FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-305 A. C. No. 46-01867-03859
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington Virginia, for Petitioner:
Walter J. Scheller, 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 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Citation No. 3334686

This citation was settled by the parties prior to the hearing. A'settlement motion was submitted by the Solicitor requesting that the citation be modified to delete the significant and substantial designation and asking that the operator be ordered to pay a civil penalty of $200. The settlement motion was approved on the record'at the hearing (Tr. 4).

Citation No. 3314689

This citation alleges a Violation of 30 C.F.R. § 75.303(a). A hearing was held on March 27, 1991. Post hearing proceedings were delayed because of many errors made by the court reporter in preparation of the administrative transcript, necessitating retranscription. This has now been done and the parties have filed post-hearing briefs.

30 C.F.R. § 75.303(a), which restates section 303(d)(l) of the Act, 30 U.S.C. § 863(d)(l), provides in pertinent part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before

> any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall
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> examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.
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> * * * *

Citation No. 3314689, dated July 13, 1990 and challenged herein, charges a violation for the following alleged condition or practice:

> An adequate preshift examination was not performed for the-8am - 4 p.m. shift of 07/13/90 from the 4 South loaded track to the 4 South Clear haul on the 4 South supply track. Condition of trolley wire installation and adequate roof support were easily observed by this inspector. No mention had been reported by the examiner. Citations of 75.516, No. 3314687, and 75.202(a) No. 3314688 were cited. A reexamination is required of the area.

The inspector marked the citation as significant and substantial (hereafter referred to as "S&S") and found negligence was moderate.

As appears hereinafter, Citation Nos. 3314687 and 3314688 also are relevant. Citation No. 3314687 charged an S&S violation of 30 C.F.R. § 75.516 for the following condition:

> The trolley wire 250 v, D.C. 1½ Blocks outby 50+00 on the 4 South supply track was not installed on suitable insulators to prevent such from contacting combustible materials. As track mounted equipment would pass, the trolley poles would push the wire against a wooden heading. Groving (sic) of the board indicated repeated contact. Such conditions may create fires and smoke inhalation to miners.

And Citation No. 3314688 charged an S&S violation of 30 C.F.R. § 75.202(a) for the following condition:

> The roof along the 4 South supply track, 50 feet outby 50+00, was not adequately supported in a loose shale roof area. An area nearest the wire side of the entry contained a roof bolt which had become loosen (sic) due to shale deterioration. Such left an area loose shale roof 7'8" wide by 6'3" in length. Nearly 6" of loose shale had fallen from around the bolt. Such conditions may cause fall of roof striking person in open jitneys presenting broken bones and cuts to head faces and arms.

At the prehearing conference the parties agreed to the following stipulations (Tr. 3-4):

(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 of 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) payment of any penalty will not affect the operator's ability-to-continue in business:

(7) the operator demonstrated good faith abatement;

(8) the operator has an average history of prior violations;

(9) the operator is large in size:

(10) Citation Nos. 3314688 and 3314687 were not contested by the operator, have been paid, and are final with respect to all matters therein:

(11) the Blacksville No. 1 mine had no fatal injuries in 1989 or in 1990.

The inspector testified that when he travelled to the P-9 area of the mine he observed black markings and indentations on a

board in the roof which showed that a trolley pole had been repeatedly striking the board (Tr. 14). As a result the inspector issued Citation No. 3314687, quoted above, which, as already set forth, was not contested and is final. (Stipulation No. 10). Accordingly, the condition described therein and the finding that it was S&S are accepted for present purposes. The inspector stated the condition was obvious because the indentations with black graphite marks from the trolley wire were easy to see (Tr. 14, 46). In his opinion the condition had not happened overnight, but had come about over a matter of days (Tr. 15-16, 38). Upon questioning, the operator's preshift examiner expressed the opinion that the condition occurred between the preshift and the inspection, but his explanation was confusing because it appeared to mix up the two underlying citations (Tr. 90-91). The operator's mine safety supervisor said anything was possible but admitted that he did not know when the violation occurred (Tr. 104-105). In light of the foregoing, I accept the inspector's testimony that the trolley wire condition had existed-for a matter of days.

