CCASE:
SOL (MSHA) v. PITTSBURG & MIDWAY COAL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 90-131 A.C. No. 29-00095-03557
v.	
PITTSBURG & MIDWAY COAL MINING COMPANY, RESPONDENT	York Canyon Mine

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas,
for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado,
for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

The only Citation involved in this docket, No. 3077050, was not settled, but was fully litigated at a hearing (Footnote 1) in Albuquerque, New Mexico, on February 12, 1990. Both parties were well represented by counsel at this hearing.

Midway of hearing Respondent conceded the occurrence of the violation charged, narrowing the issues to whether the violation was "Significant and Substantial" as charged by the Inspector, and the appropriate amount of penalty.

Based on stipulations (Tr. 29-30, 35), there is no issue as to the Commission's jurisdiction to adjudicate this matter. Based thereon, I also find that Respondent at material times conducted a large coal mining operation (both surface and underground) at its York Canyon Mine, that it had approximately 90

mine safety violations during the two-year period preceding the occurrence of the instant violation in January 1990, that its ability to continue will not be jeopardized by payment of a penalty for this violation, and that it proceeded in good faith after notification by MSHA of the subject violation to promptly abate the same. Thus, the remaining mandatory penalty considerations are "negligence" and "gravity." Further, if the "Significant and Substantial" designation is not sustained by the evidence, such will also be considered in the factual mosaic underpinning an appropriate penalty determination.

Based on the preponderant reliable and substantial evidence of record, I make the following findings:

1. Citation No. 3077050 was issued on February 8, 1990, by MSHA Inspector Melvin H. Shively (Tr. 42-45) charging a violation of 30 C.F.R. 77.400(c) (Footnote 2) as follows:

> The guard at the tail roller for the coal collecting belt main floor coal preparation plant was not extended a distance sufficient to prevent a person from coming in contact, in that the guard provided was extended only 20 inch(es) and would allow a person room to reach behind the guard.

2. The violation cited, such having been conceded by Respondent (Tr. 82-83), is found to have occurred.

3. The violation was not "Significant and Substantial."

DISCUSSION

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the 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, (Footnote 3) FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). The four essential elements necessary to sustain a significant finding as stated in Mathies are: (1) the underlying violation of a mandatory standard; (2) a discrete safety hazard, i.e., 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.

Here, the first requirements has been conceded. The record is also quite clear that, because of the inadequacy of the guard, a hazard existed, in that a person could become "caught" in a pinchpoint (Tr. 45-48, 52, 60-61, 64, 77) because of the "exposure" (Tr. 46, 51, 91) to the moving machine part, the tailroller (Tr. 45, 46, 47, 55, 60). This, as the record establishes, constitutes a safety hazard. (Tr. 48, 49, 60-61).

The injury, should a person have come into contact with the pinchpoint, would have been of "a reasonably serious nature," i.e., loss of a hand or arm. (Tr. 48, 49, 50, 51).3

The question remains, however, whether there was "a reasonable likelihood" that the hazard contributed to by the violation would result in an injury. I find that there was not and thus that MSHA did not sustain its burden of meeting the four-prong Mathies "significant and substantial" test.

The Petitioner's witness at first indicated that the guard's insufficient extension was such that a person "could" become caught (Tr. 45) and that it did not prevent a person "from reaching behind the guard and becoming caught, for whatever reason." (Tr. 46). And again, he viewed the condition as such that it allowed a person "the opportunity to reach in there, for whatever reason." (Tr. 47, 48). The Inspector's opinions as to likelihood were not convincing. The following colloquy is illustrative:

> Q. Do you have an opinion . . . as to the possibility that an employee . . . could be injured if the condition you described is not corrected?

A. I don't have an opinion, but if it's not corrected, the hazard is there, and for whatever reason, that person could get into it. (Tr. 49).

The Inspector was next asked to "rate" the likelihood of injury occurring. His response again does not fulfill MSHA's burden on the issue: "It is real likely that if it is not corrected, the potential is there." (Emphasis added). While the Inspector did here express a specific opinion on the issue using the words "reasonably likely," the mere use of this statutory phrase is not an open sesame for unlocking the door to a significant and substantial finding. When so used without supporting rationale, or as here with a simultaneous invocation of remoteness, it constitutes at best no more than the articulation of the ultimate legal conclusion urged to be drawn.

It appears that a person would actually have to reach around the guard to become exposed to being caught in the pinchpoint. (Tr. 46-48, 60, 61). The substantial evidence also supports the conclusion that it was not likely that employees would come into contact with the pinchpoint while the belt was running. (Tr. 58, 62, 84-88, 91, 92, 97). The "Significant and Substantial" classification of the violation will be stricken.

In view of the fact that a hazard did exist which, had it come to fruition, would have caused serious injuries, I find this to be a serious violation (Tr. 48, 49, 54-57, 60, 63) even though not a "significant and substantial" violation as that phrase is construed in mine safety precedent.

The Inspector's finding of a "moderate" degree of negligence on the part of Respondent was not challenged, and in view of the fact that this was a visible and obvious violative condition, such finding is found warranted.

A penalty of $40 is found appropriate and is here assessed.

ORDER

1. Citation No. 3077050 is MODIFIED to delete the "Significant and Substantial" designation thereon and to change paragraph 10 A thereof pertaining to "Gravity" from "Reasonably Likely" to "Unlikely."

2. Respondent SHALL PAY to the Secretary of Labor, within 30 days from the issuance date of this decision, the sum of $40 as and for the civil penalty above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. Tr. 44

2. 30 C.F.R. 77.400(c) provides:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

3. It is concluded at this juncture that elements "1," "2," and "4" of Mathies, supra, have been met by MSHA.