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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-350
	:	A. C. No. 15-04670-03673
v.	:	
	:	No. 37 Mine
ARCH OF KENTUCKY INCORPORATED, Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Marco M. Rajkovich, Esq., Wyatt, Tarrant, & Combs, Lexington, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

This civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) alleging a violation by the Operator (Respondent) of 30 C.F.R. 75.326. Pursuant to notice the case was scheduled and heard in Johnson City, Tennessee on October 22, 1992. James W. Poynter testified for Petitioner, and Don Henderickson, and Benny Dixon, testified for Respondent. Petitioner and Respondent filed post-hearing briefs on December 29 and December 28, respectively.

Findings of Fact and Discussion

I. Introduction

The G-4 Longwall Panel at Respondent's Karst Mine is located under another coal mine, and has experienced pressure from both the roof and the mine floor. Subsequent to the opening of the section on February 28, 1991, due to continuing roof control problems Respondent had to have the area re-bolted with super bolts. Additional supports in the forms of cribs, and donut cribs with beams on top, were also installed.

On July 15, 1991, a roof fall approximately 120 feet long, and the full width of the 18 foot wide entry, occurred in the belt entry between crosscuts 6 and 8. Additional cribbing was

again installed in the G-4 North Panel, and the area was rebolted. The following day, another roof fall occurred in the belt entry on top of the first fall, and it was decided to abandon the area and remove all equipment. As a consequence of the roof falls and deteriorating roof condition, stoppings were removed in the 6 and 8 crosscuts in order to installed additional support around the fall. The belt line was re-routed to detour the area of the fall, and new stoppings were installed to isolate the re-routed belt line from the intake entry. Subsequent to the roof fall on July 15, supplies were continuously brought to the area in question, in order to provide additional support which was being done on an on going basis. Subsequent to the roof fall, nothing was done to intentionally alter the ventilation as required by Respondent's ventilation plan.

Once supplies were brought onto the section, they had to be hand carried either through a door in the third crosscut between the belt and intake entry, or between the doors built into the stoppings in crosscut No. 8 between the belt and intake entries, and in the intake entry just inby crosscut No. 8.

In normal operation, the doors separating the belt from the intake entries are kept closed in order to prevent air in the belt from going to the face. However, subsequent to the roof falls on July 15, the doors were opened in order to allow the transfer of material to the belt entry, as there was no other access. None of the doors were kept open for the purpose of having air go from the belt entry to the face.

A few days after July 15, another roof occurred in the No. 7 crosscut to the track entry. The fall, 8 to 10 feet high, covered the width of the entry and extended 100 feet.

II. Violation of 30 C.F.R. 75.326

On July 31, 1991, James W. Poynter, an MSHA Inspector, inspected the area in question. According to Poynter, at approximately 10:30 a.m., while in the belt entry between crosscuts 5 and 6, he felt movement of air in the beltway which was "very perceptible" (Tr. 65). He picked up a hand full of rock dust, tossed it in the air, and it "easily showed the direction of the air current travel" (Tr. 65) inby. The active working place was a little more than four crosscuts inby. According to the ventilation plan, air in the belt entry is to course outby to a regulator located at the intersection of the G-4 Beltline and the return entry of the G-North Panel. Poynter issued a section 104(d)(2) order alleging a violation of 30 C.F.R. 75.326, which, as pertinent, provides that intake entries shall be separated from the belt entry and that air coursing the belt entry "...shall not be used to ventilate" active working places.