The preshift examiner further testified that he would have had to have been directly underneath the board in order to have seen the indentations made by the trolley wire. He relied upon the fact that on the preshift examination he travelled in an outby direction, whereas the inspector travelled inby (Tr. 78, 88-89). The mine safety supervisor testified to the same effect (Tr. 98-101). However, I find more persuasive the inspector's testimony that he could see the black marks made by the trolley wire when he looked backwards (outby) from an inby position (Tr. 60-61). Accordingly, I find the trolley wire condition was readily observable and should have been seen.

With respect to the roof condition cited in Citation No. 3314688, the inspector testified that roof deterioration had occurred gradually over a number of days (Tr. 24). Here too, the operator's preshift examiner averred that the condition could have happened between the time of the examination and the inspection. The mine safety supervisor also said it was possible (Tr. 91, 103-104). I find the inspector's judgement more convincing with respect to the length of time the roof condition existed. I also accept the inspector's testimony that the roof condition was easily obsewable because six inches of roof material had fallen to the floor (Tr. 22).

It is not disputed that the trolley wire and roof condition were not reported by the preshift examiner (Operator's Exhibit No. 5; Tr. 68-69). In puinland Coals Inc., 9 FMSHRC 1614, 1619 (1987), the Commission held that 30 C.F.R. § 75.303 required a preshift examiner to report hazardous conditions and violations of the mandatory safety standards such as an inadequately supported roof and that in failing to report such conditions, the preshift examiner violated the standard. In accordance with the

decision in Quinland, I find a violation of 30 C.F.R. § 75.303 existed in this case.

The next issue is whether the violation was S&S as that term has been defined by Commission in Mathies Coal Co., 6 FMSHRC 1 (January 1984). As already noted, the findings that the trolley wire violation presented a significant and substantial risk of fire and that the roof violation presented a significant and substantial risk of a fall are final for purposes of this case. I conclude that the failure to report these violations also presented a reasonable likelihood of serious injury. In this connection, I find particularly relevant the inspector's testimony that the conditions which were not reported, occurred on the main artery where people and 90% of all vehicles normally travel (Tr.34). The purpose of the preshift examination is to detect hazardous conditions so that corrective measures can be taken and thereby eliminate the exposure of miners to dangerous conditions. Indeed, the administrative law judge in Quinland whose findings were upheld by the Commission, specifically found that the failure of the pre-shift examiner to report hazardous conditions could have significantly and substantially contributed to a serious mine accident'8 FMSHRC 1175, 1180 (August 1986). In light of the foregoing, I conclude the violation was significant and substantial.

I further find the operator was negligent. As set forth above, the unreported conditions were readily observable and had existed for some period of time. As the inspector stated, the preshift examiner should have been on the lookout for bad roof conditions because this mine had thirty-three unintentional roof falls in only the last 4 or 5 years (Tr. 24-25). The remaining criteria with respect to the amount of civil penalty to be assessed have been stipulated to by the parties.

The parties are reminded that I am not bound by an MSHA assessed penalty but rather have de novo authority to assess a civil penalty herein. Sellersburg Stone Co., 5 F'MSHRC 287 (March 1983), aff'd. 736 F.2d 1147 (7th Cir. 1984); Consolidation Coal co., 10 FMSHRC 1935 (October 1989). I do not believe the MSHA assessed penalty is sufficient to serve as an effective deterrent. A penalty of $500 is assessed.

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.

ORDERS

Citation No. 3314689

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 ORDERED that a penalty of $500 be ASSESSED.

Citation No. 3314682

It is ORDERED that the citation be MODIFIED to delete the significant and substantial designation.

It is further ORDERED that the proposed settlement of $200 be APPROVED.

ORDER TO PAY

It is ORDERED that the operator PAY $706 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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