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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 91-109
A. C. No. 46-01452-03756

v.

Docket No. WEVA 91-138
A. C. No. 46-01452-03765

CONSOLIDATION COAL COMPANY,
RESPONDENT

Arkwright No. 1 Mine

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Walter J. Scheller III, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Maurer

These consolidated cases are before me based upon petitions for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, these cases were heard on June 20, 1991, in Morgantown, West Virginia. At that hearing, the parties proposed to settle two of the citations at issue in Docket No. WEVA 91-138. The motion requested approval of the respondent's agreement to pay \$213, the full amount of the proposed penalty, for Citation No. 3307843. The motion also requested approval of the respondent's agreement to pay \$128 of the proposed civil penalty of \$213 for Citation No. 3307844, as well as the issuance of an order modifying this citation to a non-"significant and substantial" violation. I granted the motion on the record, based on the Secretary's representations and the criteria contained in Section 110(i) of the Mine Act. The terms of this settlement motion will be incorporated into my order at the end of this decision.

There remained for trial three Section 104(a) citations: Citation Nos. 3307841 and 3307842 contained in Docket No. WEVA 91-138 and assessed for \$213 each; and Citation No. 3314450, contested in Docket No. WEVA 91-109 and also assessed for \$213.

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Both parties have filed post-hearing proposed findings and conclusions and/or briefs, which I have considered along with the entire record in making the following decision.

Docket No. WEVA 91-109

Citation No. 3314450

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. 77.5051 and charges as follows:

Insulated bushings were not provided where the power wires entered the metal fitting of the control box on the No. 8 jitney operating in the yard area.

The operator does not contest the existence of the violation of the cited standard in this instance, but rather submits that the citation was improperly designated as being "significant and substantial."

The No. 8 jitney is an electrically powered rail car that runs as a trolley on the 300 volts direct current it receives from the trolley wire. The cited control box was located directly in front of the jitney operator, slightly beyond his knees and reaching at most to the height of the operator's knees. Inspector Baniak noted that the operator of the jitney that day was a mine foreman. Accordingly, he concluded that management knew or should have known of the violative condition because the wires were only "a couple of inches away from the man's knee and his hands," and he therefore found a moderate degree of negligence on the part of the operator.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(D)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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).

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In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The Secretary contends that the hazards presented by the violation, i.e., the enhanced measure of danger to safety, are electrical shock and burn injuries. Inspector Baniak opined that there was a "great possibility" that such a shock and burn hazard could occur and that a serious injury could result because the vibration of the jitney would cause vibration of the wires, which would in turn wear through the wire at the two metal areas at the end of the connections or where the wire enters the control box. He further testified that the insulation on these wires was of the solid rubber type, which easily becomes bare when rubbed against metal through vibration. Basically, he was concerned that a wire would, or at least could become bare and create an electric shock or burn hazard that would be reasonably likely to result in an injury that would in turn result in at least lost work days or restricted duty.

However, the Secretary must also establish a reasonable likelihood that the hazardous condition will eventuate in the first instance. There is only a shock and or burn hazard if the wire becomes bare. It was not bare at the time the inspector cited it, so the Secretary bears the burden of proving that there

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was a reasonable likelihood that it would become so with continued normal usage in the mining operation. This burden has not been carried. The inspector's opinion in this regard is grounded more in speculation than in fact. He admitted on crossexamination that the two wires in question come straight out of the bottom of the control box, and that there was a lot of slack in the wires; they were dangling loose. He also observed that they were not touching the metal frame. He further admitted that he has not driven this jeep and does not know how much the control box vibrates, even through he knows the jitney itself "vibrates very much." My reading of the inspector's testimony as a whole is that he moved directly from the vibration occurring on the jitney generally to the shock hazard of a bare wire without adequately considering how the wire that was then insulated was going to get bare in the first place.

