

CCASE:
SOL (MSHA) V. PITTSBURG AND MIDWAY COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-119
Petitioner	:	A.C. No. 29-00845-03541
	:	
	:	York Canyon Surface Mine
v.	:	
	:	Docket No. CENT 92-142
	:	A.C. No. 29-00244-03570
PITTSBURG AND MIDWAY COAL	:	
MINING COMPANY-YORK CNYN	:	Docket No. CENT 92-143
COMPLEX,	:	A.C. No. 29-00244-03572
Respondent	:	
	:	Docket No. CENT 92-144
	:	A.C. No. 29-00244-03573
	:	
	:	Cimarron Mine

DECISION

Appearances: William E. Everheart, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., PITTSBURG AND MIDWAY COAL MINING COMPANY, Englewood, Colorado, for Respondent.

Before: Judge Lasher

In these four proceedings the Secretary of Labor (MSHA) seeks assessment of penalties for a total of 12 alleged violations (one each in Dockets CENT 92-119, 143, and 144 and nine in CENT 92-142) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977).

After the commencement of hearing in Albuquerque, New Mexico, on January 27, 1993, the parties concluded and announced the settlement of 6 of the 12 Citations involved, which accord as reflected below was approved from the bench and is here affirmed. The remaining six Citations (five in Docket No. CENT 92-142 and that involved in CENT 92-143) were litigated. As a result of the settlement at hearing, the Citations involved in Dockets numbered CENT 92-119 and 92-144 (one each) were fully disposed of. After

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the hearing, the parties submitted a second (written) settlement disposing of four of the six remaining Citations, Nos. 3244794, 3244795, 3244894, in Docket CENT 92-142, and Citation No. 3243349 in Docket CENT 92-143.

Docket No. CENT 92-119

This docket contains one Citation, No. 3242933, which was settled at the hearing. Pursuant to their agreement, the parties concur that the Citation should be modified to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof and that a penalty of \$50 is an appropriate penalty for the violation in view of the modification. Such penalty is here ASSESSED and the settlement reached, having been approved from the bench, is here AFFIRMED.

Docket No. CENT 92-143

This docket contains one Citation, No. 3243349, which was litigated (T. 132-147). However, subsequent to the hearing, as part of their written settlement agreement, Respondent withdrew its contest to Petitioner's initial penalty assessment and the parties agree that such initial proposed assessment of \$119 is appropriate. Accordingly, such penalty is here ASSESSED.

Docket No. CENT 92-144

This docket contains one Citation, No. 3243253, which Petitioner moved to vacate at the hearing on the basis of insufficient evidence. That motion was approved, this citation was vacated on the record from the bench (T. 5-6), and such action is here AFFIRMED.

Docket No. CENT 92-142

This docket contains nine Citations, four of which were settled before the hearing, three were settled after hearing, and two of which were litigated and will be decided on the merits.

A. Settlement Before Hearing

The four Citations which were settled before hearing (Nos. 3244786, 3244797, 3244883, and 3244955) were done so on identical terms. Thus, Respondent conceded the occurrence of the violations charged, the "Significant and Substantial" designation on each of the four was deleted, and the parties agreed that a penalty of \$50 for each was appropriate (T. 6-7). The settlement

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thereof was approved from the bench (T. 7-8) and that decision is here AFFIRMED.

B. Written Settlement After the Hearing

1. Citation No. 3244794

Pursuant to agreement, the "Significant and Substantial" designation of this violation will be deleted and Respondent will pay a single penalty assessment of \$50.00.

2. Citation No. 3244795

The "Significant and Substantial" designation of this Citation will be deleted and Respondent will pay a single penalty assessment of \$50.00.

3. Citation No. 3244894

Respondent agrees to pay in full MSHA's original penalty assessment of \$119.00.

C. Decision on the Two Litigated Citations

The parties have stipulated as to jurisdiction, penalty assessment factors (Footnote 1), and that the violations charged in these two Citations did occur (T. 9-18). The issue is whether these two violations were properly classified as "Significant and Substantial." Both parties submitted excellent briefs on this question.

