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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 92-799
	:	A.C. No. 46-01968-03982
v.	:	
	:	Docket No. WEVA 92-800
CONSOLIDATION COAL COMPANY	:	A.C. No. 46-01968-03983
Respondent	:	
	:	Docket No. WEVA 92-801
	:	A.C. No. 46-01968-03986
	:	
	:	Blacksville No. 2

DECISION

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

Before: Judge Feldman

These single citation proceedings are before me as a result of petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (The Act). This matter was heard in Morgantown, West Virginia on November 17, 1992, at which time Richard McDorman testified on behalf of the Secretary and Kenneth Ryan and David Lemley testified on behalf of the respondent. At the hearing, the petitioner moved to settle Docket No. WEVA 92-799 which involves a $20 proposed assessment for Citation No. 3718465 for an alleged non-significant and substantial violation of 30 C.F.R. 75.517. This citation alleges a damaged cable jacket on the trailing cable of a loading machine. The proposed settlement involves the respondent's agreement to pay the penalty as assessed. The petitioner's motion for approval of settlement was granted at the hearing and will be incorporated as part of this decision.

The remaining dockets each involve 104(d)(2) orders for violations designated as significant and substantial which allegedly occurred as a result of the respondent's unwarrantable failure. The parties' post-hearing briefs and their stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in Section 110(i) of the Act are of record.

PRELIMINARY FINDINGS OF FACT

Docket No. WEVA 92-800

Richard McDorman has been a Mine Inspector for approximately four years. He also has fifteen years experience in the mining industry including employment as a mine foreman. His educational background includes a Bachelor of Science Degree in Mine Engineering from West Virginia University. (Tr. 22-23).

On July 9, 1991, McDorman conducted a preinspection conference at the Blacksville No. 2 Mine with the respondent's management personnel. (Tr. 50). At this conference, the importance of having conventional firefighting hose for each working section was discussed. As an alternative to standard 1 1/2 inch diameter firehose, McDorman advised management that the 1 1/4 inch diameter waterline attached to the continuous miner could be used as a firehose. This could be accomplished if the operator obtained a fitting adapter that would enable a 1 1/2 inch firefighting nozzle to be connected to the end of the 1 1/4 inch waterline. In accordance with McDorman's suggestion, the respondent obtained the requisite fitting adapter and special wrenches. (Tr. 51).

On November 6, 1991, McDorman inspected the firefighting equipment in the No. 6 South Section of the Blacksville No. 2 Mine. McDorman was accompanied by company representative David Lemley and Bill Keechal, the miner's representative. The No. 6 South Section is a continuous miner section with seven entries. In this section the water supply outlet for the fire suppression system was located at the loading point.(Footnote 1) McDorman noted that the firehose located near the loading point, for use in the event of fire at a working face, was 500 feet in length. (Tr. 29,31-32). To determine if this hose length was adequate, McDorman used the foreman's section map to determine the distances between the water supply at the loading point and the working faces of each entry. McDorman ascertained that the distance from the water supply to the No. 7 working face, the entry in which the continuous mining machine was then located, was 486 feet and within reach of the hose. (Tr. 30,72). However, the 500 foot hose was inadequate for the No. 1 and No. 2 working faces which were 660 and 580 feet from the water supply line, respectively. (Tr. 33,34). Although McDorman did not witness the continuous mining operations in the No. 1 and No. 2 entries, McDorman and respondent witnesses Kenneth Ryan and David Lemley testified that

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1 The loading point is the location at which coal is brought in shuttle cars from the working face and loaded onto a conveyor belt for transportation outby. (Tr.76).

the water supply and section loading point location had not been moved since the No. 1 and 2 entries were mined approximately one week before. (Tr. 97,122,135-136).

After determining that the conventional firehose could not reach the No. 1 and No. 2 faces when they were being mined, McDorman inspected the waterline at the continuous miner to determine whether it could be adapted for use as a firehose.(Footnote 2) (Tr. 38). As noted by McDorman at the preinspection conference, such adaptation requires a standard 1 1/2 inch nozzle and a special fitting to plumb the nozzle to the 1 1/4 inch continuous miner waterline. Although a nozzle was present in the section, it took approximately 45 minutes to locate the necessary fitting. McDorman testified that three mine personnel on the section, as well as Section Foreman Kenneth Ryan, were all unfamiliar with the procedure for plumbing the nozzle to the waterline at the continuous miner. (Tr. 46,48).(Footnote 3)

