

CCASE:  
SOL (MSHA) v. COAL MAC  
DDATE:  
09251991  
TTEXT:

~1600

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.

COAL MAC INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 91-127  
A. C. No. 15-15400-03513

Docket No. KENT 91-151  
A. C. No. 15-15400-03514

Coal Mac No. 17 Surface

Docket No. KENT 91-152  
A. C. No. 15-14847-03514

Docket No. KENT 91-154  
A. C. No. 15-14847-03514

Coal Mac No. 7 Surface

DECISION APPROVING IN PART AND  
DISAPPROVING IN PART A PROPOSED  
SETTLEMENT

Before: Judge Fauver

These consolidated cases are petitions for civil penalties under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. 801 et seq.

The parties have moved for approval of a settlement.

It is stipulated that Respondent is a large operator.

The Meaning of a "Significant and  
Substantial" Violation

Since the settlement motion proposes to reduce many of the charges from a "significant and substantial" violation to a "non-significant and substantial" violation, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825

~1601

(1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (1984). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that 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). Also, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated," (Footnote 1) and expressly places S&S violations below imminent dangers. (Footnote 2) It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

#### The Proposed Settlement

Citation 3517608 alleges a violation of 30 C. F. R. 77.410, dealing with automatic warning devices on mobile equipment. The motion states that the inspector would testify that the reverse alarm on the Caterpillar 992 C loader was inoperative. Respondent's witnesses would testify that the loader operated in an area in which no one worked afoot and there was minimal vehicular traffic.

Originally, the inspector determined that the violation was significant and substantial. The parties move to change this designation to non-S&S.

~1602

The citation was assessed at \$276. The motion proposes a penalty of \$178.

The absence of a reverse alarm in "minimal vehicular traffic" does not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517610 alleges a violation of 77.1606(c), which requires that equipment defects affecting safety be corrected before the equipment is used. The motion states that the inspector would testify that the Ford 7000 grease truck had several defects; namely, the headlights were stuck on low or high beam, the left front turn signal was missing from the truck, and all the other turn signals were inoperative. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$178. The motion proposes \$127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517611 alleges a violation of 77.1606(c). The motion states the inspector would testify that the Ford 800 fuel haulage truck had several defects; namely, the headlights were stuck on low or high beam, all the turn signals were inoperative, and the brake lights were inoperative. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$178. The motion proposes \$127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517612 alleges a violation of 77.404(a) dealing with the operation and maintenance of machinery and

~1603

equipment. The motion states the inspector would testify that a Black & Decker angle grinder aboard the Ford F-250 welding truck was not equipped with a guard to protect a user from accidental contact with the metal-cutting disk. Respondent's witnesses would testify that the grinder had been removed from service.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$227. The motion proposes \$178.

The motion does not state why the grinder was in the welding truck if it "had been removed from service." In the absence of facts showing how the grinder was removed from service, the proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction in the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517613 alleges a violation of 77.208(e) dealing with storage of materials. The motion states that the inspector would testify that he found that the valves of the acetylene and oxygen cylinders stored on the Ford F-250 welding truck were not protected by any type of cover. The gauges and hoses were attached to the cylinders. Respondent's witnesses would testify that the tanks were empty and were being transported to an appropriate storage area.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$178. The motion proposes \$127.

The proposed reduction in the amount of penalty and the redesignation as a non-S&S violation are approved.

Citation No. 3517614 alleges a violation of 77.1606(c). The motion states that the inspector would testify that he found the following defects on the 600 Mack water haulage truck used for allaying road dust: the headlights were stuck on low or high beam, all of the turn signals were inoperative, an air leak was present near the engine. The exhaust pipe was broken near the muffler, and no heat shield was provided around the upright exhaust stack near the right cab door. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic. They would testify that the operator of this truck regularly got in and out of the vehicle through the left cab door and that there usually were no passengers in this vehicle.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

~1604

The citation was assessed at \$178. The motion proposes \$127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517616 alleges a violation of 77.404(a). The motion states that the inspector would testify that he found aboard the Ford F-800 mechanic's truck three chisels with mushroomed striking surfaces with cracks in the outer edges. He considered that the condition of the chisels increased the likelihood of injury from flying metal chips during use. Respondent's witnesses would testify that the chisels had been removed from service and were being transported back to the garage for regrinding.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$227. The motion proposes \$127.

