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SOL V. CONSOLIDATION COAL
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January 5, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 92-884 A. C. No. 46-01455-03886
v.	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor U. S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820.

Order Nos. 3716170, 3716171, and 3716172 were issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), for alleged violations of 30 C.F.R. 75.1105. A hearing was held on November 16, 1992, the transcript has been received and the parties have filed post hearing briefs.

Section 104(d) of the Act, supra, provides as follows:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such 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, and if he finds such violation to be cause by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any cita-

> tion given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
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> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 C.F.R. 75.1105, which restates section 311(c) of the Act, 30 U.S.C. 871(c) sets forth the following:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fire proof construction.

Order No. 3716170 dated August 27, 1991, and challenged herein, charges a violation for the following alleged condition or practice:

> The #17 thro mor pump operating at #24 block along the 15 south haulage is not ventilated with a current of air that is coursed directly to the return. The 10" vent tube provided has fallen down and separated 3 different places on the other

side of the 15 south escapeway and the air current at this location is leaking into the escapeway as cited on citation #3716169.

When this area was traveled on 8-8-91 this same vent tube was found to be leaking and in need of extra support. The condition was discussed with the company representative at that time. The company has failed to take adequate measures to prevent this condition from occurring even though they had knowledge of the area and condition.

This is a repeat violation of standard 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 3rd time this quarter that 75.1105 has been cited.

The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at both the last quarter close out and R.V.R.P. meeting.

Two other orders (#3716171 and #3716172) were issued today for similar conditions at other electrical installations inspected.

Order No. 3716171 dated August 27, 1991, also challenged herein, charges a violation for the following alleged condition or practice:

The #20 thro mor pump located at #27 block along the 15 south haulage is not ventilated with a current of air that is coursed directly to the return. The 10" vent tube used to ventilate this pump has fallen down in the intake escapeway so that any smoke from a fire on this pump would polute (sic) both the track and escapeway.

The vent tube has not been knocked down by fallen material or any abnormal roof condition but looks as if the support wires have rusted and the spads pulled out of the head coal.

This is a repeat violation of standard 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 4th time this quarter that 75.1105 has been cited on the electrical installations.

> Two other orders (#3716170 and #3716172) were issued today for similar conditions at other electrical installations inspected.
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> The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at both the last quarter close out and R.V.R.P. meeting, and the company has failed to take adequate steps to correct their problem.

Order No. 3716172 dated August 27, 1991, similarly challenged herein, charges a violation for the following alleged condition or practice:

> The #160 rectifier located at #29 block of the 15 south haulage is not ventilated with a current of air that is coursed directly to the return.
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> When tested no air is being pulled into the vent tube provided in the area and air is leaking from the area into the track entry thru (sic) holes in the frontwall. After examination the vent tube was found to be down in the old belt entry so that smoke from a fire on this rectifier would quickly polute (sic) both the track and belt air used to ventilate the 6 Butt and 7 Butt sections.
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> The vent tube does not look to have been torn down by abnormal roof conditions but looks to have fell down because of rusty wires and spads that pulled out of the top.
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> This is a repeat violation of 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 5th time this quarter that 75.1105 has been cited on the electrical installations.
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> Two other orders (#3716170 and #3716171) were issued today for similar conditions at other electrical installations inspected.
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> The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at the last quarter close out and R.V.R.P. meeting and the company has failed to take adequate steps to correct their problem.

The inspector found that the foregoing violations were significant and substantial and that they resulted from an unwarrantable failure on the part of the operator.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 4-6):

(1) the operator is the owner and operator of the subject mine;

(2) the operator is subject to the jurisdiction of the Mine Act;

(3) I have jurisdiction in this case;

(4) the inspector who issued the subject orders was a duly authorized representative of the Secretary;

(5) true and correct copies of the subject orders were properly served upon the operator;

(6) copies of the subject orders and terminations thereof at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any matters asserted therein;

(7) payment of any penalty will not affect the operator's ability to continue in business;

(8) the operator demonstrated good faith abatement;

(9) the operator has an average history of prior violations;

(10) the operator is large in size;

(11) a section 104(d) chain has been established;

(12) the fact of the violation is not contested in any of these orders;

Without objection, the stipulations were accepted (Tr. 6). In addition, it was agreed that the three orders would be tried as a group (Tr. 20-21).

