CCASE:
NOLICHUCKEY SAND V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOLICHUCKEY SAND COMPANY, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 92-361-RM
	:	Citation/Order No. 4088642; 6/16/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Tusculum Plant
	:	Mine ID 40-03054
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 92-397-M
	:	A. C. No. 40-03054-05501
v.	:	
	:	Tusculum Plant
NOLICHUCKEY SAND COMPANY, INC., Respondent	:	

DECISION

Appearances: Tom Bewley, President, Nolichuckey Sand Company, Inc., Greeneville, Tennessee, for Contestant/ Respondent;
W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Maurer

At issue in this consolidated contest and civil penalty proceeding are the validity of an order issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, (the "Act") and a citation alleging a violation of 30 C.F.R. 56.15020. Pursuant to notice, a hearing was held i Greeneville, Tennessee on December 10, 1992.

Subsequent to the hearing, my office was notified by the court reporter that all the hearing exhibits were "lost in the mail." An effort has been made to reconstruct the record by soliciting duplicate copies of the exhibits from the parties. This, however, has not been entirely successful. We have managed to obtain copies of all the government's trial exhibits, save Government Exhibit No. 2. And another copy of the respondent's only exhibit, a video tape, is likewise unavailable. This sorry state of the record is unfortunate, but at this point, I intend to proceed to judgment based on what I have before me.

Section 107(a)/104(a) Order/Citation No. 4088642, issued on June 16, 1992, by MSHA Inspector Dana Haynes, cites an alleged imminent danger as well as an alleged violation of the mandatory safety standard found at 30 C.F.R. 56.15020,(Footnote 1) and the cited condition or practice states as follows:

> An employee had traversed the river from the dredge to the shore without wearing an approved personal floatation device (life jacket). The jon boat used to access the dredge was moored at the dredge and a hazard of falling into the water at that transition point was apparent. Life jackets were available and the employees had been instructed to wear them. The lead man was not aware of the failure to wear the jacket until this witnessing. The employee was instructed not to return to the dredge until another life jacket was found and worn.

In a nutshell, the inspector observed one of the operator's employees, one Mr. Reed, get into a 14-foot long flat-bottom jon boat that was tied up to a sand dredge out in the Nolichuckey River and motor ashore. It is undisputed that this employee did not have a life jacket or life belt on his person, nor were either available to him in the boat at the time.

I agree with the Secretary that any time you are transiting into or out of the boat to or from the dredge or when you are underway in the boat on the river there is at least "some" danger present both of falling into the water and from falling into the water.

The preponderance of the evidence relating to the depth of the river over the approximately 100-150 feet that the employee traversed that day from the dredge to the riverbank is that it was 3 feet deep, and that is my finding on that point.

I also find and conclude that the evidence in the record is sufficient to prove up a simple violation that the employee, Mr. Reed, made the trip from the dredge to the shore without benefit of a life jacket or life belt. Moreover, it is not hard to imagine a possible scenario where the boat would rock, the employee could fall out, hit his head, lose consciousness and drown, even in 3 feet of water. I therefore find a violation of the cited standard stands proven.

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1/ 30 C.F.R. 15020 provides: Life jackets or belts shall be worn where there is danger from falling into water.

The tougher issues concerning "imminent danger" and "significant and substantial" findings are more problematical for the Secretary.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which 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 Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission also adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. However, the Commission held in this case that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

In the instant case, when the inspector issued the imminent danger order, Mr. Reed was at that time standing on dry land. The danger, to the extent it had previously existed, was past. It was no longer imminent. It was not impending, and pursuant to

the rationale enunciated in Utah Power and Light, supra, cannot justify the issuance of an imminent danger order. Accordingly, the order portion of Order/Citation No. 4088642 will be vacated herein.

Also without merit is the Secretary's position that the subject violation 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)(l). 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 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 (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). 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 first element of the Mathies test is satisfied. There was a violation proven. The second element is likewise satisfied in that should something untoward have happened to Mr. Reed to cause him to become incapacitated, the absence of the required life-saving equipment would have presented a discrete safety hazard. The fourth element is also satisfied because the injury if it occurred would be reasonably likely to be serious. However, it is the third prong of the Mathies test, a reasonable likelihood that the hazard contributed to will result in a injury, where the Secretary fails to meet his burden of proof. Since the water was only 3 feet deep over the route traversed by Reed that day, simply falling into the water would not be sufficient to cause Reed any particular injury. A serious injury, such as a drowning, as argued by the Secretary, would require that Reed be incapacitated and unable to help himself, and while I have earlier in this decision found that to be a possibility, it would be quite a stretch of the record evidence to raise that "possibility" to the level of a "reasonable likelihood." That being the case, I cannot find that the Secretary has proven that there was a reasonable likelihood that the hazard would result in an injury. Accordingly, I am going to delete the inspector's S&S finding.

Taking into account all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a penalty of $50 for the violation in question is reasonable and appropriate and it will be so ordered.

ORDER

It is ORDERED that the findings of "imminent danger" and "significant and substantial" for Order/Citation No. 4088642 be VACATED.

It is further ORDERED that Order/Citation No. 4088642 be AFFIRMED as a non S&S section 104(a) citation.

It is further ORDERED that Nolichuckey Sand Company, Inc. pay a penalty of $50 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

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