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CONSOLIDATION COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 93-231-R
	:	Order No. 3658846; 2/18/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Dilworth Mine
	:	Mine ID 36-04281

DECISION

Appearances: Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia for Contestant;
Anita Eve Wright, Esq., U.S. Department of Labor Office of the Solicitor, Philadelphia, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

On March 18, 1993, the Operator, Consolidation Coal Company, (Contestant) filed a Notice of Contest challenging the issuance of Order No. 3658846 which alleges a violation of 30 C.F.R. 75.364. Also, Contestant filed a Motion to Expedite. The issues raised by the pleadings were generally discussed with counsel for both parties in a telephone conference call on March 19, 1993, and again on March 22, 1993, at which time, based on repre-sentations of counsel, this case was scheduled for a one-day hearing on April 15, 1993. At the hearing held on that date in Washington, Pennsylvania, Robert W. Newhouse, Robert G. Santee, James S. Conrad Jr., and Eugene Zvolenski testified for the Secretary (Respondent). The hearing was continued on May 13, 1993, in Morgantown, West Virginia, at which time Louis Barletta Jr., Patrick N. Wise, James E. Hunyady and Gary J. Klinefelter testified for Contestant. At the conclusion of the hearing, the parties requested an opportunity to summit written briefs, and were so granted this right. Contestant filed its Post Hearing Brief on June 15, 1993. Respondent filed Findings of Fact, Conclusions of Law and Brief in Support on June 17, 1993.

Stipulations

1. Consolidation Coal Company is the owner and operator of the Dilworth Mine, which is the subject of this proceeding.

2. Consolidation Coal Company and the Dilworth Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. 801, et seq.

3. The Administrative Law Judge has jurisdiction over this matter pursuant to Section 105 of the Act.

4. The subject order, number 3658846, was issued pursuant to section 104(d)(2) of the Act, and was properly served by Robert Santee, a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent, Pat Wise, on February 18, 1993, at the Dilworth Mine.

5. The assessment of a civil penalty in this proceeding will not affect the Operator's ability to continue in business.

6. Abatement of the condition cited and listed in the Order was timely.

7. A copy of the subject Order is authentic and may be admitted into evidence for the purpose of establishing issuance, but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein.

8. Order No. 3658846 states in pertinent part:

> There was water present ranging up to 11 inches deep for the width of the entry beginning [sic] just inby survey spad 73+50 (between the No. 46 and the No. 47 crosscut) and continuing inby for a distance of approximately 50 feet, exact distance could not be measured at this time, in the 9-D (023) longwall section No. 4 intake entry (future 10-D tailgate entry). The presence of such water presents a very possible slipping and/or tripping hazard due to the possibility of debris consisting of crib blocks, cement blocks, rock, loose coal, mud etc., under such water accumulations. This entry is required to be examined weekly by a certified mine examiner, who is an acting agent of the operator, and the last date observed, outby this area, was 02-17-93 JLF 8:22 p.m. There was 1 violation issued during the last inspection period from 10-01-92 to 12-31-92 of 30 C.F.R. 75.364(d).

9. Order No. 3658846 alleges a violation of 30 C.F.R. 75.364.

I. Findings of Fact

1. Contestant's Dilworth Mine experiences, on a regular basis, accumulations of water on the mine floor. To control this problem, Contestant installed a series of pneumatic pumps to pump the water out of the mine.

2. On February 18, 1993, the bleeder entry (the future tailgate entry) for the 10-D longwall panel in the 9-D East Section extended 8,000 feet, and was approximately 16 feet wide.

3. On February 10, 1993 the longwall face in the 9-D East Section was located at spad 31+50.

4. On February 18, 1993, the bleeder entry outby the face was designated an escapeway. The working section did not extend inby the face, and the bleeder entry was not designated an escapeway inby the face.

5. The bleeder entry inby the face is traveled weekly by miners to fire-boss. Also miners travel there regularly to service and repair the pumps.

