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CONSOLIDATION COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEVA 91-204-R
v.	Citation No. 3315865; 2/8/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), RESPONDENT	Docket No. WEVA 91-205-R Order No. 3315867; 2/11/91
	Docket No. WEVA 91-196-R Citation No. 3307899; 2/12/91
	Blacksville No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 91-1964 A.C. No. 46-01867-03904
v.	Docket No. WEVA 91-1965 A.C. No. 46-01867-03905
CONSOLIDATION COAL COMPANY, RESPONDENT	Docket No. WEVA 92-148 A.C. No. 46-01968-03937
	Docket No. WEVA 92-187 A.C. No. 46-01867-03915
	Blacksville No. 1 Mine
	Docket No. WEVA 91-1833 A.C. No. 46-01452-03789
	Arkwright No. 1 Mine

DECISION

Appearances: Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Consolidation Coal Company; Robert Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Secretary of Labor.

Before: Judge Weisberger

These cases were consolidated for hearing, and are before me based on petitions for assessment of civil penalties filed by the Secretary (Petitioner) alleging various violations of mandatory safety standards set forth in Volume 30 of the Federal Code of Federal Regulations. Pursuant to notice the cases were heard in Morgantown, West Virginia on May 19, 1992. At the hearing, Lynn Arthur Workley, and Richard Gene Jones, testified for Petitioner. Robert W. Gross, testified for the Operator (Respondent).

Docket No. WEVA 91-187, WEVA 92-148, and WEVA 91-205-R and WEVA 91-196-R

It is ORDERED that the stay orders previously issued in docket nos. WEVA 91-205-R and WEVA 91-196-R are hereby lifted.

Petitioner filed a Motion to Approve a Settlement reached by the parties concerning these cases. A reduction in penalties from $1,350 to $856 is proposed. I have considered the representations and documentation submitted in these cases, and conclude that the proferred settlement is appropriate under the terms set forth in Section 110(i) of the Act.

Docket No. WEVA 91-1833

Citation Nos. 3306386, 3315573, 3315574, 3314482, and 3314483.

Petitioner filed a motion to approve a settlement agreement regarding citation numbers 3306386, 3315573, 3315574, 3314482, and 3314483. A reduction in penalty from $1,009 to $774 is proposed. I have considered the representations and documentation submitted with the motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Citation Nos. 3315576, 3315577, 3315578, 3315579, 3315580, and 3314481.

The parties stipulated that citation nos. 3315576 - 3315581 involve the same issue, and that only Citation No. 3315576 would be tried. The parties further agreed that the decision with regard to Citation No. 3315576 is to apply to citation nos. 3315577 - 3315581.

Prior to the presentation of evidence Petitioner moved for Summary Judgment on these citations based on collateral estoppel. After hearing argument, the motion was denied.

Findings of Fact and Discussion

I.

On March 6, 1991, Lynn Arthur Workley, an MSHA Inspector, inspected certain coal cars at Respondent's Arkwright No. 1 Mine and issued six citations. In three of the citations Workley alleged violations of 30 C.F.R. 75.1405, in that a device on a coal car to allow uncoupling from a safe distance, was inoperative. In three citations he alleged that on the three other cars the lever on this device was "froze-up". Respondent does not contest the existence of the violations of Section 75.1405, supra, as alleged, but does challenge the assertions of Workley, as set forth in the citations, that the violations were "significant and substantial".

II.

Each of the coal cars in question is equipped with a lever located at the end of the car, which enables a miner to uncouple the car without going between the cars. When downward pressure is placed on the lever, a chain attached to the lever is pulled up, which releases a coupler, uncoupling the car. Workley explained that on three of the cars the fulcrums were rusted preventing the levers from being moved, and on the remaining three the chains were broken.

Workley opined that the violations herein were reasonably likely to have resulted in a reasonably serious injury of a crushing nature involving an extremity. He stated that if the uncoupling devices are broken or inoperable, the only way for one to uncouple the car, is to go between the cars and physically uncouple them. He indicated, in essence, that as a result of the violation herein, it was likely that an employee would go between the cars. In this connection, he stated that at the day he issued the citations in question he observed Jack Pack, an employee of Respondent, putting his right foot and right leg between two moving cars while attempting to uncouple them.