I therefore find that the instant violation does not meet the "S&S" criteria because it is unlikely that any injury to anyone would occur as a result of this violation, and the citation will be so modified.

In assessing a civil penalty in this case, I have considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act. I concur with the inspector's negligence finding of "moderate." Under these circumstances, I find that a civil penalty of \$100 is appropriate.

DOCKET NO. WEVA 91-138

Citation No. 3307841

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. 77.1802(a)2 and charges as follows:

The energized trolley wire was not guarded for approximately a 6 foot distance at the first cut-out switch near the rotary dumps where locomotives are coupled to empty mine cars.

At 8:55 a.m., on November 27, 1990, Inspector Baniak was in the area of the rotary dump facility conducting a regular inspection at respondent's Arkwright No. 1 Mine when he noticed an area of unguarded trolley wire, approximately 6 feet in

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length, and approximately 25 feet from the dump building in the direction of the mine entrance. Because he observed a motorman working under the unguarded trolley wire, he issued the subject citation on the spot.

At the time, the motorman was turning the trolley pole in preparation to reverse his direction and go back into the mine. In order to reverse the direction of travel of the trolleys used at the Arkwright No. 1 Mine, the trolley pole must be reversed so that the harp at the end of the pole will be at an angle toward the rear of the trolley.

After conducting a mini-investigation into the subject, the inspector was able to ascertain that the procedure for bringing the coal up to the rotary dump in the trolley cars, dropping off the cars, and pulling away the empties was repeated by the motormen from 14 to 20 times per day. Each time, the motormen passed under and stopped in the same general area where the trolley wire was unguarded. Because the number of cars pulled by the trolley locomotive at each point in its daily routine rarely fluctuated, the motormen regularly turned their trolley poles at the cited location where the trolley wire was unguarded.

The importance of this fact seems lost on the respondent. Mr. Smith, who is a mine escort for respondent, sees no difference between turning the trolley pole in the cited area and turning the trolley pole in various other areas in the mine where the wire is unguarded. But the obvious difference is that the trolley pole is repeatedly turned in consistently the same area that was cited day after day, all day long (14 to 20 times per day) whereas elsewhere in the mine when the wire is unguarded the trolley pole is only irregularly changed. It is the frequency and regularity of the function that the mandatory standard speaks to.

The inspector also noted on more than one occasion that while the motor operator turns the pole in the cited area, a substantial portion of his body is underneath the trolley wire with only approximately 18 inches of clearance.

The motormen are not the only workers exposed to the electrical shock and resultant burns from inadvertently contacting the unguarded trolley wire, although they are clearly who the inspector had in mind when he issued the citation. Mr. Donald Keener, a mechanic for respondent and a safety committeeman, testified that he has personally observed greasers greasing the mining cars in the same general vicinity as the cited area for 2 weeks every spring, and another 2 weeks every fall. While Mr. Keener did clearly state that the greasers would not be standing under the unguarded trolley wire while they were

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greasing cars, he also testified that he has seen people walking under the wire in the cited area for reasons unknown to him, but nevertheless exposing themselves to the hazards presented.

Accordingly, I find that a violation of 30 C.F.R. 77.1802(a) existed as the inspector cited it. Furthermore, I also believe the violation was "significant and substantial." In order to make an "S&S" finding, the Secretary must prove a violation, a discrete safety hazard, a reasonable likelihood that the hazard will result in injury, and that the injury will be of a reasonably serious nature. Mathies Coal Co., supra.

Herein, I have already found the violation, and I accept as credible the opinion testimony of Inspector Baniak to the effect that the respondent's failure to provide a trolley wire guard at the cited location created an enhanced measure of danger to safety, i.e., electric shock or serious burns if inadvertent contact with the unguarded trolley was made. I also concur with his opinion that in the normal course of continued mining operations, it would be reasonably likely that a motorman would accidentally contact the unguarded wire. The cited area is an active location, with motormen turning their trolley poles 14 to 20 times per day at this particular spot. Finally, I take administrative notice that a shock or burn from a 300 volt wire could reasonably result in a serious injury if it in fact occurred.