As a result of his inspection, McDorman issued Order No. 3716493 for an alleged significant and substantial violation of 30 C.F.R. 75.1100-2(a)(1). This mandatory safety standard requires, in pertinent part, that "... waterlines shall extend to each section loading point and be equipped with enough firehose to reach each working face ...." (Footnote 4)

FACT OF OCCURRENCE

Docket No. WEVA 92-800

The respondent, in its brief, argues that the Secretary should not prevail because the No. 7 entry observed by McDorman during continuous miner operations was less than 500 feet from the water supply at the loading point. Alternatively, the respondent asserts that the subject order is defective because it concerns an alleged failure to train personnel in the use of the

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2 This water hose is used to supply water to the continuous mining machine for the purpose of dust suppression and for a fire suppression system in the event the continuous miner catches fire. (Tr.34). This water hose is not considered adequate as a firehose because it has no nozzle to project water. (Tr. 35-36,39).

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3 The Mine Safety and Health Administration's Program Policy Manual allows the waterline on the continuous miner to be used as a firefighting hose if it is equipped with a standard firefighting nozzle. (Tr. 35-36, Ex. P2).

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4 Section 75.1100-2(a)(1) provides three exceptions to the requirement of sufficient firehose for reaching each working face which were not present and are not relevant in this case. (Tr. 41).

special fitting hardware for the continuous miner water supply line rather than a substantive violation of the cited mandatory safety standard in Section 75.1100-2(a)(1).

The essential facts are not in dispute. The 500 foot length of hose in the No. 6 South Section could not reach the working faces in the No. 1 and No. 2 entries. Although these were idle faces at the time of McDorman's November 6, 1991, inspection, these entries were mined the previous week. It is undisputed that this hose could not reach these working faces at that time.(Footnote 5) The testimony also reflects that the water supply line to the continuous miner could not be adapted for firefighting purposes. Although the No. 1 and No. 2 entry faces were idle at the time of McDorman's inspection, his observations, given the fact that the water supply had not been recently moved, provided an adequate basis for his conclusion that a violation had occurred.(Footnote 6) Therefore, the order citing a violation of Section 75.1100-2(a)(1) was properly issued and will be affirmed.

Docket No. WEVA 92-801

At the hearing, the respondent stipulated to the occurrence of the violation cited in Order No. 3314602 of the mandatory safety standard contained in 30 C.F.R. 75.807. Section 75.807 requires, in pertinent part, that all underground high-voltage transmission cables must be installed or placed so as to afford protection against damage, and that these cables must be guarded where miners regularly work. In addition, these cables must be securely anchored, and properly placed to prevent contact with trolley wires.

In view of the respondent's stipulation, the facts surrounding the issuance of Order No. 3314602 can be briefly summarized. On September 16, 1991, Mine Inspector McDorman inspected the No. 6 North supply track of the respondent's Blacksville No. 2 Mine. At approximately 3:15 a.m., McDorman noticed a 7,200 volt high voltage cable lying on the mine floor

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5 Respondent witnesses Ryan and Lemley testified about an additional 500 foot firehose in a barrel approximately 1,200 feet from the loading point in the No.6 South Main Haulage Section. (Tr. 112-115, 131). As this hose was in the Main Haulage Section rather than the No. 6 South Section, it was not available as a firehose for the No. 1 and No. 2 working face entries. In addition, McDorman testified that no one told him about this additional hose at the time of his inspection. (Tr. 137-138).

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6 A citation need not be based on the issuing inspector's direct observations if there is a basis for concluding that the cited violation has occurred. See Emerald Mines Company v. FMSHRC, 863 F.2d 51, 63 (D.C. Cir. 1988).

for a distance of approximately 250 feet, 15 feet inby block 30. (Tr. 146,151,230). One block further inby McDorman noticed an additional section of high-voltage cable on the floor for a distance of 25 feet. (Tr.151). The cable was lying only three to five feet from one side of the track. (Tr. 146). In another area of the mine, near the Orndorff shaft, McDorman observed high-voltage cable contacting the DC feeder wire. (Tr. 151). He noticed that there were grooves in this cable where it had been rubbed by the trolley feeder wire. (Tr. 147).

The subject high-voltage cable was described as 2 1/2 inches in diameter surrounded by an exterior rubber jacket insulation. (Tr. 148,158,259). This cable is shielded with a metal sheathing around the wires embedded inside the cable. The purpose of this shielding is to contain a high-voltage charge inside the cable and to trip a circuit breaker in the event that the cable is damaged. (Tr. 192-193). The high-voltage cable is normally hung from the mine roof with spads and wire placed approximately ten to twenty feet apart. (Tr. 190-191).