According to Workley, Pack had told him that most of the time he did not need an extension bar and referred to it as a "sissy bar". Workley did not specifically identify the cars that Pack had uncoupled as being those that were cited. There is no evidence that the uncoupling device that Pack was working on was inoperative.

According to Robert W. Gross, a Safety Supervisor employed by the Respondent, if a lever does not work, an extention bar, four and a half feet long, can be attached to the lever in order to provide more leverage to push it down, and hence uncouple the cars. It is not necessary to stand between the cars to use the bar which extends twenty four inches beyond the cars. Such bars

were located at the dump and tipple, the only sites where cars are uncoupled in normal mining operations. Spare bars were kept in the safety office. Also, other bars were located at the loading point and tipple to enable persons to uncouple cars if the chain on the uncoupling device is broken. Written safety work instructions provided to Respondent's employees who perform uncoupling of the cars require employees to use these bars. Instructions also provide that if an uncoupler on a car is not working properly, another car instead is to be uncoupled. In addition, signs located on all the cars warn employees not to go between the cars. Written notices to that effect were posted at the tipple, dump, and on the surface.

The Commission has set forth in Mathies Coal Company 6 FMSHRC 1(1984) the elments that must be established to prove a violation in 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining 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).

With regard to the first element, there is no dispute that a mandatory safety standard, Section 75.1405, supra, was violated. Also, with regard to the second element set forth in Mathies, supra, I find that the violation herein, contributed to a safety hazard, i.e., and the danger of a miner going between 2 cars to uncouple them, and being injured thereby. I also find that, based on the uncontradicted testimony of Workley, should a miner go between two moving cars to uncouple them, a serious crushing injury could result. Hence, the fourth element has been satisfied.

The key issue for resolution, is whether the third element has been established, i.e., whether there was a reasonable likelihood that the hazard attributed to would result in an injury. For the reasons that follow, I conclude that Petitioner has met her burden in this regard.

In Consolidation Coal Company 13 FMSHRC 1314 (1991) Judge Melick, in finding that a violation by Respondent of Section 75.1405 for damaged and inoperative cut-off levers on supply cars was significant and substantial, noted that the inspector had previously seen a miner at that mine (Respondent's Loveridge Mine) position himself between two supply cars in attempting to uncouple the cars. In the instant case, Workley observed Pack going between two moving cars in attempting to uncouple them. According to Workley, on other occasions he had observed a miner going between the cars to uncouple them at Respondent's Humphrey Mine. In all these situations, it can not be said with certainty that the miners involved went between the cars to uncouple them because the devices were damaged or inoperative. Hence, if miners have gone between cars to uncouple them in situations where there is not a definite indication that the devices were inoperative, then, a fortiori, it can be concluded that there is a reasonable likelihood that these employees will go between cars to uncouple cars having damaged or inoperative devices, inspite of the training, warning signs, and bars provided by Respondent. Hence, I conclude that the violation herein was significant and substantial. (See Mathies Coal Company 6 FMSHRC, 1 (1984) U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984); Consolidation Coal Company 13 FMSHRC, supra).

III.

In analyzing the degree of Respondents' negligence regarding the violations found herein, I take into account Respondent's history of violations concerning the standard at issue. Respondent did not contest the issuance of a citation at its Loveridge No. 2 Mine, citing inoperative and damaged cut-off levers on two supply cars (Consolidation Coal Company, supra). Also, on July 10, 1990, Respondent was cited for the same condition on six cars. Further, according to the uncontradicted testimony of Workley, "You could tell just by looking at them" that "about half" of the switches were broken (Tr. 55). He explained that chains were broken or missing, eyes were broken, and the cut-off levers were broken or bent. However, there is no evidence how long the violative conditions existed prior to their being cited by Workley.

I find the degree of Respondent's negligence to be mitigated by its policy of warning employees not to go between cars. Also as mitigating factors are the provision of extention bars and other bars. Should one of Respondent's employees have disregarded its instructions and warnings and have gone between

the cars to physically uncouple one of the cars whose device was not in operating condition, the results could have been a serious injury, even an amputation.

Taking all the above factors into account, as well as the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the parties, I conclude that a penalty of $200 is appropriate for each of the violations cited herein.

Docket Nos. WEVA 91-1964, WEVA 91-1965 and WEVA 91-204-R

Citation 3315908 (Docket Nos. WEVA 91-1965, and WEVA 91-204-R).