I also concur with the inspector that the appropriate level of negligence established by inference in the record is ordinary or moderate negligence.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for the violation is \$213, as originally proposed by the Secretary.

Citation No. 3307842

This citation alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. 77.2023 and charges as follows:

Dry coal dust (black in color) ranging up to 2 inches in depth was accumulated on structures throughout the second floor area under the Rotary Dump Facility.

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At 9:08 a.m., on November 27, 1990, Inspector Baniak entered the second floor of the rotary dump facility during the course of a regular "AAA" inspection at respondent's Arkwright No. 1 Mine. He observed very dusty conditions in the room, which measured approximately 30 feet by 30 feet, with dry coal dust throughout the area having accumulated up to 2 inches on the structures in the room. He measured the coal dust accumulations with a ruler, at the least at four locations, noting that it varied from less than 1 inch to 2 inches in depth and he concluded that, relying on his experience and demonstrations that he had observed, there was 20 to 30 times the amount of dust needed to actually cause an explosion or a flash burn. He also noted that coal dust is easily ignited if an ignition source is present and the dust is in suspension, and he testified that the dust was fine, black, and dry, and could easily be put into suspension by persons walking in the area. In this regard, he further noted that all persons, including management personnel, who desired to enter the bottom floor of the facility had to pass through the cited area. Furthermore, due to the placement of the facility, high on a hill, the coal dust accumulations could be placed in suspension by breezes and drafts passing through the open grate ceiling.

The ignition sources which the inspector identified were inter alia: lights, electrical components, switches, and welding that might be done in that area.

The inspector opined that, because of the explosibility of the coal dust accumulations and the amount of dust present, combined with the many potential ignition sources, it was "very reasonably likely" and "very possible" that the coal dust would be ignited during the ongoing mining process if the cited conditions had not been corrected. I concur in his analysis and find this violation established and furthermore agree with his "S&S" special finding. Mathies, supra.

The closer issue in this case that arose in connection with this citation is that of merger with another citation that was written 18 minutes earlier in the same dump facility citing the same section of the standards for accumulation of coal dust. The only difference being that the citations were written for two different floors of the facility. Citation No. 3307540 is presently being contested in Docket No. WEVA 91-1550. Importantly, the inspector admitted that the only reason he did not include the second floor accumulations in Citation No. 3307540 was because he found them a short time (18 minutes) after the accumulations on the top floor. He testified that while he would normally have issued only one citation for both floors, he did not on this occasion because of the lapse of time between discovery of the accumulations on the two floors. Even more importantly however, I find that inasmuch as the instant citation and its docket are not consolidated for hearing or

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decision with Citation No. 3307540 and its Docket No. WEVA 91-1550, and the penalty for Citation No. 3307540 has not been adjudicated or paid, Citation No. 3307842 is properly before me for disposition on its own merits.

Considering the criteria in section 110(i) of the Act, I conclude and find that an appropriate civil penalty for the violation is \$213, as originally proposed by the Secretary.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

- 1. Citation Nos. 3307843, 3307841, and 3307842 ARE AFFIRMED.
- 2. Citation Nos. 3307844 and 3314450 ARE MODIFIED to delete the significant and substantial finding and, as modified, ARE AFFIRMED.
- 3. Consolidation Coal Company shall pay a civil penalty in the amount of \$867 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FOOTNOTES START HERE

1. 30 C.F.R. 77.505 provides as follows: Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

2. 30 C.F.R. 77.1802(a) provides as follows: Trolley wires, trolley feeder wires, and bare signal wires should be adequately grounded:

(a) At all points where men are required to work or pass regularly under the wires.

3. 30 C.F.R. 77.202 provides as follows: Coal dust in the air of, or in, or on the surfaces of structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.