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SOL (MSHA) v. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 91-43
A.C. No. 46-01453-03933

Humphrey No. 7 Mine

DECISION GRANTING IN PART AND DENYING
IN PART MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

The Secretary of Labor has moved for approval of a settlement of three citations, under 110(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Citation No. 3314307 charges a violation of 30 C.F.R. 75.515, alleging that the power cable on a permanent pump was not properly entered into the junction box of the pump motor. The inspector observed that insulated leads were exposed on the outside of the box. The settlement motion states that "the hazard presented by the violation is that continued operation of the pump might cause the insulated leads to rub against the junction box resulting in the insulation failing and junction box and pump motor becoming energized." The Secretary moves to settle this charge by reducing the penalty and reducing the citation from a "significant and substantial" violation to a non-S&S violation, on the ground that "the Secretary does not believe that she can demonstrate, by a preponderance of the evidence, a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature."

In a similar case involving a cable entering a pump, the Commission affirmed a decision by a Commission judge holding that the violation was significant and substantial. U.S. Steel Mining Co., Inc., 7 FMSHRC 327 (1985). The judge found that the pump vibrated and, in the absence of a bushing, the vibration could cause a cut in the insulation. He accepted the testimony of the

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inspector that the cut in the insulation could cause the pump to become the ground and, if the circuit protection failed, anyone touching the pump frame could be shocked or electrocuted. Based on the evidence, the judge concluded that the violation was S&S. 5 FMSHRC 1788 (1983).

In reviewing the judge's holding, the Commission stated, *inter alia*:

On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.

We have held previously 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), we 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.

We have explained further 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. See 6 FMSHRC at 1836.

Applying these principles to the instant case, we affirm the judge's holding that the cited violation properly was designated significant and substantial. U.S. Steel's only witness did not deny that the missing bushing could contribute to a shock hazard. [Emphasis added.] Rather, because of the pump's circuit fuses and its dual grounding system, he described the chance of miners being shocked or electrocuted as "very slight." Moreover, the inspector effectively testified that if the cited condition were left uncorrected an accident involving shock or electrocution was "reasonably likely" to occur. The inspector's statement that a person could serve as a better ground than the frame ground itself if the insulation on the wires was cut, was not refuted by U.S. Steel, and was accepted by the judge. The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. [Emphasis added.] U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground [emphasis added], we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

Accordingly, we conclude that substantial evidence supports the judge's conclusion that the violation in this case was properly designated significant and substantial. * * * [7 FMSHRC at 328-329.]

The Commission's affirmance of an S&S violation on the evidence in U.S. Steel would indicate that the Commission's test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary prove that it is more probable than not that injury or disease will result. Thus, vibration of the pump might cause the insulation to wear down to bare wire, but if the missing bushing were replaced by the company beforehand, e.g., in a periodic examination, the wire would not become bare; and even if the company's future examinations missed the violation, and the wire

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became bare, this would not cause shock or electrocution if the circuit breaker system functioned properly. The inspector's opinion that injury was "reasonably likely" did not change the scenario of possibilities into a combined probability that the company would not detect the violation, the wire would become bare, and the circuit breaker system would also fail to function. A substantial possibility of injury, yes, but not a showing that injury was more probable than not. In sum, the logical basis for the holding of an S&S violation was a scenario of a substantial possibility that the violation could contribute to shock or electrocution, not a scenario of probability that it was more likely than not that such an accident would occur.

Inasmuch as the operative test in U.S.Steel is a substantial possibility of injury, rather than proof that injury was more probable than not, the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where only a substantial possibility of injury or disease is shown by the evidence. This interpretation is consistent with the statutory definition, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation. Under the statute, an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (104(d)(1) of the Act; emphasis added).

The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. Determination of that issue will depend on a fuller presentation and evaluation of the facts. The settlement will therefore be rejected.

Citation No. 3314314 charges a violation of 30 C.F.R. 75.517, alleging that a trailing cable to a continuous miner was not adequately insulated. The inspector observed that the outer jacket of the cable had been damaged and taped but the tape was worn, exposing the insulated leads. The Secretary moves to settle this citation by reducing the penalty and reducing the citation to a non-S&S violation, on the ground that the Secretary "does not believe that she can demonstrate, by a preponderance of the evidence, a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. . . . "

The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For the reasons discussed above, I find the motion to be insufficient as to this citation.

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Citation No. 3314316 charges a violation of 30 C.F.R. 75.303(a), alleging that an adequate preshift examination was not performed on part of the mainline track entry. The proposed settlement is to pay the original proposed penalty without changing the citation. I have considered the documentation and reasons for this proposal and find that the settlement is consistent with the purposes of 110(i) of the Act. The settlement will therefore be approved as to this citation.

ORDER

1. The motion to approve settlement of Citation No. 3314307 and Citation No. 3314314 is DENIED.

2. The motion to approve settlement of Citation No. 3314316 is GRANTED.

3. Respondent shall pay the approved penalty of \$259 for Citation No. 3314316 within 30 days of this decision.

William Fauver
Administrative Law Judge