FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 11 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-310 A. C. No. 46-06489-03518
v.	:	
DONNER COAL COMPANY, INC., Respondent	:	Black Rose No. 1 Mine

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary:
James V. Brown, Esq., Charleston, West Virginia, for Respondent.

Before: Judge Maurer

This case is before me based on a petition for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, the case was heard on December 3, 1991, in Charleston, West Virginia. At that hearing, the parties proposed to settle one of the citations at issue in the case (Citation No. 3482742) with a reduction in the civil penalty from $178 to $89. The parties also moved to request approval of the Secretary's proposed vacation of Citation No. 3482745. 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 will be incorporated into my order at the end of this decision.

There remained for trial seven section 104(a) citations. The operator does not dispute the violations, but only the special "significant and substantial" (S&S) findings and of course, the amount of the civil penalty.

Both parties have filed post-hearing submissions, which I have considered along with the entire record in making the following decision.

DISCUSSION AND FINDINGS

A "significant and substantial" violation is described in section 104(d)(l) 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 reasonably serious nature." Cement Division, National Gvosum Co., 3 FMSHRC 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 Gvosum 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 Minins Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), 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)(l), 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 Comoanv, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Citation No. 3482437

On January 14, 1991, while conducting a regular AAA inspection of Donner Coal Company's Black Rose No. 1 Mine, MSHA Inspector Melvin England observed that the transformer enclosure located on the surface was not locked against

unauthorized entry and the gate was open. Inspector England issued section 104(a) Citation No. 3482437 for a violation of 30 C.F.R. § 77.509(c).

Inspector England testified that he had been informed by the Mine Superintendent, Mr. Lyons, that the gate had been left open because an electrician had been working in the enclosure and forgot to close and lock the gate.

The inspector's testimony is quite credible and I find the violation of the cited standard to be proven. The real issue is whether it amounts to an S&S violation in these circumstances.

I find that it does not because even though the failure to close and lock the gate to the transformer enclosure created the distinct potential hazard of an unauthorized person possibly entering the enclosure and being electrocuted, it was unlikely that anyone would actually do so. Plus the fact that the operator kept a watchman on the premises 24 hours a day, even when they were not running coal and the relative remoteness of the site render any unauthorized entry into the enclosure unlikely in my opinion.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for the non-S&S violation is $50.

Citation No. 3482721

On January 16, 1991, while conducting a regular AAA inspection of respondent's Black Rose No. 1 Mine, Inspector England observed that the off-standard Joy 21 shuttle car operating in the 001-O Section was not provided with a device that would permit the equipment to be deenergized quickly in the event of an emergency. More specifically, the "panic bar" was not installed in its place on the shuttle car. Inspector England issued Citation No. 3482721 for a violation of 30 C.F.R. § 75.523.

This shuttle car makes 40 to 50 trips each shift from the dumping point to the continuous mining machine at the face. When operative, the panic bar is designed to deenergize the shuttle car immediately in the event of an emergency. The operator of the shuttle car may need to quickly deenergize the shuttle car if the tram becomes stuck, thereby making it impossible for the shuttle car to be stopped without being deenergized. This is the function of the "panic bar" which is part of the standard equipment of the shuttle car when it is purchased from the manufacturer.

The hazard presented by this violation was the danger that the shuttle car, unable to be stopped by being deenergized by the operator, would run into or over another individual working in the area. If this occurred, it would be reasonably likely to result in a fatality because the shuttle car is so large, approximately 18 to 20 feet in length, and 8 feet wide. Furthermore, the shuttle car was being operated in an area with lots of activity, with miners and equipment moving around on a frequent basis.

