CCASE:
SOL (MSHA) V. CONSOLIDATION COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-816
	:	A.C. No. 46-01455-03882
v.	:	
	:	Docket No. WEVA 92-821
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01968-03989
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 92-758
	:	A.C. No. 46-01455-03874
	:	
	:	Osage No. 3 Mine

DECISION

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

Before: Judge Feldman

In these three proceedings, the Secretary seeks to impose civil penalties on the respondent, Consolidation Coal Company, under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801. et seq., for three alleged violations of the mandatory health and safety standards found in 30 C.F.R. Part 70 and Part 75. The respondent filed timely answers contesting the alleged violations and these cases were docketed for hearing. Pursuant to notice, an evidentiary hearing was held in Morgantown, West Virginia, at which Lynn Arthur Workley testified on behalf of the petitioner and Jeffrey Todd Moore testified for the respondent. The parties' stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in Section 110(i) of the Act are of record. The parties filed post-hearing briefs which I have considered in my resolution of this matter.

At the hearing the petitioner moved to settle Docket Nos. WEVA 92-816, and WEVA 92-758. These dockets each involve single citations for alleged violations of Section 70.510(b)(2) concerning the respondent's hearing conservation plan and its responsibility to provide periodic audiograms for selected employees. The proposed settlement agreement involves the respondent's acceptance of liability for the $1,100 assessed

penalty associated with 104(d)(2) Order No. 3716164 which is the subject of Docket No. WEVA 92-816. This order concerns the respondent's failure to provide audiograms for stopper operators. In addition, the Secretary moves to vacate the 104(d)(2) Order No. 3716165 in Docket No. WEVA 92-758 because of an inability to establish a violation of the respondent's hearing conservation plan with respect to its longwall operators. Arguments in support of the settlement agreement were provided at the hearing at which time I issued a bench decision approving the subject motion. The terms of the settlement agreement will be incorporated as part of this decision.

Remaining Docket No. WEVA 92-821 concerns a citation and an associated imminent danger withdrawal order involving a roof condition in the tailgate entry of the respondent's Blacksville No. 2 Mine.

PRELIMINARY FINDINGS OF FACT

Lynn A. Workley has been employed as an inspector with the Department of Labor's Mine Safety and Health Administration for approximately 10 years. He is certified as an underground mine foreman in the State of Ohio. On June 13, 1991, during the course of an inspection of the respondent's Blacksville No. 2 Mine, Inspector Workley issued 104(a) Citation No. 3715953 for an alleged significant and substantial violation of the mandatory safety standard found in 30 C.F.R. 75.202(a).(Footnote 1) Citation No. 3715953 charged as follows:

> The mine roof in the 13 M longwall tailgate entry between 4+15 and 4+80 is broken, cracked, and sagged, between the existing supports and is not adequately supported or controlled to prevent the roof from falling in this area and weekly examination of this airway is required. This condition is the contributing factor to issuance of Imminent Danger Order No. 3715952 dated 6/13/91; therefore, no abatement time is set.

Contemporaneous 107(a) Order No. 3715952 provided a further description of Inspector Workley's observations. This Order stated:

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1 Section 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts (emphasis added)."

> The tailgate entry off of the 13 M longwall section is unsafe to travel between 4+15 and 4+80. The installed roof support (bolts and double row of cribs) has failed to adequately support the roof. The mine roof is cracked, broken, and sagged between the cribs which are crushing badly. Some head coal and roof rock has already fallen and the roof was flaking and audibly cracking at this time. The underlaying (sic) cause of this imminent danger is management's failure to provide adequate support in the longwall tailgate entry.

The above citation and order involve the tailgate entry of the 13 M longwall section. The tailgate entry is located between the active longwall panel and the gob area, where the longwall panels have already been mined. Each development section has four entries. On the tailgate side, only one entry is safe to travel. The tailgate entry is the alternative escapeway from the longwall in the event of a headgate roof failure or fire.