1. Citation No. 3244895 (T. 97-118)

This Citation, issued on January 23, 1992, by MSHA Inspector Anthony Duran during an inspection of this underground coal mine charges:

1 Based thereon, I find that Respondent is a large coal mine operator (T. 11) with a history in the general neighborhood--as obtained by documentary evidence and stipulation (T. 15-17)--of 35-45 previous violations in the pertinent two-year period preceding the issuance of the Citations. It is also found that assessment of reasonable penalties will not affect Respondent's ability to continue in business and that the violations were promptly abated in good faith by Respondent after notification thereof. The two violations both resulted from negligence (T. 106, 125). The mandatory assessment factor of gravity will be discussed subsequently.

An energized [sic] auxiliary fan was so located in the no. 3 entry at the 2nd crosscut outby the last open crosscut that was causing recirculation of the air through a 3-inch vent pipe at the stopping 3rd crosscut outby the last open crosscut into the no. 2 intake air entry and to the working faces of MMU 001-0 5 left section. This was detected by the use of a smoke tube.

The standard cited, 30 C.F.R. 75.302-4 (Auxiliary fans and tubing), provides in pertinent part:

In the event that auxiliary fans and tubing are used in lieu of or in conjunction with a line brattice system to provide ventilation of the working face:

(a) The fan shall be of a permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use. (Footnote 2)

The purpose of the energized auxiliary fan in question was to exhaust air-consisting of oxygen, coal dust, and "possibly" methane--from the working face to the return. However, instead of venting into the return, the power center (discussed in the 2d Citation litigated) had a 3-inch vent pipe (tube) which was blowing air through to the intake and back into the working section (T. 99, 100, 101). (Footnote 3)

Inspector Duran, using a smoke tube and standing in the intake entry, noted that the air was being pushed back toward him through the 3-inch pipe (T. 101-102). Although he did not take an air sampling to positively establish that coal dust (or methane) was coming through the pipe, his examination of the involved area did not disclose any other reason for the presence of a "mist" of coal dust in the air (T. 103); and he testified that it was blowing back into the section (T. 100, 103-104, 117).

He stated that "you could see coal dust in the air and that you know there's something wrong in there. The coal dust is just suspended in the air or into the working section; it don't go

2 The essence of the standard, as focused by the Citation, is on the location of the fan.

3 Respondent concedes that some air from the return entry was being recirculated back into the intake entry by leakage through the 3-inch diameter pipe. (See Respondent's Post-hearing Brief, p. 4).

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out." (T. 103). It should be noted that this assessment of something being wrong was confirmed by Respondent's safety manager, Michael Kotrich (T. 129) who was not present during the inspection (T. 115).

The Inspector determined that the source of this cloud of coal dust was a three-inch vent tube in the stopping in the third crosscut which was venting "return" air into the "intake" entry (T. 103, 108, 110, 112; see Ex. P-3). Before making this determination he checked the stoppings to see if any were missing or leaking (T. 103). There were no other sources for this float coal dust as coal dust generated at the working face was being ventilated through exhaust tubing via the auxiliary fan into the "return" (T. 109-110, 116-117) and there were no leaks in this exhaust tubing (T. 116).

Respondent's only witness as to this issue was its safety manager Michael J. Kotrich who was not present during the inspection (T. 115). He testified that in his estimation "not a great deal" of dilution of the air volume in the intake could be caused by a three-inch leak and offered other possibilities for the occurrence of the mist observed by the Inspector. This testimony does not rebut the fact that the cloud of coal dust was in the intake near the working face. Nor does it rebut Inspector Duran's testimony that he investigated the source of dust, eliminated other possibilities and determined it had to be the vent tube.

Respondent's cross-examination of Inspector Duran revealed that he did not observe any dust passing through the vent tube (T. 107). However, Inspector Duran testified that you would not be able to see respiratory coal dust venting through a three-inch pipe (T. 117) although you could see it when it became suspended as a mist in the air (T. 107-108, 112, 117).

Inspector Duran testified that the two hazards associated with "return" air being recirculated in the "intake" air are methane and respirable coal dust (T. 101). He testified that the float coal dust being recirculated posed both a respiratory hazard as well as an ignition and/or explosion hazard and that nine miners at the working face were exposed to these hazards (T. 101-102, 105). While he did not detect any methane in the recirculated "return" air when he tested for it (T. 107, 109) he testified that methane is liberated when coal is mined (T. 99-100, 126-127) and that methane poses a fire and/or explosion hazard (T. 123).

