3311391, issued pursuant to section 107(a) of the Act, was issued on December 6, 1989, by MHSA Inspector Lynn

Workley at the Blacksville No. 2 Mine operated by the contestant. That order charges as follows:

> Information gathered from miners and site inspection indicates that it is a practice at this mine for wiremen to install wire above rail placed on unsecured ties over low and irregular areas. Dan Meyers and Pete Yost both stated that they have slipped and fallen while attempting to install wire in such areas.

On December 6, 1989, Inspector Workley was told by a Mr. Michael Ayers, who is the President of the union local and a safety committeeman, that a hazardous condition existed in that wiremen were working off unsafe platforms while hanging wire in the Six South grade job area. He reported that there had been several instances where the wiremen had nearly fallen.

Inspector Workley went into the mine to have a look for himself. He was accompanied by Jay Simes, the miners' representative and Todd Moore, the Company safety representative. When he arrived in the Six South area, he also met Mr. Daniel Myers, one of the wiremen.

They proceeded to the Six South supply track. The bottom in this area had been graded, but was irregular with bumps and dips which had loose unconsolidated lumps and small pieces of rock strewn along it. The wooden ties had been laid down, but the rails were not spiked to these cross-ties. Since the bottom was irregular, the rails laid along the entry were six inches to a foot and a half above the cross-ties in places. The wooden cross-ties on the mine floor were on loose, unconsolidated material and were tipped in various directions. The rails themselves had been joined together at 10 to 12 foot intervals with steel ties. The mine roof in this area varied from six and one-half to nine feet above the mine floor. The trolley wire was already installed approximately 72 inches above where the top of the rails would eventually be when the rails were installed and ballasted with crushed limestone. The wire would also be approximately six inches outside the gauge of the rail.

Inspector Workley stepped up on a rail in an area where it did not rest on the wooden cross-ties and found that the rail bounced up and down under his weight. Mr. Moore stated to the inspector that the company didn't want the wiremen to install wire that way. They wanted them to lay down boards on the cross-ties for a platform to work on. However, in the considered opinion of the inspector, that would not have provided a stable work platform either. The inspector testified that he told Mr. Moore that he (the inspector) didn't think that you could lay boards on ties which tip from one side to the other and roll

forward and back as well and make a stable work platform out of it.

Mr. Daniel Myers has been employed by Consolidation Coal Company at the Blacksville No. 2 Mine since 1971 and has been a wireman for the past five years. As such, he installs trolley wire in construction and development areas of the mine.

Installation of the trolley wire involves drilling holes in the roof, making up wire hangers, installing them, including lining them up and tightening them, placing the trolley wire on the hangers and pulling it tight with come-alongs and placing the trolley wire into the trolley clamp of each hanger and tightening up that clamp.

The established practice at the Blacksville No. 2 Mine was to install the trolley wire prior to spiking the rails to the cross-ties at least in those areas of the mine where the bottom was low and irregular. Mr. Myers testified that to tighten the wire hangers, a wireman stood on a five-gallon bucket resting on the loose and unsecured cross-ties. When he tightened the trolley wire in the trolley clamp, he stood on the rail suspended between high areas of the mine floor. Mr. Myers further testified that when tightening the hangers and trolley clamps "[y]ou put your whole body into it because you [sic] got to get that thing tight because you got motors and stuff." If the wrench slips during this tightening process "[y]ou're going off of whatever your standing on." (Tr. 74). Myers also testified that he has fallen a number of times while tightening wire hangers and trolley clamps where the cross-ties were loose and unsecured and believed that he could be seriously injured from such a fall. He opined that when the rails are spiked to the cross-ties, a wireman has a more secure footing since the cross-ties don't wobble.

On December 6, 1989, Myers related to Inspector Workley that the wiremen were installing trolley wire in the above fashion, i.e., standing on five-gallon buckets or on top of the steel rails.

Inspector Workley considered what he had been told by Moore, Ayers, and Myers and his own direct observation in the Six South supply track and determined that an imminent danger existed and so issued the order at bar. He believed that the practice of installing trolley wire over unsecured cross-ties in low and irregular areas of the mine posed several hazards to miners. One was that a cross-tie would tip or roll under a wireman causing him to be thrown to the mine floor or to strike parts of his body against the rail, cross-ties, or the mine floor. Another was that a wireman standing on the rail could easily slip off and

fall onto the steel rail. Inspector Workley characterized these hazards as "[s]lip or trip and fall, stumble and fall." (Tr. 33). He further testified that such an accident could result in strains, sprains, broken bones, dislocations of bones, or if a wireman struck his head on the steel rail, even fatal injuries.

There was much testimony from the operator's management personnel to the effect that the wiremen had been instructed to build platforms to make their job function safe. More specifically, Myers in particular, was told not to stand on a five-gallon bucket to reach over his head to install trolley wire. I find credible that testimony that the wiremen had been instructed to build the necessary platforms to make their work area safe prior to the issuance of the imminent danger order at bar. Furthermore, Myers admits that on at least one occasion he was told to build a platform or to spike the rails to the ties before hanging the trolley wire. He also admits to having stood on a five-gallon bucket to perform his work both before and after he was specifically instructed by mine management not to do so.

Nevertheless, the practice existed whereby wiremen stood on five-gallon buckets placed on the top of teetering wooden ties that were loose and unsecured while they worked off-balance over their heads. They also stood on the unsecured moving rails to work over their head on the trolley wire. The major point here is that these practices in fact existed whether Consolidation Coal Company management wanted them to or not.

Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The test of validity of an imminent danger order is whether a reasonable person given a qualified inspector's education and experience would conclude that the facts indicated an imminent danger. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 804 F.2d 741 (7th Cir. 1974). See also C.D. Livingston, 8 FMSHRC 1006 (1986); and United States Steel, 4 FMSHRC 163 (1982).

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists

when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).

The Commission stated as follows at 11 FMSHRC 2164:

In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

According to MSHA Inspector Workley, the imminent danger order was issued because of a "practice" which existed in this mine as set out above. Inspector Workley maintained that this "practice" constituted an "imminent danger" because of the injuries which might reasonably result from an unabated continuation of this practice. I concur with the inspector that the cited practice could reasonably be expected to cause serious physical harm" if not discontinued.

I further find that the operator had at least permitted a dangerous practice to exist by allowing these wiremen to install trolley wire in the manner described earlier in this decision. The fact that company management instructed the miners to install the wire in some other safer fashion is not persuasive because it is obvious to me that they have not taken adequate measures to assure compliance with their directives in this regard. One miner testified at the hearing that he is still standing on five gallon buckets to install this wire.

I conclude from the entire record herein that the inspector could not have been reasonably assured that this practice would be abated before a serious injury accident occurred. Under these circumstances, I further conclude that the inspector as well as the record herein provides a cogent and compelling rationale for issuing the order at bar and the facts presented in this record fully support and meet the legal standard for the affirmance of this order. Accordingly, I find that there was an imminent danger and affirm Order No. 3311391.

ORDER

Order No. 3311391 is affirmed and Contest Proceeding Docket No. WEVA 90-50-R is dismissed.

Order No. 3098641 has been vacated by the Secretary and therefore the contestant's motion to withdraw the application for review docketed at PENN 90-47-R is granted and the proceeding dismissed.

Roy J. Maurer
Administrative Law Judge