Workley testified that he entered the tailgate entry on June 13, 1991, from the main entry with the respondent's Safety Escort Todd Moore, miner representative Jack Rinehart, and Stephanie Bunn, an inexperienced miner trainee. They proceeded up the tailgate entry in the direction of the longwall face until the roof began to deteriorate. At that point, Workley and Moore left Rinehart and Bunn and proceeded to determine how far it was safe to travel. Workley testified that at approximately 415 feet into the tailgate entry, the roof conditions had deteriorated to such an extent that it became unsafe to continue. In describing the roof condition, Workley testified that:

> We started with approximately 7 feet of [height] where we entered the tailgate entry. As we proceeded forward, the mine floor had squeezed up, the mine roof had squeezed down. At 4+0, the mining height was approximately 4 feet high and ahead of us it got lower yet. The mine roof was broken. There was (sic) visible cracks in it. It was sagged between the cribs and the solid block. (Tr. 33-34).

Workley testified that the respondent's roof control plan requires the tailgate entry to be supported by roof bolts through a board or steel mat, a maximum of 5 feet across and 8 feet apart. The roof control plan also requires that cribs be installed the entire length of the tailgate entry for

supplementary roof support. The cribs are 5x7 inch timbers that are 30 inches in length. The cribs are placed on the ground parallel to each other approximately 30 inches apart. Alternating cribs are then placed upon each other at right angles until they support the tailgate entry from the mine floor to the roof. Wedges are driven into the corner of the cribs for additional support. Workley described the condition of the cribs as follows:

> The wood was crushing into toothpicks. The 5x7's were no longer 5x7's. They started out at 7 [feet] high and were smashed to 4 [feet] high in places. They started out in vertical position from the floor to the roof, some were leaning as much as a 30 [degree] angle towards solid block. (Tr.37).

Based on the above observations, Workley concluded that it was dangerous to continue down the tailgate entry toward the longwall. Therefore, he and Moore retreated up the tailgate entry back around to the headgate entry across the face and then back down the tailgate to determine the extent of the deteriorated area. Workley determined that approximately 65 feet of the tailgate entry was unsafe to travel. (Tr.38). In this 65 foot area, pieces of roof had fallen and continued to fall, the cribs were squeezed and broken and the roof was making audible cracking noises. (Tr.39). Workley testified that the roof and floor were squeezed to such an extent in this 65 foot area that there were places where the vertical clearance was as little as 2 feet. (Tr.81). In short, Workley stated that the roof was ready to fall "at any moment." (Tr.40). He testified that it was highly likely, given the large quantity of roof material, that a roof collapse would result in serious or fatal injuries. (Tr.40).

Workley testified that mine personnel routinely traverse the tailgate entry. For example, he stated that section or longwall foreman occasionally go into the tailgate entry to adjust or repair a block stopping to maximize ventilation of the longwall face. In addition, he stated that 30 C.F.R. 75.305 requires weekly examination of the tailgate entry for hazardous conditions. Finally, Workley testified that employees must traverse the area in order to drag or rock dust the tailgate floor in accordance with Section 75.403. (See Tr. 40-41,94).

Consequently, Workley issued a 107(a) withdrawal order in addition to a 104(a) citation because of his concern for the safety of workers who would go into the affected area during the

course of normal mining operations. However, the only effect of this withdrawal order was to prevent workers from entering this area. The 107(a) order did not require the cessation of any mine operations. (Tr. 47).(Footnote 2)

The respondent called Safety Escort Jeffrey T. Moore who accompanied Workley during the inspection. Moore essentially corroborated the observations of Workley. In this regard, Moore testified that:

> "[t]he roof had fallen out, the cribs were crushing. The top was working, you could here it audibly cracking. You could see flakes and pieces of roof material and rib falling to the floor." (Tr.116).