With regard to the fallen cable, McDorman expressed his concern for mine personnel riding in a mantrip or jeep which could derail and damage the cable. In such an event, the occupants could sustain shock, electrical burn or electrocution. McDorman also testified that the cable observed rubbing against the trolley feeder wire was a potential ignition source if the insulation was penetrated. (Tr. 155,178-179).

FURTHER FINDINGS AND CONCLUSIONS

Significant and Substantial

The next issues for determination are whether the firehose and high-voltage cable violations cited by McDorman were properly designated as significant and substantial. The Commission has held that a violation is "significant and substantial" 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.

Applying the Mathies test, it is clear that the first element is satisfied as a result of the respondent's failure to provide adequate firehose as required by Section 75.1100-2(a)(1). The second and third elements in Mathies must be viewed in the context of safety standards that are intended to prevent or minimize injury in the event of an emergency. Violations of such standards create discrete safety hazards that are fundamental contributing causes to injuries although they may not be the proximate cause of such injuries. For example, the failure to have adequate escapeways in a mine would be a fundamental cause of serious or fatal injuries should a fire occur although it may not be considered the proximate cause. Likewise, the failure to have an adequate length of firehose that will reach the working face is the functional equivalent of having no firehose at all. This creates a discrete and continuing safety hazard which impedes mine personnel from defending against the persistent danger of a fire in an underground mine.

It is inconceivable, given the remedial nature of the Mine Act, particularly in this case involving a mine meeting the criteria of section 103(i) of the Act, that Congress contemplated that the inability to fight fire could be construed as a non-significant and substantial hazard. Thus, I conclude that the absence of firehose that could reach the working faces is a violation that results in a discrete safety hazard, and, it is reasonably likely that the continued existence of this hazard will materially contribute to serious or fatal injuries when viewed in the context of continued mining operations. (Footnote 7)

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7 This conclusion is consistent with the Court of Appeals' discussion of respirable dust exposure, wherein, it recognized that a presumption that a violation is significant and substantial is consistent with Congressional intent where the violation exposes miners to the cumulative effects of a fundamental hazard. See Consolidation Coal v. FMSHRC, 824 F.2d 1011, 1085-1086 (D.C. Cir. 1987). I construe the continuing inability to fight fire, which has not been adequately rebutted by the respondent, as a fundamental hazard constituting a significant and substantial violation.

Therefore, the violation was properly characterized as significant and substantial without addressing the issue of the likelihood of fire.(Footnote 8)

Docket No. WEVA 92-801

As noted above, a significant and substantial violation requires a finding of a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a serious nature. In this case, the respondent has conceded that the high-voltage cable exposed on the mine floor next to the supply track and the cable exposed to the trolley feeder wire constitute violations of Section 75.807. It is clear that the exposure of this high-voltage cable to possible derailment and to the moving trolley feeder wire creates a discrete safety hazard associated with the possibility of electric shock injury or fire.

However, I am not convinced that the evidence of record demonstrates a reasonable likelihood that this hazard will result in serious injury. In this regard, the risk of injury is diminished by the number of events which must occur. Specifically, there must be (1) a derailment of a vehicle carrying mine personnel; (2) the derailment must occur in an area where the 275 feet of cable is exposed in this mine which contains approximately 15 miles of track (tr.242); (3) the vehicle must derail on the side of the track where the cable is exposed (tr.236); (4) the derailed vehicle must come into contact with the cable and penetrate the rubber jacket insulation; (5) the metal shielding must fail to trip the circuit breaker and prevent serious injury; and (6) the disconnecting devices intended to immediately de-energize the voltage cable in the event of damage must also fail (tr.154-156). Given this series of events which must occur before mine personnel are exposed to the risk of serious injury, I am unable to conclude that the cable in proximity to the supply track created a reasonable likelihood of such injury. With regard to the cable exposed to the trolley feeder wire, McDorman admitted that this condition, alone, should not be viewed as a significant and substantial violation. (Tr. 194). Consequently, I am removing the significant and substantial designation from Order No. 3314602.

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8 While I am not specifically addressing this issue, I wish to note that the excessive quantities of methane liberated by this Section 103(i) mine, and, the potential ignition sources described by McDorman, provide a basis for concluding that it is reasonably likely that fire and resultant serious injuries could occur. (Tr. 101-104).

Unwarrantable Failure

The remaining issue concerns whether the subject violations are attributable to the respondent's unwarrantable failure. The Commission has noted that unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1977 (December 1987); Youghiogheny & Ohio Coal Company, supra; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). The Commission has held that "unwarrantable failure" requires conduct that is not justifiable or behavior that is inexcusable. Such conduct is more than ordinary negligence characterized by "inadvertence," "thoughtlessness" and "inattention". Emery Mining Corporation, 9 FMSHRC at 2001, 2010.

