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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 PROCEEDING Docket No. WEVA 91-1988 A. C. No. 46-07178-03501
v.	Red Warrior Mine
EL DORADO CHEMICAL COMPANY, RESPONDENT	

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

This case is a petition for assessment of a civil penalty under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq.

Petitioner has moved for approval of a settlement to reduce the alleged violation from "significant and substantial" to non-S&S and to reduce the penalty to $20.

The Meaning of a "Significant and Substantial" Violation

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 (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 a 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. An illustration of this point is U. S. Steel Mining Co., Inc., supra, in which the Commission affirmed an S&S finding by a Commission judge. the judge found that:

> * * * [A]n insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of a bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. * * * [5 FMSHRC at 1791 (1983); emphasis added.]

As found by the judge, injury from the missing-bushing violation could result if the insulation wore through to metal and the circuit protection system failed to operate. However, one may observe that circuit protection devices are not presumed to be "reasonably likely" to fail unless they are found to be defective. There was no finding of defective fuses in the U. S. Steel case. The violation presented a substantial possibility of injury, not proof that injury was more probable than not. The effective meaning of the Commission's term "reasonably likely to occur" as applied in cases such as U. S. Steel is to find an S&S violation if the violation presents a substantial and significant possibility of injury or disease, not a requirement that injury or disease is more probable than not. This meaning harmonizes with the statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, but 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). In contrast, 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"1 and expressly classifies S&S violations as less than imminent dangers.2

Proposed Settlement

Citation 3503706 alleges an unsafe steering section on a truck

used to haul explosives, in violation of 30 C.F.R. 77.1606(c). The inspector observed that the steering section was loose and moving sideways about one-half inch. He concluded that this condition could cause the bolts to break, resulting in loss of steering capability, and that a serious vehicle accident was reasonably likely.

The motion seeks to reduce the charge to non-S&S and the penalty to $20 on the grounds that:

> Because the driver of the truck regularly performs routine maintenance on the vehicle which includes tightening the bolts . . . and because the driver may have been able to feel the steering coming loose prior to any effect on the actual steering of the truck, a reasonable likelihood of serious injury did not exist if normal mining operations had continued.

The motion misconstrues the term "normal mining conditions." This term refers to continued mining operations assuming the violation is not abated. It would render the Act and safety and health regulations a hollow mechanism if violations were to be redesignated as non-S&S violations on the ground that the operator might detect and correct the violation before an accident occurs.

The proposed penalty of $20 trivializes the alleged violation, which the inspector found to be serious based on his on-site observations.

ORDER

The motion to approve settlement is DENIED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

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

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