CCASE:
SOL (MSHA) v. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 91-1375 A. C. No. 36-04281-03736
v.	
CONSOLIDATION COAL COMPANY, RESPONDENT	Dilworth Mine

DECISION DENYING SETTLEMENT MOTION

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. 801 et seq.

The parties have moved for approval of a settlement.

The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes1 to reduce some of the alleged violations from "significant and substantial" to "non-significant and substantial" violations, 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,"2 and expressly places S&S violations below an imminent danger.3 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.

Proposed Settlement

Citation No. 3702181 was issued for a violation of 30 C.F.R. 77.205 when the inspector observed that the travelway to th electrical switch box was obstructed by a wooden pallet and old desks, creating a tripping hazard.

The motion states that, "while the pallet lay horizontal under the switch box, thus creating a possible tripping hazard, the desks were not directly in front of the box, and less likely to create a tripping hazard. Thus, the likelihood of being injured is less that originally assessed."

The motion does not state or indicate that the pallet and desks did not present a substantial possibility of causing a tripping accident. Accordingly, the proposal to reduce the charge to a non-S&S violation will be denied.

Citation Nos. 3702182 and 3702187 were issued for violations of 30 C.F.R. 77.513 when the inspector observed that electrical control switch boxes were not provided with insulating mats nearby.

The motion states that, while "the mats were placed on the outside wall to the electrical control switch boxes and within 10 feet of the switch box, this placement does not meet the condition that the mat be kept in place. Moreover, while the electrical control switch boxes were Delta grounded system, externally grounded, a shock hazard was still possible depending on the method of installation and on the conditions existing at the switch boxes, such as whether it was wet. The shock hazard would be eliminated by the use of the insulating mats, which, though not in place, were nearby. Therefore, the likelihood of being injured is less than originally assessed."

The motion does not state or indicate that the failure to keep the insulated mats in place did not present a substantial possibility of resulting in an electrical injury. Accordingly, the proposal to reduce the charges to non-S&S violations will be denied.

The settlement proposals as to Citations 3702191 and 3702193 are appropriate and if resubmitted in a revised motion will be approved.

ORDER

WHEREFORE IT IS ORDERED that:

1. The settlement motion as a whole is DENIED.

2. The parties may submit a revised motion as to all or any of the citations involved.

3. The citations not approved for settlement will proceed to hearing at a date to be set.

William Fauver
Administrative Law Judge

Footnotes start:-

1. The motion states that after discussion the "significant and substantial" designation was "deleted." However, the Secretary has no authority to change an allegation of violation after filing a civil penalty proceeding, without approval of the judge. Accordingly, the "deletions" will be considered as a settlement proposal to amend the citations.

2. Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

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