Moore's testimony that he did not believe that the roof condition constituted an imminent danger is belied by his own characterizations of the roof condition. Significantly, Moore indicated that he would not feel very comfortable passing through the area and that he felt the area was "somewhat risky". (Tr.118). He also testified that "it seem[ed] to be hazardous, that I wouldn't want to have a picnic lunch in that area." (Tr.122). Although Moore also characterized the area as "somewhat questionable" and an area of "increased danger" he opined that the danger was not of an imminent nature. (Tr.115-117). Finally, Moore testified that ". . . I myself would readily pass through that area if we had a fire or something." (Tr. 120).(Footnote 3)

Moore also testified that he and Workley inspected the same area the previous day on June 12, 1991. Moore conceded that the area had deteriorated since the previous day in that a post had fallen and was lying diagonally across the tailgate entry. (Tr. 119). Moore testified that the roof condition was such that it could not be physically supported because it would endanger anyone sent to alleviate the problem. (Tr.124). Despite the deteriorated roof condition Moore testified that he believed danger boards were inappropriate because the area "was not

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2 The respondent made a motion to dismiss after presentation of the Secretary's direct case. The motion was denied because Workley's testimony adequately established a prima facie case. (Tr. 108-111).

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3 The tailgate entry is the only alternative escapeway in the event of headgate roof collapse or fire. However, Moore's willingness to traverse the tailgate area in question as a last resort in order to escape from the longwall is not relevant to the issue of the fitness of this area as a working environment.

impassable." (Tr.122).(Footnote 4) Moore testified that the condition was ultimately abated approximately 2 to 4 days after Workley issued the citation and withdrawal order by mining past the area in question allowing the area to become part of the gob as the longwall retreated.

FURTHER FINDINGS OF FACT AND CONCLUSIONS

Fact of Occurrence

The respondent, in its brief, heavily relies on the Commission's decision in Cyprus Empire Corporation, 12 FMSHRC 911 (May 2, 1990) which vacated a citation for an alleged violation of Section 75.202(a). The Commission's action in Cyprus was based on its findings that the Secretary had failed to demonstrate that the compromised roof section in that case was an area "where persons work or travel." In Cyprus, the Commission noted ". . . that as soon as Cyprus encountered the poor roof conditions it dangered-off the area to prevent miners from entering. In doing so, Cyprus acted in accordance with accepted safe-mining practice." 12 FMSHRC at 917.

The respondent's reliance on Cyprus is misplaced. Unlike Cyprus, in this case the Secretary has established that mine personnel periodically traverse the area in question to adjust or repair block stoppings, to conduct weekly examinations for hazardous conditions and to drag or rock dust the tailgate floor.(Footnote 5) Moreover, unlike the Cyprus case, the respondent failed to act "in accordance with accepted safe-mining practice" in that it failed to danger-off this roof area despite the apparent deterioration manifested by audible cracking and crushing of the cribs. Significantly, Moore testified that he did not danger-off the area because he believed the area to be passable. Thus, the

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4 Section 303 (d)(1) of the Mine Act provides: "If [a mine operator] finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass. . . No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted." (Emphasis added). 30 U.S.C. 863(d)(1).

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5 Workley estimated that a section foreman enters this area once each shift and that each day consists of three shifts. He also testified that personnel drag or rock dust the area approximately twice weekly (Tr.58).

respondent has neither alleged nor shown that it took any measure to dissuade personnel from passing under the area. I find, therefore, that the evidence strongly establishes a violation of Section 75.202(a) in that this area was situated in a place where persons work or travel and the respondent failed to take adequate measures to protect such persons from hazards related to roof collapse.

THE ISSUES OF SIGNIFICANT AND SUBSTANTIAL

AND IMMINENT DANGER

The respondent maintains that the cited roof condition does not constitute a significant and substantial violation or an imminent danger because no one was required to work or travel in the tailgate entry. In this regard, the respondent argues that it was unlikely that a roof collapse would occur at the very moment that a miner was in this area. As noted above, I credit the testimony of Workley, which was not rebutted by Moore, that employees did have reason to periodically enter this area. This conclusion is consistent with Moore's testimony that the area was "passable" and, therefore, not dangered-off.