Not only are the violations admitted, but there is no dispute with respect to the conditions described by the inspector in the orders and at the hearing (Tr. 31-32, 38-40, 44-47, 142-143, 147-149).

The first issue to be resolved then is whether the violations were significant and substantial. The Commission has held that a violation is properly designated as S&S "if, based on the particular facts surrounding that 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 Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

> 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.

The first element of the Commission's test is satisfied because the violations are admitted. The second element also is satisfied because the evidence demonstrates that should a fire occur in the installations and the air not be vented directly to the return, noxious air or smoke would travel to the faces where men were working (Tr. 68-69). The violation thus presented a discrete safety hazard. The fourth test is likewise met since individuals could inhale polluted air or become trapped by it (Tr. 71). It is with respect to the Commission's third requirement that the findings of significant and substantial herein, like those in many prior cases, founder. As the inspector acknowledged, the cited pumps and rectifiers were operating properly and had no permissibility defects (Tr. 33, 73-74, 76). Nothing else was cited with respect to the electrical equipment (Tr. 74). The inspector agreed that the potential danger would arise from a malfunction in the subject electrical equipment. However, on the day in question he saw no malfunction in the equipment (Tr. 76). This being so, it cannot be found that the Secretary has proved there was a reasonable likelihood that the hazard would result in injury.

I reject the Secretary's contention that in determining whether or not there was a reasonable likelihood that the hazard would result in injury, the emergency (in this case a fire in the electrical installation), must be presumed to have occurred (Secretary's brief p. 10). The Secretary does not define "emergency", or in any way indicate what standards in addition to 75.1105 would qualify under the "emergency" umbrella. Th scope of what she proposes, is therefore, unexplained. Admittedly, 75.1105 is designed to prevent the serious effects that

could arise from a fire in an electrical installation. This does not, however, mean that the standard presupposes the likelihood of the occurrence of the hazardous situation. What the standard does is set forth the ventilation requirements for electrical installation which must be followed in all instances. The standard is silent on likelihood or possibility or probability or any like inquiry. Degrees of chance are relevant to evaluation of gravity, of which S&S is a particular variant. Nowhere in the standard or elsewhere is there any basis for adopting a presumption that would do away with the Commission's requirements of proof. The inevitable consequence of giving the Secretary the benefit of the proposed presumption would be to render this violation and whatever other ones qualify as emergencies, per se significant and substantial. By so doing, the third step of the Commission's test for S&S would be vitiated, because the very facts which the Commission in Mathies required the Secretary to prove would be assumed to have happened without reference to what actually transpired in the case. The Commission's conclusion that a confluence of factors must exist in order to establish S&S is premised upon a case by case evaluation of the particular circumstances as adduced through the evidence of record. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988).

Also without merit is the Secretary's assertion that the subject violation is S&S, because if there were an immediate risk of fire, the violation would constitute an imminent danger rather than just being S&S (Secretary's brief p. 10). The Secretary has misframed the issue. A reasonable likelihood of fire can exist without there being an immediate danger. Consideration of imminent danger involves analysis of the facts pursuant to precepts and rules laid down by the Commission for that purpose. Wyoming Fuel Co., 14 FMSHRC 1282 (August 1992); Utah Power & Light Co., 13 FMSHRC 1617 (October 1991); Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989). The Secretary submits no such analysis of imminent danger. She cannot make out her case by confusing the concepts of imminent danger and significant and substantial, because under governing law they are separate and distinct. It is recognized that in several recent decisions the Commission declined to rule on the propriety of the presumption advanced by the Secretary herein, because in those cases the issue had not been presented at the trial level. Shamrock Coal Company, Inc., 14 FMSHRC 1300 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306 (August 1992); Beech Fork Processing Inc., 14 FMSHRC 1316 (August 1992). For the reasons set forth herein, I have no difficulty in declining to accept and apply a presumption which I perceive to constitute a material and unsupported departure from current Commission interpretation and practice.