Inspector England testified that he has personally observed shuttle cars with the tram stuck on them, and unable to be stopped without being deenergized. Although *Mr.* Lyons testified that there were other methods of stopping the shuttle car besides activating the "panic bar", he also acknowledged that "there's no excuse for the panic bar being off the machine" and admitted that when he operates the shuttle car, he does so with the "panic bar" in place.. (Tr. 102). Furthermore, as Inspector England opined, the "panic bar" is necessary to allow the shuttle car to be instantly deenergized in the event that the other methods of stopping the shuttle car fail, or could not be activated in a timely fashion.

I therefore find that the failure to have a "panic bar" on this shuttle car created the distinct possibility of a miner being run into or over by the shuttle car which could not be immediately stopped because it could not be deenergized rapidly enough. Accordingly, I find that it was reasonably likely that a fatal injury could have occurred as a result of the "panic bar" not being installed in place on this shuttle car. The violation was therefore "significant and substantial" and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $112, as originally proposed by the Secretary.

Citation No. 3482726

On January 22, 1991, while conducting a regular AAA inspection of respondent's Black Rose No. 1 Mine, Inspector 'England observed that a canopy was not provided for the Joy Miner operating in the 001-O Section. Inspector England determined that the canopy had been removed to be repaired and had not been reinstalled on the Joy Miner. He also testified that the miner was in operation at the'time he observed it. He then issued the subject citation for a violation of 30 C.F.R. § 75.1710-1(a).

The hazard presented by this violation was of a roof fall on the miner operator. should a roof fall have occurred on the miner operator when the canopy was not there to protect him, the operator could very likely have been fatally injured. In 'addition, as Inspector England testified, the roof conditions in

this mine were such that a roof fall was likely. There have been previous instances of roof falls in this mine, and numerous citations had been issued for violative roof conditions prior to the date of the instant violation. The previous violations were for additional roof support needed, roof fallen out from around roof bolts, and loose and unconsolidated roof.

The failure to have a canopy in place on the miner created the distinct safety hazard of an individual being injured or killed by a roof fall occurring while he was operating the miner. In light of the previous citations issued to Donner for unsafe roof conditions, and considering the normal course of continued mining operations, it was reasonably likely that an individual would be fatally or at least seriously injured as a result of a roof fall occurring while operating this miner unprotected by a canopy. Accordingly, I find the violation was "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $112, as proposed by the Secretary.

Citation No. 3482740

On January 25, 1991, while conducting a regular AAA inspection of this mine, Inspector England observed that the fire sensor system provided for the main line belt and the section belt inside the mine was not being maintained in an operative condition. Inspector England also observed that when tested, the automatic fire sensor system would not give an automatic warning if a fire occurred on or near the belt. The system can be tested to determine if it is operational, and Inspector England tested the system from the dumping point at the belt and again in the mine office, and the system was not operational. Replacement equipment was necessary to make the system operational. The system was not operational on either belt, for a distance of approximately 1000 feet on the main line belt and a distance of 300 feet on the section belt.

The hazard presented by this violation was that in the event of a fire, the miners in the area would receive no alarm from the fire sensor system. Furthermore, I find that it was reasonably likely that a fire could occur because of combustible materials accumulated in the area. Inspector England testified that he had recently written a citation to the respondent for loose coal and float coal dust on the belt and connecting crosscuts. He also testified that these combustible materials could ignite from several different ignition sources, including hot belt rollers or an explosion. Superintendent Lyons conceded that there was float coal dust in the area and that float coal dust is very combustible. The failure to maintain the fire sensor system in an operative condition created the discrete safety hazard of the

miners being overcome by smoke or fire because they would not receive sufficient advance warning of a fire in the area. I therefore find that the hazard created by this violation was reasonably likely to result in a serious injury or fatality if the violation had remained unabated during the continued normal course of mining operations. Accordingly, I find the violation to be "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is $136, as proposed.

Citation No. 3482741

On January 25, 1991, while conducting a regular AAA inspection of the captioned mine, Inspector England observed that a mechanical equipment guard was not provided for the right side of the No. 2 belt conveyor head. The belt head was approximately 3 feet off the mine floor and the absence of a guard made it possible for an individual to become caught between the roller and the belt. The belt was moving at the time Inspector England observed these conditions.