Respondent has not rebutted or impeached the testimony by Poynter with regard to the flow of air inby as observed by him in the belt entry. As conceded by Benny Dixon, who was Respondent's day shift supervisor on July 31, if air is going inby in the belt entry it is "likely" that some will go across the face (Tr. 305) It is Respondent's position that Section 75.326 supra, which precludes air in the belt entry from being used to ventilate the working place, is violated only when an operator has "employed belt air for the given purpose of ventilating the working face". I do not accept Respondent's argument. There is nothing in the plain language of section 75.326 supra, to support the interpretation urged by Respondent. There is no language indicating that only a planned or intentional use by an operator by air from the belt entry to ventilate the working face is prohibited. Nor does the legislative history of the statutory provision which has been repeated in section 75.326 supra, allow for the interpretation urged by Respondent. In this connection, I take cognizance of the Senate Report of the Committee on Labor and Public Welfare accompanying S. 2917, regarding the purpose of Section 204(y) whose pertinent language was continued in the Federal Mine Safety and Health Act of 1977, "the Act," and reiterated in Section 75.326 supra. (S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), reprinted in Legislative History of the Federal Coal Mine Health and Safety Act of 1969. ("Legislative History")) The Senate Report provides as follows:

> The objective of the section is to reduce high air velocities in trolley and belt haulageways where the coal is transported because such velocities fan and propagate mine fires, many of which originate along the haulageways. Rapid intake air currents also carry products of the fire to the working places quickly before the men know of the fire and lessen their time for escape. If they use the return aircourses to escape, the air coursed through may contain these products and quickly overtake them. Also, the objective is to reduce the amount of float coal dust along belt and trolley haulageways. (Senate Report supra at 64, Legislative History, supra at 190).

Hence, the expressed intention of Congress in enacting the language found in Section 75.326, was to reduce the hazards of the propagation of mine fires and the carrying of fire products to the working places. In order to interpret Section 75.326 supra consistent with Congressional intent, i.e. to minimize the hazards which formed the basis of Congressional concern, I conclude that Section 75.326 supra has been violated where the proscribed condition, i.e. air in the belt entry used to ventilate the working place, has arisen even inadvertently and

without the expressed intent of the operator.1 To accept Respondent's position, would be in conflict with Commission authority holding that because the purpose of the Act is the protection of miners, the regulatory scheme of mandatory safety standards contemplates the strict liability of an operator. (See Western Fuels-Utah, 10 FMSHRC 256 (1988); Asarco, Inc, FMSHRC 1632 (1986))

III. Unwarrantable Failure

According to Poynter, when he observed the flow of air from the belt entry inby, he went to examine the cause for the direction of air flow. He indicated that he observed four conditions which could have given rise to the violative change in air flow. In the No. 3 crosscut, the double doors were partially open, a car was parked in the opening, and a curtain had been draped across the car but did not extend to the floor. Also, at a point where the belt in question went over an overcast, two doors at the inby wall of the overcast were closed. At a head drive (headdrive C) a door was open in the stopping isolating the belt from intake air. Lastly, at a point approximately 120 feet outby the working face where the belt was separated from the intake entry, a curtain was hung "very loosely". (Tr.60) According to Poynter, these conditions were "easily observed" (Tr.67), and the improper direction of the flow of air could have been remedied by tightening the curtain that was loosely hung, closing the mandoor, and properly closing off the two supply doors. He also indicated that as soon he entered the belt entry, "instantaneously" (Tr. 68), he could feel that the air direction was wrong. In essence, none of this testimony by Poynter in these regards was rebutted or impeached by Respondent. Indeed, Benny Dixon, Respondents day shift supervisor conceded that the four factors referred to by Poynter could possibly have caused the air to go the wrong way. In essence, this testimony of Poynter appears to provide the basis for the argument of Petitioner that the violation herein was as a result of Respondent's "unwarrantable failure".

In order to find that a violation resulted from the Respondent's "unwarrantable failure" it must be established that there existed "aggravated conduct", on the part of the Respondent i.e. more than ordinary negligence (Emery Mining Co., 9 FMSHRC 1997 (December 1987)).

