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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 91-178 A.C. No. 46-01453-03946
v.	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	Docket No. WEVA 91-193 A.C. No. 46-01455-03821
	Osage No. 3 Mine

DECISION

Appearances: Charles M. Jackson, Esq., Caryl Casden, Esq., and Tana Adde, Esq., U.S. Department of Labor, Arlington, Virginia for Petitioner; Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor (Petitioner). Subsequent to notice, the cases were heard in Morgantown, West Virginia on July 31, 1991. George H. Phillips, Merven Knotts, Dale R. Dinning, and John R. Cox, testified for Petitioner. Samuel O. Statler, and Joseph Frank Mlinarchik, Jr., testified for Respondent. On September 23, 1991, the parties each filed proposed findings of fact and a brief.

Findings of Fact and Discussion

I. Docket No. WEVA 91-193;
A. Citation No. 3308030
1. Alleged Violation

On October 16, 1990, Respondent was engaged in the extraction of coal in the No. 5 Butt section by a longwall mining system. According to Respondent's roof control plan, upon completion of mining in the No. 5 Butt section, a longwall mining would commence in the adjacent No. 6 Butt section. The roof

control plan provides, in essence, that as the No. 5 panel is being mined, cribs should be maintained in the headgate (neutral) entry, which will become the tailgate entry once mining commences in the adjacent No. 6 section.

Respondent does not contest the observations of MSHA Inspector George A. Phillips that, on October 16, 1990, cribs had not been placed in an approximately 100 foot long section in the future a longwall tailgate entry (i.e. the tailgate entry of the No. 6 Butt section) in violation of the roof control plan. Accordingly I find that Respondent did violate its roof control plan, and hence did violate 30 C.F.R. 75.220 as alleged in the citation issued by Phillips.

2. Significant and Substantial

Petitioner alleges that the violation herein is significant and substantial. For the reasons that follows I conclude that the record fails to establish that the violation was significant and substantial.

Phillips noted that in the area in question, at Spad 9223, the roof was good and he was not concerned about any danger. According to Phillips the No. 5 Butt is bolted and supported properly. In the same fashion, Mervin Knotts an MSHA Geologist testified that there was no danger of a roof fall in the cited area. Essentially, the record does not establish that, in the normal mining cycle of the No. 5 Butt section, there was created any hazard of a roof fall in the cited area. However, according to Phillips, once mining has been completed in the No. 5 Butt section and mining has commenced in the No. 6 Butt section, abutement pressure increases as the face advances. According to Mervin Knotts a geologist who works in an MSHA roof control section, abutement pressures have been measured 1,000 outby the face.

According Phillips and Knotts, if the area in question is not cribbed, assuming the continuation of the normal mining process, a point would be reached in the No. 6 Butt section where the advancing face would create sufficient pressure on the area in question to cause a roof fall. Further, according to Phillips and Knotts, such an event is reasonably likely to occur given the normal mining cycle of the advancing face in the No. 6 Butt section. According to Phillips, it becomes "critical" (Tr. 65, 83) to support the cited area, when the longwall panel approaches within 200 feet. Knotts testified that the face would have to be within 25 feet of the cited area for there to be a reasonable likelihood of a roof fall occasioned by frontal abutment pressures. Due to Knotts' expertise I accept his testimony.

Phillips opined that should a roof fall occur, it would be reasonably likely for miners to be seriously injured if they would be in the area of the roof fall. Also, according to Phillips, in the event of a mine fire, which he indicated was always a possibility, miners might have to use the entry in question as an emergency escapeway, should the two regular escapeways not be passable. Phillips opined that in such an event, miners could be seriously injured should there be a roof fall of such a nature as to block or impede ventilation in the entry in question.

In analyzing whether the facts herein establish whether the violation is significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. 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:
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> > 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). 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)." (Southern Ohio, supra at 916-917)

In the instant case the first element set forth in Mathies, supra has been met, in that it has been established that Respondent herein did violate a mandatory standard. Also, the evidence establishes that the lack of the cribs in the cited area did contribute to the hazard of a fall occurring at a future date when the No. 6 Butt section would be developed to the point where the face would advance close enough to the area in question to create sufficient pressure so as to create a hazard of a roof fall. The key element for resolution is thus whether it has been established that there was a reasonable likelihood that the hazard of an unsupported roof, contributed to by the lack of cribs in the future tail gate return entry will result in a roof fall causing an injury (See U.S. Steel Mining Co., supra, 1836).