Docket No. WEVA 92-800

McDorman's opinion that the inadequate firehose is a result of the respondent's unwarrantable failure is undermined by McDorman's own testimony. Significantly, in response to McDorman's suggestion at the preinspection conference, the respondent did obtain the fittings and the special wrench necessary to convert the waterline on the continuous miner to a firehose. The fact that this hardware could not be readily located contributes to the fact of the violation. However, as the respondent took the trouble to acquire this hardware, its unknown whereabouts is more appropriately attributable to ordinary negligence manifested by inadvertence rather than aggravated conduct requiring a conscious disregard or indifference to the risk associated with inadequate firefighting equipment. With regard to the inadequate firehose length, McDorman's testimony that he had to refer to a section map to determine the distances to the working faces reflects that these distances were not obvious and these distances were subject to change. Therefore, distances greater than 500 feet could be overlooked as a result of ordinary negligence. Consequently, I am modifying McDorman's 104(d)(2) Order No. 3314602 to a Section 104(a) citation.

Docket No. WEVA 92-801

The record supports an unwarrantable failure finding with respect to the respondent's violation of Section 75.807. As a threshold matter, the 275 feet of fallen high-voltage cable was clearly visible from the jeeps and mantrips traversing the 6 North supply track. (Tr. 183-184,266). Moreover, this condition was well known to management in that it was repeatedly noted in the preshift examination book prior to the afternoon shift starting at 4:00 p.m., on September 15, 1991, and prior to the midnight shift on September 16, 1991. In fact, David Lemley, the respondent's safety escort, testified that the shift foreman told

him at the beginning of the midnight shift that he had sent wiremen to rehang the cable. (Tr. 243-244). However, the cable was not reinstalled at 3:15 a.m. when McDorman issued Order No. 3314602 to Lemley. Thus, the condition was not corrected even though it had been noted in the preshift examination book approximately 12 hours before.(Footnote 9) Finally, at the hearing the respondent stipulated to the fact that it received seven previous citations for violation of the same mandatory safety standard pertaining to high-voltage cable during the proceeding 24 month period. (Tr. 171,184,185).

The failure of the respondent to correct the condition despite its repeated reference in the preshift examination book, particularly when viewed in the context of its history of similar violations, evidences a conscious disregard of the risk associated with the downed cable. Although I have concluded that this violation was not significant and substantial in nature, the condition posed a risk of serious electric shock injury or electrocution which warranted the respondent's immediate attention. Thus, I conclude that the petitioner has met its burden of establishing an unwarrantable failure on the part of the respondent.

ULTIMATE CONCLUSIONS

As noted above, I am removing the unwarrantable failure component of Order No. 3716493 in Docket No. WEVA 92-800. Consequently, this order is modified to a 104(a) citation. The gravity of this violation is serious and the underlying negligence associated with this violation is moderate. In view of my findings and the statutory civil penalty criteria contained in Section 110(i) of the Act, I am assessing a penalty of $750.

With respect to Order No. 3314602 in Docket No. WEVA 92-801, I also consider the gravity associated with this violation to be serious given the risk of electrocution. However, I have removed the significant and substantial designation. I find that the failure to correct the condition, despite its repeated entry in the examination log and the history of similar violations, dictate against a substantial reduction in the proposed penalty. Considering the criteria in Section 110(i) of the Act, I am imposing a penalty of $900 for this violation.

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9 At trial, the respondent claimed that it was prevented from rehanging the high-voltage cable because it was required to abate another violation cited by McDorman for an unguarded trolley switch. I find Lemley's testimony in this regard to be lacking in credibility. (Tr. 250-256). Moreover, this testimony was rebutted by McDorman. (Tr. 203-206).

Finally, I am incorporating the $20 settlement for Citation No. 3718465 in Docket No. WEVA 92-799. My decision in this regard is consistent with the statutory criteria and is supported by the Secretary's presentation in support of the settlement motion at trial.

ORDER

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

(1) Order No. 3716493 is modified to a citation issued under Section 104(a) of the Act and IS AFFIRMED as modified.

(2) Order No. 3314602 IS AFFIRMED and the significant and substantial designation for the underlying violation IS DELETED.

(3) The proposed settlement agreement concerning Citation No. 3718465 IS APPROVED.

(4) The respondent SHALL PAY a total civil penalty of $1,670 within 30 days of the date of this decision. Upon receipt of payment, these matters ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

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