The motion does not state why the defective chisels were in the mechanic's truck if they had been "removed from service." In the absence of facts showing how the defective chisels had been removed from service, the proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction in the penalty amount is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517607 alleges a violation of 77.1606(c). The motion states that the inspector would testify that the bottom step of the right side boarding ladder was torn off and the rear step to the engine access area on the right side was missing from the Caterpillar 980C loader (Company No. L-13). The equipment was being used to load coal. Respondent's witnesses would testify that, in the normal course of operations, the right side of the equipment was not used for boarding by the operator and that there was other access to the engine area.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$178. The motion proposes \$127.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

~1605

Citation No. 3517609 alleges a violation of 77.1606(c). The motion states that the inspector found the following defects in the 600 Mack explosives haulage truck: there was no heat shield around the exhaust stack located adjacent to the right side cab door used by the blaster's helper, the headlights were stuck on low or high beam, all the turn signals were inoperative, and the brake lights were inoperative.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at \$178. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3517615 alleges a violation of 77.1103(a) dealing with the storage of flammable liquids. The motion states that the inspector would testify that he found approximately one pint of gasoline being stored in a gallon milk jug. The jug had been tied onto the side of the 600 Mack water haulage truck, and was used to fuel the transfer pump.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at \$178. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3517851 alleges a violation of 77.1606(c). The motion states that the inspector would testify that the Caterpillar No. 14G motor grader used to grade the road had several defects affecting safety; namely, the brake and tail lights were gone, the rear windshield wiper was inoperative, oil leakage was noted at the valve banks under the cab and at the hydraulic lines to the steering gearbox. Respondent's witnesses would testify that the grader regularly was used only on the day shift and in areas where there was minimal vehicular traffic, and that the leakage noted would not adversely affect the operator's ability to steer the grader.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$311. The motion proposes \$178.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved,

~1606

but not the redesignation as a non-S&S violation.

Citation No. 3511971 alleges a violation of 45.4(b) dealing with the maintenance of an independent contractor register. The motion states that the inspector would testify that he found that Respondent had failed to maintain in writing the contractor register containing information required in 45.4(a)(1) through 45.4(a)(4). The information could not be produced when requested.

The non-S&S citation was assessed at \$20. Respondent has agreed to pay this amount.

A violation that hampers enforcement of the Act is a serious violation, even though it is non-S&S. If the facts indicated were proved at a hearing, I would consider a penalty of \$50 appropriate for this violation.

Citation No. 3517584 alleges a violation of 77.1605(b) dealing with the installation of brakes and parking brakes on loading and haulage equipment. The motion states that the inspector would testify that he found that the White Mack Truck, Number 7, used to transport explosives was being used with defective brakes. There was an air leak in or near the brake valve. The right front brake plunger would not move when the foot brake was set. The brakes needed to be adjusted on all wheels; the loss of air when the brakes were used showed that there was too much travel in the brake pedal.

The inspector determined that the violation was S&S. The parties agree that this is the proper designation.

The citation was assessed at \$371. Respondent has agreed to pay this amount.

The proposed settlement of this charge is approved.

Citation No. 3511978 alleges a violation of 77.1303(d), which requires that damaged or deteriorated explosives or detonators be destroyed in a safe manner. The motion states that the inspector would testify that he found explosive materials in a state of deterioration. Liquid had leaked from the explosives in the explosives magazine. Several cartridges of Tovex water gel explosives had been cut in half and were stored in that condition in the explosives magazine. He noted that the deteriorated and damaged explosives had not been destroyed in a safe manner, and that the use of such material, altered from the condition intended by the manufacturer, could adversely affect a blast. Respondent's witnesses would testify that only their explosives experts would have access to the explosives and that they were not planning to use the altered explosives.

The inspector determined that the violation was S&S. The



~1607

parties agree that this is the proper designation.

The citation was assessed at \$350. The motion proposes \$227.

The proposed settlement of this charge is approved.

Citation No. 3517842 alleges a violation of 77.410. The motion states that the inspector would testify that he found that the blue Ford F250 mechanic pickup truck, used for repair work, was not provided with a reverse alarm. The view to the rear of the truck was impaired by tool boxes on each side of the truck bed and an air compressor mounted in the middle of the bed. There was a ladder atop the right side tool box. The truck was used in a service area where others were afoot.

The non-S&S citation was assessed at \$20. Respondent has agreed to pay this amount.