I find, based on Poynter's testimony, that the improper direction of the air in the belt entry was obvious. Also, I find, based on Poynter's testimony, that once a change in a

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1to the extent that American Coal Company, 1 FMSHRC 1057 (August 17, 1979, Judge Michels) relied on by Respondent, is inconsistent with this decision, I choose not to follow it.

direction in the air flow was noted, a search for its cause should have been made, and such a search would have revealed the conditions observed by Poynter as, according to his testimony, they were obvious. Also unchallenged are Poynter's assertions with regard to the steps that should have been taken to remedy the reversal in air flow. I thus find that Respondent herein was negligent to a moderate degree with regard to the violation herein.

However, there is no evidence as to when the change in air flow first became perceptible. Nor is there any evidence as to how long the conditions observed by Poynter, which could have caused the reversal in air flow had been in existence. Neither the pre-shift examination report of July 31, nor the report of two other examinations made on July 30 and July 31 (Exhibits R-1 and R-2), note any abnormality in the direction of air flow in the beltline. According to Poynter, he spoke with Ben Rhymer, the foreman of the shift that had begun at 8:00 a.m., and asked him if he "made the belt", and Rhymer indicated that he did, but he did not recall the direction of the air. Further, a finding of a degree of negligence more than ordinary i.e. aggravated conduct, is mitigated by the fact that, as indicated by Dixon, the doors were left open, as they were the only means of access for equipment to brought to the area in question. The equipment was being brought to the area in question on a continuous basis in order to provide critical support to an unstable roof that had already fallen three times, and had experienced numerous bumps. It also is noted that the doors were normally closed, and employees were instructed at weekly meetings with regard to the closing of doors. Further, although a car had been parked in the doorway which apparently resulted in a curtain being draped over it which did not reach the floor, according to the uncontradicted testimony of Dixon there was no other area for the car to be stored. He indicated that such storage was necessary in order to allow other equipment to go inby to facilitate the supporting of the roof. For these reasons, and taking into account the priority placed by Respondent on working on a continuous basis to support the hazardous roof, I find that it has not been established that the violation herein was as the result of Respondent's unwarrantable failure. (See, Emery, supra).

IV. Significant and Substantial

Petitioner also takes the position that the violation herein has set forth by Poynter is significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) 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 Gypsum Co., 3 FMSHRC 822, 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 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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)(1), 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 Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

As discussed above infra, II, the record establishes a violation of a mandatory standard i.e. Section 75.326 supra. I also find that the flow of air from the beltline toward the working place clearly contributed to the hazard of an injury to miners working inby as a consequence of a fire. Hence, the first two elements of Mathies have been met. The key issue herein is the existence of the third element of Mathies. In order for this element to be met, Petitioner must establish a reasonable likelihood of the existence of an injury producing event i.e.,

herein, a fire. In this connection, Poynter testified that the drives contained electrical installations and drive motors which are known to cause fires. Further, in the event of a fire the hazards are exacerbated by the fact that the deluge system is not present at the drives of the belts. However, Poynter did not indicate the existence of any defects in any of the electrical equipment. Also, he indicated on crosss-examination, that from the new belt drives to the section it was very wet. According to the uncontradicted testimony of Dixon, the belt was 5 1/2 feet off the bottom of the floor, and hence there were no friction points. Also, according to the uncontradicted testimony of Dixon, although the deluge system was not present, the CO Censor was in operation, there were four fire extinguishers at the head drives, as well as a 2,000 foot fire hose at a power center in the area, as well as 4 inch water lines. Also mitigating against likelihood of a fire is the fact that no methane was indicated to be present.

Therefore, for all these reasons I conclude that there was not a reasonable likelihood of an injury producing event, i.e. a fire, contributed to by the violation herein. Thus, I find that it has not been established that the violation was significant and substantial (See Mathies and U.S. Steel).

Considering all the statutory factors set forth in Section 110(i) of the Act, I find a penalty of $700 to be appropriate.

ORDER

It is ORDERED that Citation No. 3834380 be amended to reflect the fact that the violation therein was not significant and substantial and was not the result of the Operator's unwarrantable failure. It is further ORDERED that the citation herein be amended to a Section 104(a) citation. It is further ORDERED that within 30 days of this decision Respondent pay a civil penalty of $700 for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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