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SOL (MSHA) v. UNITED STATES STEEL MINING  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

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

v.

UNITED STATES STEEL MINING  
COMPANY, INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 91-39  
A. C. No. 36-05018-03821

Cumberland Mine

DECISION

Appearances: H. P. Baker, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary;  
Billy M. Tennant, Esq., Pittsburgh,  
Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for an admitted violation of a mandatory standard. The remaining issues before me in this case are whether this violation was a "significant and substantial" one, the "negligence" to be attributed to the operator, and the assessment of an appropriate civil penalty in accordance with Section 110(i) of the Act.

The case was heard in Morgantown, West Virginia, on April 18, 1991. The parties have both filed proposed findings and conclusions which I have duly considered in making the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 6-9):

1. United States Steel Mining Company, Inc., hereinafter called Respondent, is a wholly owned subsidiary of USX Corporation.

2. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citation was properly served by a duly authorized representative of the Secretary, William E. Wilson, upon an agent of the Respondent at the date, time, and place stated therein.

5. The Respondent demonstrated good faith in the abatement of the citation.

6. Payment of the proposed Civil Penalty of \$445 will not affect Respondent's ability to continue in business.

7. The appropriateness of the Penalty, if any is affirmed, to the size of the coal operator's business, should be based on the fact that, (a) the Respondent company's annual production tonnage is 10,349,448 and, (b) the U. S. Steel Mining Company, Inc.'s, Cumberland Mine had an annual production tonnage of 2,530,694.

8. Respondent was assessed 796 violations over 879 inspection days during the 24 months preceding the issuance of the subject citation.

9. The parties stipulate to the authenticity of each other's exhibits, but not necessarily to the relevance or the matters asserted therein.

10. Citation No. 3089547 was issued at Respondent's Cumberland Mine on September 19, 1990, by Inspector William E. Wilson.

11. The citation alleges a violation of 30 C.F.R. 75.1403. The citation is based on a valid safeguard, that is Safeguard Number 234407 issued April 27, 1978.

12. Respondent did violate 30 C.F.R. 75.1403 as alleged in the citation. Respondent does dispute, however, the gravity and negligence finding set forth in Section 2, paragraphs 10 and 11 of the citation. Respondent specifically disputes the characterization of the violation as significant and substantial.

DISCUSSION AND FINDINGS

Citation No. 3089547 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.1403 and charges as follows:

The 5 ton Greensburg personnel carrier being used to transport the 27 Butt crew to No 3 air shaft portal bottom was not provided with a lifting bar for the track jack. Mantrip 110. ML-116, Sr 3324."

Safeguard No. 234407 mandates that a lifting jack and bar be kept on all self-propelled personnel carriers. A lifting bar is used with a lifting jack to rerail a mantrip if there is a derailment.

The inspector found that the lifting bar in this case was missing from a mantrip that had just arrived at the bottom, transporting a crew from a section. The operator admits this fact and thus the violation of 30 C.F.R. 75.1403.

The Secretary maintains that in the absence of the actual bar during a derailment/rerailment scenario, a miner would be sorely tempted to use a substitute bar. I concur with the inspector that using a substitute could be unsafe and increases the likelihood of injury because the substitute would not provide a good fit between itself and the jack. It is certainly a credible claim that the use of many imaginable substitute devices could result in serious injuries to a miner.

However, in our case there was no derailment. The missing lifting bar in and of itself, does not create any safety hazard. Something more is required. That "something more" is that the miner in charge of the derailed mantrip will act improperly to rerail it. The inspector had to assume that the hypothetical miner involved would elect to use some improper substitute device because the required bar was not immediately available to him. I do not believe that assumption will carry the Secretary's burden of proof on the issue. One could perhaps make an equally likely assumption that the miner would obtain the correct bar before proceeding with the rerailment.

A violation is properly designated as 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 standard is significant and substantial under National Gypsum the Secretary 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.

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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

With respect to the first Mathies element, a violation of 30 C.F.R. 75.1403 has been established by stipulation, which I have previously accepted.

With respect to the second element, a discrete safety hazard contributed to by the violation, I find none. The violation here is simply the missing bar, and the missing bar, standing alone, does not create a safety hazard. There must additionally be a derailment, which is not unknown in this mine, but was not a part of this particular incident. Thirdly, even if there was a derailment or there might be one tomorrow, a safety hazard would be created only if the miner on the scene at the time acted improperly and attempted to rerail the mantrip by some unsafe methodology. There is no evidence in the record that this heretofore and still unknown miner would do so. And I don't believe you can assume all these necessary facts that are otherwise not in evidence.

Accordingly, finding that the Secretary has failed to prove that there was a discrete safety hazard contributed to by the violation, I find that the violation was not "significant and substantial."

Moderate negligence may reasonably be inferred from the circumstances. These mantrips are frequently inspected and management knew or at least should have known of the missing equipment before the mantrip was operated.

Considering the statutory criteria contained in Section 110(i) of the Act, I find that a civil penalty of \$50 is warranted and appropriate for these circumstances.

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ORDER

Citation No. 3089547 is AFFIRMED as a non-"significant and substantial" violation of 30 C.F.R. 75.1403, and respondent is hereby ORDERED to pay a civil penalty of \$50 within 30 days of the date of this Decision.

Roy J. Maurer  
Administrative Law Judge