II. Further Findings of Fact and Discussion

Robert G. Santee, an MSHA inspector, testified that on February 10, 1993, he inspected the 9-D East Section at Contestant's Dilworth Mine. Between the 19th and 20th crosscuts in the No. 4 intake entry (bleeder entry) he observed water up to 14 inches deep. He indicated that he was unable to see the bottom of the water as it was muddy. He also observed a 4 inch drainage line, and a 3 inch air line going under the water. He said that he also suspected the presence of other material in the water as, while travelling up the entry (inby) to the point in question, he had observed crib blocks, old pipeline, loose rock, and coal. He issued a citation, alleging a violation of 30 C.F.R. 75.364, and informed Contestant's representatives that he would allow until 8:00 a.m., February 12, for the violation to be abated.

Santee did not return until February 17. He indicated that when he returned there was more water present. He told Contestant's representatives that he was going to issue a Section 104(b) order. Kenny Boyle, the longwall coordinator, and J.J. Pohira, the pumper foreman, informed him that on February 12, water had been pumped out. Santee then terminated the original citation, and issued a Section 104(b) order because Contestant had allowed the water to return. Upon discussion with his supervisor, Santee voided the Section 104(b) order, and extended the abatement of the original citation until February 18. According to Santee, when he returned on February 18, he observed 2 or 3 miners pumping water in the area between the 19th and 20th

crosscuts. He also observed that crib blocks were being removed from the water inby.

According to Santee, at spad 73+50 he observed an accumulation of water that he indicated was "almost identical" (Tr. 69) to that to which he had previously observed between crosscuts 19 and 20. He indicated that the water went from rib to rib, and extended 50 feet. He indicated that the water was muddy,(Footnote 1) and he could not see through the water. When he entered the water he went as far as he felt safe. He put a ruler in the water until it hit the mud on the bottom, and noted that the depth was 11 inches. He took only one measurement.

Santee also observed footprints on the floor at the outby side of the water accumulation. He also indicated that there was a swag at Spad 72+10, 140 feet outby, and at a lower elevation than the water accumulation. According to Santee, the presence of a pump in the swag indicated that water had been pumped out of the swag.

At spad 73+50, two pipes led into the water accumulation. One pipe was four inches in diameter, and the other was three inches in diameter. These pipes ran the entire length of the entry, and were placed on the right side of the entry inby. Aside from these items, nothing was protruding from the water, nor were there any cement blocks, crib blocks, loose coal, or rocks observed. Santee stated that he believed that there were objects under the water, as he had observed crib blocks and cement blocks at various locations when he had walked the entry inby earlier that day. According to Santee, there were "numerous" crib blocks, 6 inches by 6 inches by 30 inches in length throughout the entry. (Tr. 86). Also, according to Santee, he saw aluminum and steel pipeline joints, 3 to 4 inches in diameter, and 10 to 15 inches in length, around the pump in the swag outby spad 73+50. Santee said that the area of water between crosscuts 19 and 20,(Footnote 2) contained steel bands that were 3/4 inch wide 16th of an inch thick, and between 4 and 6 feet in length. He said that it is very easy to trip on such items.

Santee opined that if a person had entered water at Spad 73+50 he could have been injured by slipping or tripping on submerged objects such as pipes, crib blocks, cement blocks, loose rock or mud.

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1Eugene P. Zvolenski a miner who accompanied Santee on his inspection described the water at 73+50 as cloudy, and said that he could not see where he was walking.

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2The area at crosscuts 19 and 20 is approximately 4,300 feet from Spad 73+50.

Santee issued a Section 104(d) order alleging a violation of 30 C.F.R. 75.364(Footnote 3). Section 75.364, supra as pertinent, provides that at least every 7 days an examination shall be made, and that hazardous conditions "shall be corrected immediately."

III. Analysis

A. Violation of 30 C.F.R. 75.364

The key issue for resolution is whether, on the date of Santee's inspection, the accumulation of water in the cited area constituted a hazardous condition which had not been corrected immediately.