The Secretary filed a motion to approve partial settlement with regard to citation No. 3315908. The Secretary indicated that the operator has agreed to pay the full amount of the assessed penalty of $276. Based on the the representations and documentation set forth in the motion, I conclude that the proferred settlement is appropriate under the terms of Section 110(i) of the Act.

Citations 3315803 (Docket No. WEVA 91-1965), and 3315865 (Docket No. WEVA 91-1964).

It was stipulated to by the parties that the issues presented in Citation No. 3315865 are the same as those presented in Citation No. 3315803 which is the subject matter of Docket Nos. WEVA 91-1964 and WEVA 91-204-R. The parties stipulated that the decision concerning Citation No. 3315803 is to apply to Citation No. 3315865.

Findings of Fact and Discussion

On March 5, 1991, Richard Gene Jones, an MSHA inspector, inspected the P-8 Longwall section at Respondent's Blacksville No. 1 Mine. He cited Stopping No. 3 located in a crosscut between an intake escapeway entry, and the adjoining track entry, as having an 8 inch by 16 inch hole. He noted that air was coursing from the track entry to the intake entry. The citation alleges a violation of 30 C.F.R. 75.1707 which, as pertinent, provides that the escapeway which is required to be ventilated with intake air ". . . shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section . . . ."

Neither the pertinent regulations, nor the Federal Mine Safety and Health Act of 1977, nor its predecessor, the Federal Coal Mine Health and Safety Act of 1969, whose statutory provisions has been set forth as Section 75.1707 supra, contain any definition of either the type or degree of separation that is required between the track (haulage) and escape entries. Nor

does the legislative history of either Act shed any light on this issue. Hence, in interpreting legislative intent, reliance is placed upon the common meaning of the term "separate". Webster's Third New International Dictionary ("Webster's") (1986 Edition) defines the word separate as "la: to set or keep apart: . . . 4: to block off: BAR, SEGREGATE. . . ."

The cited stopping was permanent in nature, constructed of cement blocks, and was approximately 15 inches wide, by approximately 6 1/2 feet high. Although it contained an 8 inch by 16 inch hole, there can be no doubt that the stopping did separate the escape (intake) entry from the adjacent travel entry, as it was placed in the crosscut between these two entries. There is no requirement in either the plain language of Section 75.1707, or the legislative history, mandating that the air in the intake escapeway be sealed from the air in the travel entry, or that the mandated separation, i.e., the stopping in issue be air tight. Accordingly, I conclude that it has not been established that Respondent herein violated Section 75.1707 supra, as alleged.

Citation 3315802 (Docket No. WEVA 91-1964).

I. Violation of the Ventilation Plan ("the Plan")

On March 5th, Jones cited two haulage doors located in the crosscut at the No. 1 Block, between the intake and the track entries for not being maintained "reasonably air tight". Jones indicated that the haulage door on the track side had a hole that had extended about 12 feet, and was between 1 to 5 inches wide. He also stated that on the door on the intake side, there were 4 locations where there were holes approximately 4 inches by 5 inches. In essence, the citation alleges a violation of the ventilation plan ("The Plan") which provides, as pertinent, as follows:

> "Reasonably air tight haulage doors . . . may be used in lieu of a permanent stopping. They are used to isolate the air from the intake escapeway and the belt entries from the track, for the purpose of crib building, construction work, etc., on the longwall retreat or development panels . . . They will provide the same protection as that of a permanent stopping."

Hence, in summary, according to the Plan, the haulage doors which are required to be "reasonably air tight", may be used in lieu of a stopping, and are to ". . . provide the same protection as that of a pertinent stopping." Also, according to the Plan, the intake escapeway ". . . shall maintain a constant pressure on the intake to the track where these doors are installed."

As observed by Jones, although each of the doors in questions had holes in them, air was going in the direction from the intake to the track entry. However, a pressure door which was located in close proximity in the intake entry, was closed. Jones opined that if the pressure door, which is designed to maintain pressure in the intake escapeway would be opened, then the air flow would reverse, and air would go from the track entry to the intake entry. He indicated that in the normal course mining the pressure door is opened approximately 4 to 5 times a shift, in order to allow traffic such as supplies to traverse the area. None of these statements were impeached by Respondent. Nor did Respondent adduce any evidence to contradict these statements. Accordingly, I conclude that in the normal course of mining, given the holes in the haulage doors, there would not be maintained a "constant pressure on the intake to the track where these doors are installed". Thus, I conclude that the ventilation plan herein was violated by Respondent.