Respondent did not contest the underlying violations. Only the "Significant and Substantial" (S&S) designation is in dispute. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission set forth the S&S prerequisites:

In order to establish that a violation of a mandatory standard is significant and substantial under [Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981)], the Secretary 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 question is whether there is a "reasonable likelihood" the hazards contributed to by this violation will result in an injury of a reasonably serious nature. "Such a measurement cannot ignore the relevant dynamics of the mining environment or processes" and must be evaluated "in terms of continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). The Commission has emphasized that "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 Co., 6 FMSHRC 1834, 1836 (August 1984). In other words, was "there a reasonable likelihood that the hazard contributed to would come to fruition and cause an injury?" Mountain Coal Company, 14 FMSHRC 1571, 1581 (Sept. 1992).

In discussing analytical processes for determining the "reasonable likelihood" question, in Mountain Coal Company, supra, at pages 1582-1583 the "substantial possibility" test was noted. It is defined in Coal Mac. Incorporated, 13 FMSHRC 1600 (ALJ September 1991) as follows:

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continue mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result... . The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" (104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated," and expressly places S&S violations below imminent dangers. It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof

may not show that injury or disease was more probable than not.

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In Mountain Coal it was indicated that a "remote possibility of the violation's resulting in injury (or disease) is not sufficient." Supra, 1583. However, "to meet the "S&S" requirements, MSHA would not seem to be required to show a "strong" possibility, a probability, or a certainty of a resultant injury.," Supra, 1583.

Convincing evidence shows a "substantial possibility" of injury or disease as a result of this violation of this ventilation standard for the following reasons:

1. The area in the vicinity of the working face where the violation occurred was an active mining area and coal mining was in progress. Nine workers were working in this area (T. 104-105, 112, 115, 126).

2. As a result of the violation, combustible and respiratory coal dust in the "return" was being recirculated into the "intake" resulting in a cloud of coal dust suspended in the intake near the working area (T. 100-104, 108, 110, 112, 117).

3. Numerous ignition sources were present in the working area where the recirculated "return" air was suspended, i.e., the power center, electric cable, power center connection points, and the electrically powered continuous miner machine (T. 103, 104, 116, 123-124).

4. Float coal dust accumulations in active workings pose a serious danger of explosion or fire.

5. The nine miners working in this area were exposed to the hazard of fire and/or explosion caused by a possible ignition or the recirculated float coal dust. Injuries would be disabling or fatal (T. 102, 105).

6. The nine miners working in this area were exposed to the hazard of breathing respirable coal dust. Pneumoconiosis (Black Lung Disease) is a chronic dust disease of the lung arising out of dust exposure in coal mine employment. (See 20 C.F.R. Part 718.201). It is recognized as "one of the most crippling occupational health hazards facing miners."

7. Although the recirculated air tested negative for methane at the time of the inspection, methane is liberated when coal is mined and methane is exhausted into the "return" (T. 126-127). In the perspective of continued normal mining operations, methane release is another possibility which added to coal dust suspension, and considered in conjunction with the potential ignition sources present, increases the likelihood of injury from explosion or fire. See Youghiogheny and Ohio Coal Company, 9 FMSHRC, 673 (April 30, 1987).

It is concluded that there existed a reasonable likelihood that the hazard contributed to by the violation would result in reasonably serious injury or illness and that, the other prerequisites of the Mathies formula having been conceded or clearly shown, this violation is significant and substantial.

As such, it necessarily follows that it is a serious violation. Having considered this factor and the other penalty assessment criteria mandated by the Mine Act set forth above, a penalty of \$100 is found appropriate and is here assessed.

2. Citation No. 3244896 (T. 118-132)

This Citation also issued on January 23, 1992, by Inspector Duran and based on the same facts as Citation No. 3244895, charges:

The energized non-permissible power center located in the 3rd crosscut outby the last open crosscut of the no. 2 intake air entry was not placed in intake air in that a 3-inch pipe vent pipe at the stopping was venting return air over the top of the power center caused by recirculation of the air from an auxiliary fan located in the no. 3 return entry of MMU 001-0 5 left section. This was detected by the use of a smoke tube. A methane test was taken with a permissible methane detector chk .0% at the vent pipe.