Contestant did not impeach the testimony of Santee regarding his observations of the water accumulation. Patrick M. Wise, who accompanied Santee in his capacity as Contestant's Safety Inspector, did not contradict Santee's testimony with regard to the depth, and extent of the accumulation. Nor did he contradict the testimony of Respondent's witnesses that the water was cloudy or muddy, which prevented the bottom from being seen.

According to Santee he concluded that the accumulation was present for some time because the area between the swags was dry, and crusted, and because he had observed a water-discoloration line 36 inches high, approximately 20 feet inby spad 73+50. On the other hand, Louis Barletta, who was the superintendent of the mine during the period in issue, indicated that it is not possible to tell the age of an accumulation of water soley by looking at a water-discoloration line. He opined that water can accumulate quite quickly.

The record does not contain any testimony from any person having personal knowledge of the length of time the accumulation of water had existed prior to Santee's inspection. Resort thus is made to an analysis of the documentary evidence. The documentary evidence indicates, prior to Santee's inspection, the presence of water close to the cited area. In an Examinations of Emergency Escapeways, Facilities, Air Courses, and Bleeders Including Tests for Methane, ("Weekly Examination Book"), on February 17, 1993 at the 10-D tailgate, "15 xc to backend" it is noted as follows under the heading "hazards noted": "H20 73+80". The following is set forth under the heading "action taken": "reported". (Contestant's Exhibit C). The Pumper's Report (Contestant's Exhibit D), wherein pumpers note the condition of pumps, and the water level in the area of various pumps,

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3The pertinent language, set forth in Section 75.364, supra was previously found at 30 C.F.R. 75.305, and had been revised effective August 16, 1992, 57 F.R. 20914 (March 15, 1992)).

indicates that, on February 15, 1993, at the pumps located at spad 72+20 the water was "at strainer" (sic). Barletta explained that this indicates a water depth of approximately 2 to 3 inches. The same comments are found in the reports for the midnight to 8:00 a.m. shift on February 17, 1993. In the next shift, at the pump location 72+20 the water level is noted as 12" at 57+20 it is noted as 10", and at 36+90, 20 xc, the water level "noted as "strainer" (sic). Also, the Pumper's Report for this shift contains the following remarks "told E.B. that pumpe needs to start pump inby in 10-D tail for 12/18/93" (sic).

Considering the depth of the water, the fact that it was cloudy or muddy, the extent of the accumulation, the presence of two pipes in the water, and the fact that mud and rocks, occur naturally on the floor of mines, I conclude that the accumulation of water cited by Santee constituted a hazardous condition that should have been reported.

Within the framework of the above evidence I conclude that the hazardous water accumulation had not been corrected by Contestant prior to the time it was noted by Santee. I thus conclude that Contestant herein did violate Section 75.364, supra.

B. Significant and Substantial

Santee characterized the violation he cited as significant and substantial. He defined "significant and substantial" as a condition which would cause a serious injury before it could be corrected. He opined that in the situation presented herein, an injury was reasonably likely to have occurred, taking into account the presence of water, and the likelihood that it contained debris. This conclusion was based upon his observation of debris in the area of crosscuts 19 and 20, which was 4,300 feet outby the area cited.

On the other hand, Barletta indicated that he was not aware of any slipping or tripping injuries in water up to 12 inches that occurred from January 1988 to February 1993. Patrick M. Wise, who was Contestant's Safety inspector during the period in issue, testified to the same effect. He also opined that the accumulation at issue did not constitute a hazard, as it was possible to travel in the cited area without slipping. He said that he had travelled there in the past without slipping. Barletta indicated, in essence, that miners are aware of the need to walk carefully in water that is muddy or cloudy, and miners are aware of the placement of pipes in the water and their location. He also indicated that by using a stick as a guide, it is possible to safely traverse water that can not been seen through.

In evaluating whether the violation herein was significant and substantial, I disregard the erroneous definition proffered by Santee, and instead refer to established case law.

In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the recent Decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as 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 explained:
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> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); See: also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

(Southern Ohio, supra at 916-917).