The fact that the violations in this case do not meet all the tests required to support a finding of S&S does not however, mean that they were not serious. The Commission has recognized

that S&S and gravity are not identical, although they are frequently based upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987). Following Commission precedent, I have previously held that although they may have common elements, the term "significant and substantial" is not synonymous with gravity. Consolidation Coal Company, 10 FMSHRC 1702, 1706 (December 1988); Columbia Portland Cement Company, 10 FMSHRC 1363, 1373 (September 1988), See also, Energy West Mining Company, 14 FMSHRC 1595, 1611 (September 1992). In this case the dangers posed by smoke and contaminated air reaching men at the face, where mining was going on at the time, were grave (Tr. 74). On the basis of such proof I find the violations were serious.

The remaining issue is whether the violations resulted from an unwarrantable failure on the part of the operator. The Commission has determined that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The Commission has also stated that this determination is derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

The evidence shows that prior to 1990 the operator used plastic tubing to vent air from electrical installations to the returns (Tr. 122, 136-137, 149-150). When the Mine Safety and Health Administration no longer accepted plastic tubing due to the fire hazard it presented, the operator over a three month period removed the plastic and replaced it with metal tubing (Tr. 37, 98, 123). The galvanized metal tubing came in 10 foot sections and was 10 inches in diameter (Tr. 37, 150). Spads 15 or 20 or more feet apart were driven into the coal roof attached by wires wrapped around the tubing (Tr. 38-39). As demonstrated by the orders issued in this case, air was not being vented from the electrical installations directly to the return because the metal tubing had fallen down. Spads coming loose from roof and wires rusting caused the tubing to fall (Tr. 37-38, 45-46, 137, 143). Due to changing climatic conditions the roof was flaky, sloughing and deteriorating over time, making the spads fall out of the roof (Tr. 39, 44, 137-138). Also, wires just rusted and fell down (Tr. 44).

A conflict exists over when the operator learned of the tubing's inadequacies. On August 8, 1991, the inspector found ventilation tubing that had fallen down from a broken wire and spads that had come loose from a roof deteriorating from climatic changes (Tr. 40-41). Because the operator's escort accompanying

the inspector temporarily fixed the tubing before the inspector reached the pump, the inspector did not issue a citation on that occasion (Tr. 40-41, 43). The inspector did discuss the matter with the company escort and told the escort that precautions should be taken to insure the tubing was properly repaired and secured or else it would fall down again (Gov't. Exh. 5; Tr. 42-43). However, three weeks later the inspector found the tubing down again at the same location and issued the first of the three withdrawal orders at issue herein (Tr. 32).

According to the operator's safety supervisor, the operator only became aware of tubing problems from the deteriorating roof on August 8, 1991, when the inspector found tubing down at the location he subsequently cited on the 27th (Tr. 150-152, 155-156, 161-163). The supervisor testified that between August 8 and August 27 the operator instituted a program of reinforcing the tubing which took about two and a half months to complete (Tr. 152, 167-168). In his view citations issued by the inspector prior to the subject orders did not put the operator on notice of deteriorating roof and climatic conditions as a cause of tube falls because the earlier citations concerned situations where the tubing had been dislodged by pieces of falling rock and roof (Tr. 151).

Upon review I find more persuasive the evidence of the Secretary which clearly shows that the operator had knowledge sufficient to enable it to take action which would have rendered unnecessary the issuance of the subject orders. I accept the inspector's testimony that the operator attempted to address the August 8 situation merely by putting up one wire with no evidence of support anywhere (Tr. 179). I, therefore, approve the inspector's opinion that no one paid attention to that area (Tr. 179-180).1 Under the circumstances, it was all but inevitable that tubing would fall again in the same and at other locations, as it in fact did, leading to issuance of the subject withdrawal orders. Had the operator heeded the advice of the inspector on August 8, the situation would have been remedied. The information which the operator received on August 8 put it on notice that immediate and wholesale corrective action to resupport the

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1 The operator's safety escort testified that an entry in the fireboss book that the ventilation tubing was rehung, referred to the August 8 condition involved in this case (Tr. 114, 126-127). This testimony is rejected because it is not based on first-hand information and because it is directly contradicted by the inspector who did have direct knowledge that the fireboss entry dealt with a different situation concerning inadequate examinations of intake escapeways (Tr. 178-179).

tubing was necessary to prevent the possibility of miners at the face being exposed to smoke and polluted air. The operator's inception of a program which took 2« months to complete was an inadequate response to a potentially dangerous situation of which it had actual knowledge. Such conduct can be fairly characterized as "aggravated" within the purview of Commission precedent.

