CCASE:
SOL (MSHA) v. CONSOLIDATION 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 v.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 91-303 A. C. No. 46-01453-03949
CONSOLIDATION COAL COMPANY, RESPONDENT	Docket No. WEVA 91-353 A. C. No. 46-01453-03950 Docket No. WEVA 91-1028 A. C. No. 46-01453-03953 Humphrey No. 7 Mine Docket No. WEVA 91-305 A. C. No. 46-01436-03840 Shoemaker Mine Docket No. WEVA 91-1033 A. C. No. 46-01867-03886 Blacksville No. 1 Mine

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

At the hearing of these cases, which was held on November 13 and 14, 1991, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of certain portions of the captioned matters. And subsequently, the Secretary on January 16, 1992, filed a Motion to Approve Settlement in Docket No. WEVA 91-1033 in its entirety.

Docket No. WEVA 91-303 involves a single section 104(d)(2) order, Order No. 3314158. An oral motion was presented on the record requesting approval of a reduction in the proposed civil

penalty from $1000 to $900, and a request to modify the order to a section 104(a) citation as well as reducing the negligence factor to "moderate." I granted the motion on the record.

Docket No. WEVA 91-305 involves a single section 104(a) citation, Citation No. 3327217. Respondent agreed to pay the full amount of the proposed civil penalty, i.e., $311. I granted the motion to approve settlement on the record.

Docket No. WEVA 91-1028 involves two section 104(a) citations, Citation Nos. 3308260 and 3307302. An oral motion was presented on the record requesting approval of a reduction in the civil penalty proposed for each citation from $259 to $155 as well as modification of each of the citations to nonsignificant and substantial violations. I granted the motion on the record.

Docket No. WEVA 91-353 involves six section 104(a) citations, Nos. 3308250, 3327724, 3308251, 3307317, 3307306, and 3327732. At the hearing, settlement motions were presented with regard to five of these six. In regard to Citation No. 3308250, a motion was made requesting approval of a reduction in the civil penalty from $259 to $155 and modification to a nonsignificant and substantial violation. With regard to Citation No. 3327724, respondent agreed to pay the full amount of the proposed civil penalty, $192. A motion was made concerning Citation Nos. 3308251 and 3307317, requesting approval of a reduction in the civil penalty proposed for each citation from $259 to $155 as well as modification of each of the citations to nonsignificant and substantial violations. In regard to Citation No. 3307306, a motion was made requesting approval of the respondent's agreement to pay $192 of the proposed penalty of $259 as well as requesting an order modifying the citation to reflect a "low" degree of negligence on the part of respondent. I granted the motions concerning these five citations on the record. Citation No. 3327732 remained for trial, and in that regard, the operator stipulated to the fact of violation, but disputes the "S&S" finding and of course, the assessed penalty.

At hearing, there were two citations and an order still in dispute. As noted previously, in Docket No. WEVA 91-353, section 104(a) Citation No. 3327732 remained in dispute and in Docket No. WEVA 91-1033, section 104(d)(2) Order No. 3314086 and section 104(a) Citation No. 3314087 remained in dispute. Testimony was heard in regard to each of these on November 13 and 14, 1991. Following the conclusion of the testimony on November 14, respondent had not yet fully presented its defense for the two violations at issue in Docket No. WEVA 91-1033. Accordingly, it was agreed that the parties would reconvene in Morgantown, West Virginia, on December 17, 1991, for the conclusion of the evidence in Docket No. WEVA 91-1033. However, prior to that date, the parties reached an agreement in regard to each of the violations at issue in Docket No. WEVA 91-1033. A written Motion

to Approve Settlement was filed with the undersigned administrative law judge. In regard to Order No. 3314086, the motion requested approval of respondent's agreement to pay $276 of the proposed penalty of $1100 as well as requesting modification of the order to a section 104(a) citation as well as indicating that the violation was the result of a "moderate" degree of negligence on the part of the respondent. With regard to Citation No. 3314087, the motion requested the entry of an order vacating the citation. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement as well as those entered onto the record at the hearing will be incorporated into my order at the end of this decision.

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.

FINDINGS OF FACT

1. Citation No. 3327732 alleges a violation of the regulatory standard found at 30 C.F.R. 75.605 and charges as follows:

> A strain clamp was not provided to prevent strain on the No. 6 A.W.G. trailing cables for the 5 southwest section (043) battery charger.

2. MSHA Coal Mine Inspector, (Electrical) Roy Jones issued Citation No. 3327732 to the respondent on November 20, 1990, while conducting a regular electrical inspection of respondent's Humphrey No. 7 Mine. On that date, he had observed that there was no strain clamp on a trailing cable for a battery charger.