The hazard presented by this violation was that an individual could become caught between the roller and the belt. Inspector England explained that this could happen by someone attempting to clean spillage up around the belt or reaching in to dislodge a piece of coal which had become stuck on the belt. At least one individual on each shift has the responsibility of insuring that the belt remains clean. Because an individual would be working in close proximity to this belt on each shift, it was reasonably likely that someone would get caught in the exposed area as a result of the absence of the guard and that such an occurrence would result in at least a permanently disabling injury.

I accept as credible the inspector's opinion that in the continued course of normal mining operations with the guard missing, it was reasonably likely that a miner would be seriously injured by being caught between the unguarded pulley and the belt. Accordingly, I find the violation at bar to be "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is $91,

Citation No. 3482743

On January 25, 1991, while conducting a regular AAA inspection of Donner Coal Company's Black Rose No. 1 Mine, MSHA Inspector England observed that the canopy provided for the

off-standard shuttle car operating in the 00-10 Section was not substantially constructed in that one of the legs of the canopy was broken.

The hazard presented by this violation was that the canopy would not adequately protect the person operating the shuttle car in the event of a roof fall. Although the canopy with three good legs would provide some protection, it would not be sufficient because the roof in the section in which this shuttle car was operating was massive sandstone. Furthermore, in the opinion of Inspector England, because of the roof condition in this mine, this violation was reasonably likely to result in a permanently disabling injury to the operator and I concur. I find the violation to be "significant and substantial," and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is $91, as originally proposed.

Citation No. 3482744

On January 25, 1991, while conducting a regular AAA inspection of respondent's mine, Inspector England observed two parallel roof cracks extending for approximately 25 feet at the dumping point of the section belt conveyor. These cracks were approximately 3 feet apart, and were not supplemented with any supporting devices such as posts, cribs, or crossbars as required by the roof control plan. As a result of the conditions he observed, Inspector England issued Citation No. 3482744 for a violation of 30 C.F.R. § 75.220(a)(l).

The hazard presented by this violation was the danger that a large piece of roof would fall in at once. Inspector England opined that it would be likely for a piece as large as 25 feet long and 3 feet wide to fall. He further concluded that it would be reasonably likely for'such a roof fall to occur because the roof is massive sandstone in this area. And such a roof fall was reasonably likely to result in a fatality because of the size of the piece that could fall and because the cracks were in an area in which there was a great deal of activity. People are travelling in this area. The mine telephone is positioned nearby, and the shuttle cars make frequent trips through this immediate area.

Therefore, I find that because these roof cracks were in a very active area of the mine, in the continued normal course of mining operations, it was reasonably likely that an individual would be fatally injured as a result of a roof fall occurring at the point of the roof cracks. Accordingly, the violation was "significant and substantial," and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate civil penalty for this violation is $112.

Respondent's principal defense to all these charges is to the effect that it would be highly unlikely that any accident would occur as the result of these types of violations. Their "proof" of that position is the fact that no fatal accidents have actually happened and neither has any type of injury occurred as a result of these particular violations or any other violations written up at the Black Rose No. 1 Mine. That may all very well be true, but is not the test for an S&S violation. The law is otherwise.

ORDER

1. Citation Nos. 3482742 and 3482437 are modified to delete the characterization "significant and substantial" and, as so modified, ARE AFFIRMED.

2. Citation No. 3482745 IS VACATED.

3. Citation Nos. 3482721, 3482726, 3482744, 3482741, 3482743, and 3482740 ARE AFFIRMED.

4. The Donner Coal Company, Inc., shall within 30 days of the date of this decision, pay the sum of $793 as a civil penalty for the violations found herein.

5. Upon payment of the civil penalty, these proceedings ARE DISMISSED.

Roy J. Maurer
Administrative Law Judge

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