

CCASE:
SOL (MSHA) V. T & T FUELS
DDATE:
19920108
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
Falls Church, Virginia 22041
January 8, 1992

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

v.

T & T FUELS INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 92-168
A. C. No. 46-03149-03567

No. 2 Mine

DECISION GRANTING AND DENYING IN PART
MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

This case is a petition for assessment of civil penalties 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 of one citation to reduce the alleged from "significant and substantial" to non-S&S, to reduce the allegation of negligence from ordinary to low negligence, and to reduce the penalty to \$63. Settlement of the remaining three citations is proposed without changing the original proposed penalties.

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"(Footnote 1) and expressly classifies S&S violations as less than imminent dangers.(Footnote 2)

Proposed Settlement

Citation 33151966 alleges that the panic bar for an emergency stop of an electric scoop, used at the face, was not properly maintained and produced friction and difficulty in using it. The inspector found that this condition would significantly and substantially contribute to the cause and effect of a coal mine safety hazard. The parties move to reduce the charge to a non-S&S violation on the ground that the scoop operator had reported the problem to the maintenance foreman before issuance of the citation.

A violation is evaluated, for S&S or non-S&S purposes, on the assumption that normal mining conditions would have continued without abatement of the violation. The settlement motion does not state that the friction and difficulty in using the panic bar did not present a substantial possibility of contributing to a serious injury. The proposed reduction to a non-S&S violation will therefore be denied.

The proposal to reduce negligence to low negligence has a factual basis in the motion, and will be granted.

The motion proposes settlement of the other three citations on the basis of their original allegations and the original proposed penalties. That part of the motion will be granted.

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 this case is approved as follows, without modification of the citations (except citation 3315196, which is redesignated as a low negligence violation):

Citation	Approved Civil Penalty
3315196	\$ 63
3315195	136
3315198	20
3315199	20
	\$239

~116

"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.

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