If the proffered facts were proved at a hearing, I would be inclined to find the violation was S&S, instead of a non-S&S, and that a penalty of \$150 is appropriate for this violation. The proposed settlement of a \$20 penalty is not approved.

Citation No. 3517843 alleges a violation of 77.1605(b). The motion states that the inspector would testify that he found that the white Ford F600 grease truck, used for service of equipment, was not provided with adequate brakes. The emergency park brake failed to hold the truck on a slight roadway grade. The truck was subject to steep grades at this pit and the driver would not be able to stop in the event of a service brake malfunction. In the inspector's opinion, the truck could roll if parked on a slight grade. Respondent's witnesses would testify that the truck was not operated where others were afoot.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$392. The motion proposes \$227.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Citation No. 3517844 alleges a violation of 77.400(a) dealing with mechanical equipment guards. The motion states that the inspector would testify that he found that there was no guard on the two V-belts, flywheel and pulley of the air compressor on the white Ford F-600 grease truck. In the inspector's opinion, workers could have contacted moving parts or could have been struck by a broken belt. Respondent's witnesses would testify that

~1608

placement of the equipment in the bed of the truck made it so inaccessible that it was unlikely that a worker could come into contact with the moving parts.

Originally, the inspector determined that the violation was S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$311. The motion proposes \$178.

The conflict between the expected testimony of the inspector and Respondent's witnesses, without a factual resolution, does not warrant redesignation as a non-S&S violation. The proposed reduction in the amount of penalty is approved.

Citation No. 3517847 alleges a violation of 77.208(b) dealing with storage of materials that could create hazards if accidentally liberated from their containers. The motion states the inspector would testify that gasoline vapors were being emitted from the fill cap atop the pit gasoline tank. The gasoline was not properly stored in that no vent pipe was installed to allow vapors to escape higher and away from the top of the tank where a careless smoker or spark could cause ignition.

The non-S&S citation was assessed at \$20. Respondent has agreed to pay this amount.

The proffered facts do not indicate a non-S&S violation. If the proffered facts were proved after a hearing, I would be inclined to find an S&S violation and find a penalty of \$100 to be appropriate.

Citation No. 3517848 alleges a violation of 77.1606(c). The motion states that the inspector would testify that he found that the Caterpillar 988 loader, used to load spoil into trucks, had several safety defects. The right boarding ladder was badly bent thereby reducing the width of the ladder, and the right bottom step was missing. The left and right engine deck steps were gone and had been replaced with a chain which required a step of 30 inches. The windshield wiper overtraveled to the left, leaving approximately the right one third of the windshield unclean. The right tail light was inoperative. The brake lights were inoperative. The front horn was too weak to be audible at a distance. Respondent's witnesses would testify that, in the normal course of operations, the right side of the equipment was not used for boarding by the operator and there was a good boarding ladder on the other side of the truck where the operator usually boarded. They would testify that there rarely was a passenger on this equipment. Respondent's witnesses would testify that the truck regularly was used only on the day shift and in areas where there was minimal vehicular traffic and where people are not afoot.

Originally, the inspector determined that the violation was

~1609

S&S. The parties move to change this designation to non-S&S.

The citation was assessed at \$311. The motion proposes \$227.

The proffered facts do not indicate there was no substantial possibility of injury resulting from the violation.

The proposed reduction of the amount of penalty is approved, but not the redesignation as a non-S&S violation.

Provisional Order

If the parties agree to entry of the following provisional order, the charges herein will be disposed of as indicated. In such case, the parties should file, within 10 days of this date, a joint motion for entry of the provisional order as a final order.

If the parties do not agree to the provisional order, they may file a revised settlement motion.

"PROVISIONAL ORDER

"Upon motion of the parties, settlement of the charges in these cases is approved as follows, without modification of the citations (except Citation 3517613, which is redesignated as a non-S&S violation):

Citation	Approved Civil Penalty
3517608	\$178
3517610	127
3517611	127
3517612	178
3517613	127
3517614	127
3517616	127
3517607	127
3517609	178
3517615	178
3517851	178
3511971	50
3517584	371
3511978	227
3517842	150
3517843	227
3517844	178
3517847	100
3517848	227

\$3,182

~1610

"Respondent shall pay the above civil penalties within 30 days of the date of this Order."

William Fauver  
Administrative Law Judge

Footnotes start here:-

1. Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

2. Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger . . . . "