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SOL (MSHA) v. SHREWSBURY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1796 A.C. No. 46-03300-03520
v.	
SHREWSBURY COAL COMPANY, RESPONDENT	VC #8 Central Shop

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge Citation No. 3482538, issued by the Secretary of Labor under section 104(d)(1) of the Act for an alleged violation of the regulatory standard at 30 C.F.R. 77.1607(bb). (Footnote 1) The general issue before me is whether the

section 104(d)(1) citation against Shrewsbury Coal Company (Shrewsbury) is valid and, if so, what is the appropriate civil penalty.

Citation No. 3482538 charges as follows:

> A positive audible or visible warning system was not installed and operated to warn persons that the conveyor would be started at the mine when the No. 9 overland belt was started by a person located more than a mile away who could not see the entire length of this conveyor. It was reasonable to expect a person could be working on this belt and get injured when the belt started up without warning because the breaker could not be locked out and the belt gobbed off once during this shift and the guards were off. The foreman, John Hudnall, was in a building (door open) located approx. 50 feet from the tail of the belt and approx. 5-7 feet from the belt. When asked why alarms were not on the belt he said they were stolen when the belt was idle in the past. The belt was put back into active service about July, 1990 according to Hudnall.

The cited standard, 30 C.F.R. 77.1607(dd), provides in part that "[w]hen the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started."

Shrewsbury does not deny the violation but maintains that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure." According to experienced Coal Mine Inspector Sherman Slaughter, during the course of a regular inspection at the subject mine on January 15, 1991, he was inside foreman John Hudnall's office next to the No. 9 overland belt when the belt went down. He noted that no alarm sounded when the belt resumed operation. According to Slaughter, Hudnall explained that the belt alarm had been stolen sometime before July 1990, and had not since been replaced. During his inspection Slaughter noted that the No. 9 belt started and stopped more than 10 times. From his experience he opined that the belts would frequently shut down during the course of a shift. Slaughter also observed that two beltmen worked on each

shift and were responsible for all 19 belts. Slaughter found the violation to be "significant and substantial" based on his knowledge of the frequency and seriousness of injuries and accidents that have occurred in the past by belts starting without warning. In reaching this conclusion he also considered that at the time of this citation some rollers were left unguarded, that there were no lights along the belt and that it was necessary to cleanup gob along the belt. He also noted that neither the No. 9 belt nor the door to the breaker box could be locked out at that time. Slaughter opined that as a result of the violation persons could become caught in the belt and lose limbs and bleed to death. He pointed out that an accident had previously occurred at this particular plant and a worker lost a limb as a result of contact with a conveyor belt. Slaughter also testified that he had seen the belts running at this operation without guards and on this same date had issued approximately 20 violations for missing guards.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Co., 6 FMSHRC 1 (1984), explained 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 question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf,

Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

The third element of the 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" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

Clearly the facts of this case warrant "significant and substantial" findings. The circumstances herein were particularly aggravated since at the time of the violation, miners were in the act of shovelling coal adjacent to unguarded rollers on the cited beltline, that the belt had not been locked out to prevent movement, and that there was no audible or visible system in place to warn these miners when the belt would commence movement. Under the circumstances, it is indeed reasonably likely that these miners could become entangled in the unprotected rollers upon a sudden belt start-up and suffer severe injuries including loss of limbs and/or death. From the significant number of guarding violations also issued that same day, and the fact that the alarm system had been absent for a significant period of time, it is apparent that, under normal continued mining operations, the hazard would have continued unabated.

It is also clear that the violation was the result of "unwarrantable failure." In reaching this conclusion I have not disregarded the testimony of John White, Corporate Manager of Maintenance and Environment for the Shrewsbury parent company, that a previously stolen alarm on the No. 9 belt had been replaced in May 1990. This testimony is, however, immaterial. Inspector Slaughter testified credibly that Hudnall told him at the time he issued the citation that the alarm had been stolen during the previous shutdown and that the belts had been subsequently restarted in July 1990. Furthermore Inspector Slaughter maintains that Hudnall told him that the alarm had not been working since July 1990. While Hudnall testified at hearing that he did not then have personal knowledge that the alarm had been absent for that period and learned this only from later talking to his electrician, I do not find this version to be credible. It is inconsistent with the inspector's credible testimony, it comes a year and a half after the citation was issued after a long opportunity for contemplation and it is patently not credible to believe that the belt foreman did not notice the absence of an audible alarm that should be expected to

be triggered on a belt that would have been repeatedly started during the 6-month period July 1990 to January 1991.

Under the circumstances it is clear that both Shrewsbury's electrician and its belt foreman knew that the start-up alarm was missing from the No. 9 belt for nearly 6-months before the citation was issued. Their failure to have replaced the stolen alarm system for that period of time constitutes an omission of an aggravated nature constituting "unwarrantable failure" and high negligence. See Emery Mining Corporation, 9 FMSHRC 1997 (1987), and the Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987). The section 104(d)(1) citation is accordingly affirmed. Considering the criteria under section 110(i) of the Act, I also find that the proposed penalty of $400 for the alleged violation is appropriate.

ORDER

Shrewsbury Coal Company is hereby directed to pay a civil penalty of $400 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Footnote starts here:-

1. Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mien safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from,a nd to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."