A finding of unwarrantability is further supported by evidence that for some months before the August 8 incident the operator knew it had problems with falling ventilation tubes, calling for remedial action. In this connection, I accept the inspector's testimony that during the second quarter of 1991 he had a number of meetings with mine management pursuant to the operator's Repeat Violation Reduction Program (R.V.R.P.) at which ventilation problems under 75.1105 were talked about (Tr. 52-60). The operator's safety escort who with the inspector initiated these meetings, stated that ventilation tubing was identified as a problem at the meetings (Tr. 132-133). According to the inspector, beginning in April the deterioration of the spads and wires was visible and was pointed out during inspections (Tr. 176). At the final R.V.R.P. meeting with the general mine foreman at the end of June, the inspector highlighted problems with the ventilation of electrical installations (Tr. 52-53, 61-62, 175-176). In particular, the inspector called attention to the fact that tubes and the wires supporting them were rusting and that spads were pulling out of the top (Tr. 62). At this meeting all conditions and suggestions about the tubing were noted (Tr. 175-176). Insofar as deterioration of the roof due to climatic conditions was concerned, the inspector testified that the company was well aware of changing weather conditions which occur every year (Tr. 180).

The foregoing evidence is compelling and based upon it, I conclude that prior to the issuance of the subject orders, the operator had known for some months that it had an ongoing problem with ventilation tubing for electrical installations. I further conclude that the operator was conversant with climatic conditions and changes which caused deterioration in the roof, loosening the spads and rusting the wires which held the tubing up. I also determine that it is not necessary that the fallen tubing in the prior citations have resulted from exactly the same cause as the three orders involved herein. Nor is it necessary for a finding of unwarrantability that the tubes repeatedly fall down at the same location. The operator's suggestions to this effect is rejected (Operator's brief pp. 8-9). What matters is that for a long period of time the operator not only understood it was having difficulty regarding the ventilation tubing, but also was apprised of all the various circumstances which caused the problem. The operator's failure to remedy the situation despite continual suggestions from the inspector can only be characterized as aggravated conduct. The inspector's findings of unwarrantable failure are affirmed.

Based upon the foregoing evidence I further find the operator is guilty of high negligence.

Since the inspector's findings of violations and of unwarrantability are valid, the requirements of section 104(d)(2) are satisfied and the subject orders are upheld. UMWA v. Kleppe, 532 F.2d 1403 (D. C. Cir. 1976); Old Ben Coal, 1 FMSHRC 1954, 1959 (Dec. 1979); Eastern Associated Coal Corp., 13 FMSHRC 902, 911 (June 1991).

It is well established that hearings before the administrative law judges of this Commission are de novo and that the judges are not bound by penalty assessments proposed by the Secretary. Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984); Consolidation Coal Company, 11 FMSHRC 1935, 1939 (Oct. 1989). In determining the appropriate penalty amounts for these orders, I bear in mind that the findings of significant and substantial have been deleted. However, the violations were serious and resulted from high negligence. Taking into account these criteria and the others to which the parties have stipulated, I find that a penalty of $900 is justified for each of the subject withdrawal orders.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is ORDERED that the findings of significant and substantial for Order Nos. 3716170, 3716171, and 3716172 be VACATED.

It is further ORDERED that the findings of unwarrantable failure for Order Nos. 3716170, 3716171, and 3716172 be AFFIRMED.

It is further ORDERED that Order Nos. 3716170, 3716171, and 3716172 be AFFIRMED.

It is further ORDERED that a penalty of $2,700 be ASSESSED and that the operator PAY $2,700 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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