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SOL (MSHA) v. TUNNELTON MINING
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 91-1456 A. C. No. 36-00929-03720
v.	
TUNNELTON MINING COMPANY, RESPONDENT	Marion Mine

DECISION DENYING SETTLEMENT MOTION

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. 801 et seq.

The parties have moved for approval of a settlement.
The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes to reduce the alleged violation from a "significant and substantial" violation to a "non-significant and substantial" violation, it will be helpful to review the meaning of this statutory term.

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 any 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. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, 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). Also, 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 places S&S violations below an imminent danger. Footnote 2) It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

The Proposed Settlement

The inspector issued Citation No. 3484197, alleging a violation of 30 C.F.R. 75.604(b) on the ground that the trailing cable to a roof bolter was not "effectively insulated, and [did] not effectively exclude moisture" because there was "an opening measuring 1/2 inch by 1 1/2 inches through the outer insulated jacket, and the inner insulated conductors [were] exposed."

The settlement motion states that the exposed inner insulation of the cable was intact and, therefore, injury was "unlikely to occur." However, it does state or indicate that the opening in the cable did not present a substantial possibility of injury, e.g., the exposure of the inner insulation rendering it vulnerable to cutting or breaking, with moisture reaching live conductors, by forces that would not penetrate the inner insulation if the outer jacket were intact, or the possibility of moisture entering the outer jacket reaching an existing but unseen nick in the inner insulation.

Accordingly, the settlement motion is DENIED. The proposal to reduce the penalty from $136 to $86 will be approved if the motion is amended to delete the change to non-S&S, or if the parties show sufficient facts to warrant such a change.

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; emphasis added.

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