Having concluded that employees were exposed to this hazard, I turn to whether the facts in this instance support a designation of "significant and substantial" and "imminent danger". A violation is properly designated as "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 a 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).

A condition is properly designated as an "imminent danger" as defined by Section 3(j) of the Mine Act if the condition ". . . could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j). In Utah Power and Light Company, 13 FMSHRC 1617, 1622 (Oct. 1991), the Commission reviewed the legislative history of this definition and concluded that an imminent danger exists if the inspector determines that the condition presents an impending threat to life and limb without considering the percentage of probability that an accident will happen. Thus, to

support a finding of imminent danger, the inspector must conclude that the hazardous condition has a reasonable potential to cause death or serious harm within a short period of time. 13 FMSHRC at 1622.

In its defense of Workley's citations, the respondent apparently relies on a series of cases which question the propriety of presuming the occurrence of an emergency in order to establish a violation as significant and substantial. See Consolidation Coal Company, 15 FMSHRC ___ (January 1993); Shamrock Coal Company, Inc., 14 FMSHRC 1300 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306 (August 1992); and Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992). Consequently, the respondent argues that a significant and substantial or imminent danger finding in this instance requires the impermissible presumption of the presence of mine personnel at the moment of a roof fall.

I find this argument unpersuasive. In this case, the discrete safety hazard, i.e., an unstable roof, created a real and present danger rather than a presumed threat. The fact that miners were not exposed to this roof hazard at the time of inspection is not dispositive of the S&S or imminent danger issues as long as a miner could be at risk during the course of continued mining operations. See Halfway Incorporated, 8 FMSHRC 8, 12 (January 1986) citing National Gypsum Co., FMSHRC 822, 825 (April 1981) and U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In the current case this area was considered "passable" and thus accessible to mine personnel for periodic examination, stopping maintenance and rock dusting. Thus, miners would be exposed to a potential roof fall which, given the observations of Workley and Moore, was reasonably likely to occur at any moment. In the event of such an occurrence, it is reasonable to conclude that the exposed miners would sustain serious or fatal injuries. Thus, the significant and substantial designation was appropriate under these circumstances and is affirmed.

With respect to the issue of imminent danger, it is significant that the condition could not be abated before it could cause death or serious injury during continued mining operations because abatement was accomplished only after further retreat of the longwall past the area in question, which took approximately 2 to 4 days. During this interim period, absent danger boards, personnel continued to be in jeopardy. In fact, Moore's testimony reflects that it was not until Workley issued the imminent danger withdrawal order that Moore advised the longwall personnel not to traverse the area. (Tr.119). Therefore, the imminent danger order was warranted and shall be affirmed.

CONCLUSIONS

Having affirmed the citation and withdrawal order, I find that the gravity associated with this violative roof condition was serious and that the respondent's underlying negligence was moderately high given the fact that it failed to danger-off the area despite obvious manifestations of an unstable roof. Consequently, I conclude that the $1,300 assessment proposed by the Secretary is appropriate and consistent with the criteria in section 110(i) of the Act.

I am also incorporating the previously noted settlement agreement in this decision, which requires the respondent to pay a penalty of $1,100 for Order No. 3716164 and which vacates Order No. 3716165.

ORDER

Based upon the above findings of fact and conclusions of law, it IS ORDERED that

1. Citation No. 3715953 IS AFFIRMED.

2. Imminent Danger Withdrawal Order No. 3715952 IS AFFIRMED.

3. The proposed settlement agreement concerning Order No. 3716164 IS APPROVED.

4. Order No. 3716165 IS VACATED.

5. The respondent SHALL PAY a civil penalty of $2,400 within 30 days of the date of this decision.

Jerold Feldman
Administrative Law Judge

Distribution:

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