Phillips indicated on cross-examination that it would take approximately 13 months from the date the citation herein was issued, (October 16, 1990) for the face in the No. 6 Butt section to advance to the point where the roof conditions in the cited area would be critical. In this connection, Samuel O. Statler, Respondent's longwall coordinator, whose responsibilities include maintaining the longwall panel and setting up the next panel, testified that, at the date of the hearing, 15 months subsequent to the date of the citation was issued, the longwall face in the No. 6 Butt section had not yet advanced to within 200 feet of the cited area.

According to Statler, cribs to build blocks were placed in the neutral entry of the No. 5 Butt section (the future tailgate return entry for the No. 6 Butt section) the weekend prior to the issuance of the citation on Tuesday, October 16. Statler indicated that Respondent commenced to install cribs. That weekend it was subsequently noted that there were insufficient crib blocks to fill in the approximately 100 foot void that was subsequently cited by Phillips on October 16. Statler testified that, on Saturday, cribs were brought up the No. 2 entry (intake) to the crosscut near spad 9224, in order to fill in the void. According to Statler, it was intended to build cribs as soon as there would be down time, which he thought was going to occur within the next week. Statler stated specifically that he would not have allowed the No. 5 Butt section to be mined out and retreated beyond the area of the void in the cribbing, without having first placed cribs in that area.

In rebuttal, Phillips testified that it would take about 6 or 7 bundles of cribs to fill the uncribbed cited area. He said that each bundle is ". . . at least 4 feet by probably four feet three, 3 1/2 feet high" (Tr. 144-145), and accordingly, the bundles should have been seen by him on October 16, if they were

in the area. He testified on cross-examination that he does not have any image of seeing these bundles, and does not remember having seen them.

I find Statler's testimony more persuasive, and conclude that the testimony of Phillips on rebuttal is not sufficient to have impeached it. Hence, based on the testimony of Statler, I conclude that, had the void (i.e. the uncribbed area) not been cited by Phillips, it would have been filled in with cribbing within a week or so. Further, there was no hazard to miners when the area was cited. Any hazard would have occurred only if the area would have remained unsupported by cribs, at the time when the face had approached within 200 feet as testified to by Phillips, or 25 feet as testified to by Knotts. It was estimated by Phillips that it would have taken approximately 13 months subsequent to October 16, for the face to have reached that point. I find, that had the area not been cited, the void would have filled in by Respondent long before there would have been any hazard of a roof fall due to the advancing of the face.

Accordingly, for all the above reasons I find that it has not been established that the violation herein was significant and substantial.

Although Respondent was aware of the violation I find the degree of its negligence to have been low, inasmuch as it intended to have the situation cured as soon as it was feasible, and long before the creation of a hazard of a roof fall. Considering the remaining statutory factors set forth in Section 110(i) of the Act, I find that a penalty of $100 is appropriate for the violation found herein.

B. Citation Nos. 3307218, 3308021, 3308022, 3308037, and 3307804

Subsequent to the hearing, on October 4, 1991, Petitioner filed a motion to approve a settlement agreement with regard to Citation Nos. 3307218, 3308021, 3308022, 3308037, and 3307804. A reduction in penalty from $1,124 to $774 is proposed. I have considered the representations and documentation submitted in this Motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly the motion for approval of settlement is granted.

II. Docket No. WEVA 91-178

A. Citation No. 3314318

1. Alleged Violation

On October 4, 1990, Dale Dinning an MSHA

inspector, inspected Respondent's Humphrey No. 7 mine. He noted that in the 13 east main return, at 4 overcasts a ladder was placed leaning up against the sides of the overcast, to enable a person to climb up to the overcast, cross over, and then climb down. None of these ladders were secured to the overcast. He issued a citation alleging a violation of 30 C.F.R. 75.305. In that "a safe means of travel across the 4 overcasts in the main return to Kirby shaft just outby 13 East Regulator is not being provided".