I have already found that Contestant did violate Section 75.364, supra, and that, in essence, the violation herein

did contribute to the hazard of slipping or tripping. In evaluating the third element of the Mathies formula, I take cognizance of the following facts: the depth of the water; the fact that the bottom could not be seen through the water; the presence of 2 pipes in the water; the uncontradicted testimony of James Samuel Conrad Jr., an MSHA Inspector who inspected the site on February 7, 1993, and observed, in the area cited, planks and crib blocks lying on the floor in the center of the entry on the right side;(Footnote 4) and Conrad's uncontradicted testimony that within 20 feet inby of Spad 73+50 he had observed a canvas lying on the floor covered with mud which made it extremely slippery when wet. Within the above framework, I conclude that it has been established that an injury producing event i.e., slipping or tripping, was reasonably likely to have occurred. I also conclude, due to the nature of the items in water, that should a person have tripped or slipped, there was a reasonable likelihood of an injury of a reasonably serious nature. Thus, I conclude that it has been established that a violation herein was significant and substantial.(Footnote 5)

C. Unwarrantable Failure

According to Santee, the violation herein resulted from Contestant's unwarrantable failure. Santee defined "unwarrantable failure" as a situation where an operator knew or should have known of a violative condition, and did not take corrective action. In this connection, he referred to the similar accumulation which he had cited on February 10, in an area outby, and concluded that accordingly, Contestant should have been made aware of hazardous water conditions. Also, he indicated that an outby swag at a higher elevation had been pumped out. In this connection, reference is made to the entry in the Pumper's Report of the second shift on February 17, 1993 as follows: "Told E.B. that pumpe needs to start pumps inby 10-D tail for 2/18/93." (sic)

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4Conrad said that he observed 5 crib blocks, and 7 planks approximately 20 feet inby Spad 73+50.

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5The issue for resolution is not whether Santee's determination that the violation was significant and substantial finds support in the factors he took into account, but rather a decision on the issue of significant and substantial must be based upon all the evidence presented at a de novo hearing on this issue. Accordingly, the observations of Conrad, although not known to Santee when he made his determination, constitute important evidence to be taken into account in analyzing the issue of significant and substantial.

In making a de novo determination whether the record establishes unwarrantable failure on the part of Contestant, I

consider the following facts: the depth and extent of the accumulation observed by Santee; the fact that a similar accumulation had been cited on February 10; the lack of factual evidence indicating that the accumulation at issue had occurred at a point of time close to Santee's inspection which would not have allowed Contestant sufficient time to have pumped it out before Santee's inspection;(Footnote 6) and the lack of any evidence on Contestant part explaining why the area in question has not been pumped out. Within the context of these facts, I conclude that it has been established that the violation herein was as a result of aggravated conduct on the part of Contestant and, hence constituted an unwarrantable failure (See Emery Mining Corp.,
9 FMSHRC 1997, 2004 (1987)).(Footnote 7)

ORDER

It is ORDERED that the Notice of Contest be DISMISSED, and the ORDER be affirmed as written.

Avram Weisberger
Administrative Law Judge

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6I find that Barletta's opinion that such an accumulation can occur quickly is of little probative valve in establishing how long the accumulation observed by Santee had actually existed.

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7It appears to be part of Contestant's argument that, prior to October 1992, MSHA had an unwritten policy that an accumulation of water would not be cited in bleeders unless the water exceeded hip boot height; in the return entries unless the water exceeded knee height; and in intake entries unless the water was higher than 15 1/2 inch boots. Hunyady indicated that he was told of such a policy by various inspectors when they came across water accumulations when he accompanied them on inspections subsequent to 1986 or 1987. I do not find much merit to this argument. First of all, there is no evidence that Contestant's personnel in charge of pumping water accumulations were aware of such MSHA "policy". Nor there is any evidence that such persons measured or walked into the water accumulation at issue and decided, in reliance upon past MSHA "policy", not to pump the accumulations, as being below the level of hip boots.

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