The safety standard infringed. C.F.R. 75.507 (Power connection points), provides insofar as pertinent:

Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air. (Footnote 4)

The parties stipulated on the record (T. 119) that the evidence introduced with respect to Citation No. 3244395 can be considered part of the record in connection with Citation No. 3244896. My findings of fact in connection with Citation No. 3244395 are incorporated with respect to this Citation insofar as applicable (T. 121) and except with respect to the hazard involved with this Citation which the parties agree differs from that involved in Citation No. 3244895 (T. 119).

4 The thrust of the violation is that the non-permissible power center was not located in intake air. This, in conjunction with the hazard created, are important background for determining the "Significant and Substantial" issue.

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It is further found that Citation No. 3244896 was issued a few minutes after Citation No. 3244895 was issued. The reliable, substantive evidence of record established that:

1. Return air was being recirculated through a vent tube over the nonpermissible power center located in the third cross-cut near the working face in an intake air entry (Ex. P-3; T. 121).

2. There was no evidence of a malfunction in the power center, cables, or machinery (T. 126, 127).

a. The 7,200-volt power center supplies power to machinery at the working face (T. 121-122).

b. At least seven cables run from it to the working face (T. 121-122).

3. The potential ignition sources present were the power center, its cables, and nonpermissible connection points (T. 122, 123).

4. While there was coal dust suspended in the air, as previously determined, there was no evidence of methane present (T. 124, 125, 126). The Inspector said the absence of methane was "possibly" because the continuous miner was not operating (T. 126). (Footnote 5)

5. The Inspector described the hazard and resultant injury as follows: "Possible ignition source, respirable dust, smoke from fire in the event the power center caught on fire ...

* * * * *

Lost days work, restricted duty. (T. 124)

6. Equipment in the power center was examined "each shift when it's energized and by a qualified electrician weekly" (T. 128).

CONCLUSION

The hazard created by this violation is confined to that which is created by the location of the power center. In terms of the Mathies formula, the violation has been conceded, and there is no question that this violation would result in an injury. Although the Inspector at one point stated his opinion,

5 Respondent's Safety Manager indicated he has never detected methane at the working faces in excess of "applicable" standards (T. 129).

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that there was a "probability" (T. 127) that something could happen if there were a malfunction, the totality of his testimony reveals that (a) there was no malfunction and (b) there existed only a remote possibility of a malfunction occurring and the hazard coming to fruition. Thus, he testified, "There could be a failure at the power center, there could (be a) failure at the cable, at the connecting points." (Emphasis added). (T. 123).

Speculation of an event that "could" occur falls short of showing that the illness or injury is "reasonably likely" to happen. See Union Oil Co. of California, 11 FMSHRC 289 (Mar. 31, 1989).

The Inspector not only did not identify any malfunction of the equipment specified in the standard, but that such malfunction might occur in the future was speculative. The evaluation of reasonable likelihood of risk must be made in terms of continued normal mining operations, and based on the particular facts surrounding the violation.

It is concluded that the Secretary did not carry the burden of proof in establishing the "reasonable likelihood that the hazard contributed to will result in an injury." This violation is not found to be significant and substantial. It is found to be moderately serious. Accordingly, Citation No. 3244896 will be modified to delete the "S&S" designation, and a penalty of \$50 is ASSESSED.

ORDER

1. Citation No. 3243253 in Docket No. CENT 92-144 is VACATED.
2. The following Citations in the dockets indicated are MODIFIED to delete the "Significant and Substantial" designations thereon:

Citation No.	Docket Number
3242933	CENT 92-119
3244786	CENT 92-142
3244797	CENT 92-142
3244883	CENT 92-142
3244955	CENT 92-142
3244794	CENT 92-142
3244795	CENT 92-142
3244896	CENT 92-142

3. The following penalties are ASSESSED.

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Citation No.	Docket Number	Penalty
3242933	CENT 92-119	\$ 50.00
3243349	CENT 92-143	\$119.00
3244786	CENT 92-142	\$ 50.00
3244797	CENT 92-142	\$ 50.00
3244883	CENT 92-142	\$ 50.00
3244955	CENT 92-142	\$ 50.00
3244794	CENT 92-142	\$ 50.00
3244795	CENT 92-142	\$ 50.00
3244894	CENT 92-142	\$119.00
3244895	CENT 92-142	\$100.00
3244896	CENT 92-142	\$ 50.00

4. Respondent, if it has not previously done so, SHALL PAY the Secretary of Labor within 30 days from the date hereof the total sum of \$738.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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