3. Respondent does not contest the fact that the violation of the cited mandatory standard as described in Citation No. 3327732 existed at that time. The cable admittedly was not properly clamped, but respondent submits that the violation was nonetheless improperly designated "S&S."

4. The trailing cable in question was suspended from the mine roof on insulated "J" hooks, and extended from the battery charger to the power center, a distance of approximately 100 to 150 feet. It was arguably subject to being pulled down by a scoop car that would of necessity travel under it on a regular basis, i.e., once or twice every shift. However, only 15 feet of the cable, the width of a heading, would ever be exposed to the scoop, if it could be reached.

5. The height of the entry was approximately 7 to 7 1/2 feet and the scoop was approximately 4 1/2 feet high. Mr. Radabough, a maintenance foreman, credibly testified that in his opinion it would be unlikely for the scoop to catch that cable, although he acknowledges the possibility. Inspector Jones, on the other hand, testified that he was not aware of the clearance existing for the scoop from the roof in the area where it could potentially pull the cable (Tr. 58-59). This is a significant omission in the chain of analysis regarding the reasonable likelihood of the cable being pulled down in the first instance.

6. A strain clamp is most important on equipment that is actually in motion, that is mobile equipment which is in frequent motion and which drags its trailing cable behind it. This is so because the purpose of the strain clamp is to protect the cable and electrical connections from damage should the cable be jerked or suddenly pulled.

7. A battery charger is mounted on skids and not moved on a daily or even weekly basis. Rather the charger is moved only once or twice per month. Furthermore, the cable is not pulled or dragged behind the battery charger.

8. There was a box connecter installed where the cable entered the metal frame of the battery charger which provided protection for the jacketing of the cable where it enters the frame and also provided some strain relief on the cable.

DISCUSSION AND FURTHER FINDINGS

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 reasonable 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 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's position is that if the cable should be pulled down by the scoop, the absence of a strain clamp on the cable at the battery charger could result in insulated wires becoming exposed. Inspector Jones explained that power conductors are normally inside the housing of the battery charger and therefore are not subject to contact with any surface which may conduct an electric current. However, in the absence of a strain clamp, the cable can be pulled outside the housing, and the power conductors could become exposed. This sequence of events could possibly shock a miner who might inadvertently touch the exposed power conductors or the metal guard surrounding the battery charger. If an exposed wire should come into contact with the metal housing in such a fashion, an electric current, i.e., amperage, would be conducted onto the frame of the battery charger. An individual would be potentially exposed to as much as 15 amps of electric current were he to come into contact with the exposed conductors or the energized frame of the battery charger. This in turn could produce a serious electric shock injury or even an electrocution.

The weakness in the Secretary's analysis is, however, that the likelihood of the scoop pulling down a cable 2 1/2 feet above it and to which it is exposed for only a distance of 15 feet once or twice per shift is not a reasonably likely event. Yet it is a precondition to all that follows in the Secretary's above scenario which culminates in the miner's injury or death due to electric shock.

Additionally, even the inspector concedes that the box connector which was installed would supply some strain relief to the battery charger cable in the absence of the required strain clamp.

Accordingly, on the basis of the foregoing findings and conclusions, I find the violation alleged in Citation No. 3327732 to be nonsignificant and substantial. Citation No. 3327732, as so modified, will be affirmed herein.

I also find that the violation occurred as a result of the "moderate" negligence of the respondent because there was no recordation of this condition in the weekly electrical examination records and it is most likely that there was never a strain clamp installed for this cable on this particular battery charger.

Considering the statutory criteria contained in section 110(i) of the Mine Act, I find and conclude that a civil penalty of $50 for the admitted violation is appropriate and will be ordered herein.

ORDER

It is hereby ORDERED that:

1. Citation Nos. 3327724, 3307306 (modified to reflect "low" negligence), and 3327217 ARE AFFIRMED.

2. Citation No. 3314087 IS VACATED.

3. Citation Nos. 3308250, 3308251, 3307317, 3327732, 3308260, and 3307302 ARE MODIFIED to delete the "significant and substantial" (S&S) finding, and as so modified, ARE AFFIRMED.

4. Order Nos. 3314158 and 3314086 ARE MODIFIED to citations issued pursuant to section 104(a) of the Mine Act with negligence factors reduced to "moderate" in each, and as so modified, ARE AFFIRMED.

5. Respondent, Consolidation Coal Company, IS ORDERED TO PAY civil penalties in the amount of $2,696 within 30 days of the date of this decision, for the violations found herein.

Roy J. Naurer
Administrative Law Judge