It is Petitioner's position that, in essence, there is an "implied duty to provide safe passage" under section 75.305 supra.1 In essence, according to Petitioner this duty is breached where the means of conducting an examination pursuant to section 75.305, supra, is hazardous, i.e., the hazardous conditions of the 8 ladders in issue which were placed on each side of the 4 overcasts in the main return.2 I do not find merit in Petitioner's argument for the reasons that follow.

2. Discussion

a. Condition of the ladders

According to Joseph Frank Mlinarchik, Jr., Respondent's safety inspector the ladders were purchased from a carpenter who made them, and they are of substantial construction. The ladders are 10 feet high, 24 inches wide. They were leaning against the overcast and resting between two metal rails approximately 36 inches apart. The rails protruded horizontally from the tops of the overcast between 6 to 8 inches.

Dinning described the hazard posed by the unsecured ladders as follows:

> Without these ladders being secured and with the equipment you got to carry over top of them, you always have a chance of this ladder sliding along the wall. You're going down the other side, the ladder could kick out on the bottom and cause you to fall." [sic] (Tr. 29)

In the same fashion, John Cox, a walkaround who accompanied Dinning, described the hazard as follows:

> The hazard is that the person can go ahead and lose their balance. And the ladder gives you the sense, if the ladder's secured, if you lose your balance you grab something secured it's going to at least protect you from your fall or curtail you from a free fall. [sic] (Tr. 58)

Cox also indicated that the unsecured ladders ". . . may rock back or slip when an individual would be climbing up or down the ladders because of them being able to get hurt or an accident to occur." [sic] (Tr.44)

Essentially, according to Dinning and Cox, the hazard posed by the unsecured ladders is contributed to by the use of metatarsal boots, metacarpal gloves, and various equipment worn by a miner. Also according to Petitioner's witnesses, the lack of hand rails on the ladders, and the fact that the area in question is illuminated only by cap lights contribute to the hazard.

According to Cox when he climbed the ladder at the first overcast and reached the top it was "wobbly" (Tr.57). He said that in climbing down he had to swivel around, and reach out with his leg to go around a protruding rail. He indicated that he then had to bend down to hold on to the ladder, inasmuch as it protruded over the top of the overcast only 6 to 8 inches. He testified that some of the rails protruded from the overcast up

to 18 inches, which would make it more difficult swivel around from the top of the overcast to reach the ladder to climb down.

According to Dinning, the base of the ladders were not as far away from the bottom of the overcasts, as they should have been, and he indicated that the ladders were positioned "pretty well straight up and down" (Tr.20). Cox testified that the ladders were two to three feet back from the base of the overcasts, and extended 6 to 8 inches over the top of the first 2 overcasts that were approximately 8 feet high. However, neither Dinning nor Cox measured the horizontal distance between the bottoms of the ladders and the bottom of the overcasts. In contrast, Mlinarchik measured that distance and indicated that the bottom of one ladder was 4 feet in a horizontal distance from the base of an overcasts that was 8 feet high, and that the horizontal distance of a ladder from the bottom of a 6 foot high overcast was 3 feet. I accept Mlinarchik's testimony with regard to the distance the base of the ladders extended from the overcasts inasmuch as it was based upon actual measurement.

Dinning was asked to describe "the ground conditions surrounding the overcast" (Tr.20), and he responded as follows: "Well, in any underground coal mine you have uneven pavement or bottom. You're going to have coal sluffage, rock, other debris laying around. So, it's uneven bottom." (Tr. 20-21) He did not specifically describe the ground conditions in the areas at issue.

Cox indicated on direct examination that, in essence, there were old cement blocks around and under the ladders, and "there were several large rocks at the bottom" (Tr.51). However on cross-examination, it was elicited from Cox that the walkways were clear, and that the blocks that he referred to on direct examination were at the base of the overcasts, and the ladders were not set on blocks and crushed wood.