II. Significant and Substantial

According to Jones, the violation herein is significant and substantial in that, in the event of a fire in the track entry, with no-air tight separation between the intake and track entries, smoke and carbon monoxide would enter the intake entry. Workers inby would thus be exposed to the hazard of smoke inhalation and carbon monoxide poisoning. He also indicated that a decrease in visibility caused by smoke could cause lack of orientation, which could result in contusions. Jones noted the existence of fire sources such as a high voltage cable, the liberation of methane which would accumulate in a roof cavity, (FOOTNOTE 1) and the fact that the gauge of the trolley track is incorrect which causes the trolley pole to jump off the wire, and hit the trolley which causes arcing.

In analyzing whether it has been established that the violation was significant and substantial, I note my finding, infra, of the violation by Respondent of the ventilation plan. Further, I find that the violation contributed to the hazard of miners in the intake entry being exposed to the dangers of smoke, should a fire occur in the track entry. Also, the hazards of smoke exposure could certainly result in serious injury as set forth in Workley's uncontradicted testimony.

The issue for resolution, is the likelihood of a fire causing smoke to course from the track entry, through the holes in the doors at issue, to the intake entry. (See, Bethenergy Mines, Inc., 14 FMSHRC _____, Docket Nos. PENN 88-149-R etc., slip op. P.11, (August 4, 1992)). In other words, since the

holes in the door contribute to a hazard only in the event of a fire, it must be established that the event of the fire was reasonably likely to have occurred. (See, Bethenergy, supra).

The mere existence of various potential fire sources can not support a conclusion that the event of a fire was reasonably likely to have occurred in the normal course of mining operations. There is no evidence of the existence of any fault in the condition of the high voltage cable. Further, on cross-examination, Jones indcated that the portion of the track where the gauge is not correct is not within the P8 Panel, i.e., the panel at issue.2 He conceded that, accordingly, a fire started by arcing caused by the incorrect track gauge should not affect the P8 panel in issue, unless the fire gets out of control. There is no evidence that this would be reasonably likely to occur. Also, contrary to Petitioner's assertion in her brief that the mine in question has a history of mine fires, the only evidence on this point is the testimony of Jones that there was a fire causing fatalities in 1972. I thus conclude that, inasmuch as the record fails to establish the likelihood of a hazard producing event i.e., a fire, it must be concluded that the violation herein was not significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1 (1984).

III. Civil Penalty

In evaluating the negligence, if any, of the Respondent with regard to the specific violation cited herein, not much weight is placed on the fact that on various dates in January and February 1991, Jones issued citations to Respondent alleging violations of Section 75.1707 supra, with regard to stoppings located at other longwall panels. The issuance of these citations is accorded little weight in evaluating whether Respondent knew or reasonably should have known of the existence of the specific holes in the doors in question.

Jones indicated that during inspections on February 21, 1991, and February 26, 1991, he cited the same doors as containing holes, and being in violation of the Ventilation Plan. However, he indicated on cross-examination that the holes that were in existence on March 5th and cited by him, were not the same holes as were cited in February. Also, although he had cited the same doors, in February, they were at a different location.

Jones indicated that the holes were "very obvious" (Tr. 48) and that the doors themselves were approximately 20 to 25 feet from where he got off the mantrip. However, there was no

evidence as to how long these holes existed prior to the inspection, nor is there any evidence to indicate what caused these holes.

I find, for the above reasons, that there is insufficient evidence to base a conclusion that the Respondent's negligence herein was more than a slight degree. Taking into account the remaining factors in Section 110(i) is stipulated to by the parties I conclude that a penalty of $100 is appropriate for the violation cited in Citation No. 3315802.

ORDER

It is ordered that, within 30 days of this decision, the operator shall pay $3,206 as a civil penalty for the violations found herein.

It is further ordered that citation numbers 3315803 and 3315865 be DISMISSED.

It is further ordered that citation number 3315802 be amended to reflect the fact that the violation cited therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge
(703) 756-6215

1. The mine is classified by MSHA as one that liberates more than one million cubic feet of methane in a 24 hour period.

2. The parties stipulated that the site of the incorrectly gauged trolley track is between the P7 and P8 Panels.