Cox on rebuttal testified that only the edge points of the bases of the ladders were dug in the ground, and that the ground was not smooth. However, earlier he was asked by me whether, in his opinion the surfaces that the ladders rested on were even, and he said "I believe so" (Tr.63).

Mlinarchik, indicated that he climbed all the ladders in question. He testified that he weighs "probably 250 pounds" (Tr.77), and that he did not detect any motion in the ladders, and that the bases of the ladders were even, and on solid ground. He opined that if a ladder would slide, the protruding rails would prevent it from sliding further.

I accept Milanarchiks testimony with regard to the stability by the ladders, as Cox indicated that the ground was even, a fact not rebutted by Dinning. Also there is no evidence that the

surface that the ladders rested on was not flat, or that it contained objects the would upset the balance of the ladders. Further, neither Dinning nor Cox, indicated that the ladders were not sturdy. Nor did they indicate there were any defects in the construction of the ladders.

b. Applicability of Section 75.205 supra

Section 75.305 supra provides as follows:

> In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entity, idle workings, and, insofar as safety considerations permit, abandoned areas. Such weekly examinations shall be made before any other miner returns to the mine. The person making such examinations and tests need not be made during any week in which the mine is idle for the entire week, except that such examination shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

A plain reading of the words of Section 75.305 supra. reveals that there is no explicit provision for safe travel across overcasts. Nor does Section 75.305 supra contain any language mandating the manner in which ladders are to be used. Such a requirement, which goes beyond the scope of the explicit plain language of Section 75.305, may accordingly not be imposed based only on an implied duty to provide safe access (see, Consolidation Coal Co., 2 FMSHRC 1809, 1817 (1980) (ALJ Merlin); Riverside Cement Co., 1 FMSHRC 2057, 2059 (1979) (ALJ Merlin). Further there is nothing in the legislative history of the

statutory provisions of Section 303(f) of the Federal Mine Safety and Health Act of 1977,3 and the parallel language in the 1969 Act (Public Law 91-173) indicative of a legislative intent that this section shall encompass a duty to provide safe access.

Hence, for all the above reasons, I conclude that it has not been established that Respondent violated Section 75.305, supra.

B. Citations 3307246, 3307836, 3307837, 3307251 and 3307255.

At the hearing Petitioner indicated that the parties had reached a settlement with regard to Citation Nos. 3307246, 3307836, 3307837, 3307251 and 3307255. On October 2, 1991, Petitioner filed a Motion to Approve a settlement agreement with regard to this Citations and proposed a reduction and in penalty from $1,295 to $1,059. I have considered the representations and documentation submitted in the motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Therefore, the Motion to Approve Settlement is granted.

ORDER

It is ORDERED that: (1) Citation Nos. 3307804, and 3307836 be modified to allege a violation that is not significant and substantial; (2) Citation No. 3314318 be vacated, and (3) Respondent pay within 30 days of this decision $1,933 as a civil penalty.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. In its brief the Petitioner cites 30 C.F.R. 75.1704-1(c)(2) (which requires ladders in underground mine escapeways to be anchored securely) and 30 C.F.R. 77.206, (which requires that in surface mines ladders shall be anchored securely), for the proposition that the "Mine Act recognizes that unsecured ladders are hazardous." However the issue presented herein is not whether ladders that are unsecured are hazardous per se, but rather whether the condition of the ladders herein violated section 75.305 supra for which Respondent was cited. As such, the other standards cited by Petitioner are not relevant in disposing of the issues herein presented.

2. Respondent has not contradicted or impeached the testimony of Dinning that at least once a week an examiner would be in the area in question. Neither did it contradict or impeach the testimony of John Cox a union walkaround who, when asked who is required to cross the ladders, answered as follows:

> A. Anybody that would be walking that area. We have a --- it has to be traveled at least once a week. And any work that would be done in that area, people would have to travel across them in order to go and do the work. (Tr. 53)

However no evidence in the record sets out in any detail any facts which tend to establish that, in making an examination pursuant to section 75.305 supra it is necessary to traverse the overcasts in the main return.

3. Section 75.305, supra repeats the language of Section 303(f), supra