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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 92-814-A
	:	A.C. No. 36-04281-03790
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 92-1207-A
	:	A.C. No. 46-01968-04027 R
	:	
	:	Blacksville No. 2 Mine

DECISION

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

Before: Judge Feldman

The above captioned 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). These cases were called for hearing on June 22, 1993, in Washington, Pennsylvania. The parties' stipulations concerning my jurisdiction to hear these matters and the pertinent facts associated with the civil penalty criteria contained in section 110(i) of the Act are of record. At the hearing, the parties moved to settle Citation No. 3702203 which is the subject of Docket No. PENN 92-814-A. The parties' motion was granted on the record and the approved settlement agreement is incorporated in this decision. The parties' post-hearing briefs with respect to remaining Docket No. WEVA 92-1207-A have been considered in my disposition of this proceeding.

Docket No. WEVA 92-1207-A

Docket No. WEVA 92-1207-A concerns Citation No. 3315474 issued by Inspector John Baniak on March 11, 1991, for violation of the mandatory health and safety standard contained in section 75.1405, 30 C.F.R. 75.1405,(Footnote 1) based upon his observa-tions of inoperable uncoupling devices on ten mine cars observed at the rotary dump at the respondent's Blacksville No. 2 Mine.(Footnote 2) Inspector Baniak attributed this violation to a moderate degree of negligence on the part of the respondent. The Secretary initially proposed a civil penalty assessment of $259.00.

At trial, the respondent stipulated to the fact of occurrence of this violation. (Tr. 11-13). The Secretary now argues that the degree of the respondent's culpability, manifested by the numerous mine cars cited for violation and a history of similar violations, warrants the imposition of a larger penalty than that initially proposed. The respondent asserts that the subject violation should not be designated as significant and substantial as inoperable decouplers have not resulted in any recent serious injuries.

In view of the respondent's stipulation to the fact of the violation, the pertinent facts can be briefly stated. The Blacksville No. 2 Mine is a shaft mine. Coal extracted from the face is loaded on a belt and transported to the tipple. There the coal is loaded into mine cars that are coupled together for transportation over the loaded track to the rotary dump where the cars are inverted and unloaded. (TR. 105). The unloaded cars then proceed to the empty track where groups of cars are

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1 Section 75.1405 provides, in pertinent part, that "[a]ll haulage equipment ... shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment." (Emphasis added).

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2 Docket No. WEVA 92-1207-A was reassigned to me from Judge Melick on June 8, 1993. Prior to this reassignment, in an Order released April 20, 1993, Judge Melick denied the Secretary's Motion for Summary Decision. At the commencement of trial, the Secretary presented oral argument in support of his request to renew his Motion for Summary Decision. (Tr. 17). The motion was denied. (Tr. 32-33).

uncoupled and transported back to the tipple by the motorman. (Tr. 36-42). The cars are uncoupled by mine personnel using a handle located at the end of each car. The handle is attached to a chain which goes through a metal eye. Pressing down on the handle raises the chain disengaging the cars. (Tr. 46-47).

Inspector Baniak testified that of the ten cars cited in Citation No. 3315474, eight had broken chains and two had broken eyes. The handles on these cars were inoperable and in the down position. (Tr. 48). Baniak stated that in order to decouple these cars, a miner would have to go between the cars, which weigh approximately 15 tons when loaded, to manually raise the metal eye or use a bar to raise the eye to separate the cars.(Footnote 3) This could subject the miner to serious foot or hand injuries if an extremity was caught in the eye or lever. (Tr. 50). A miner could also sustain critical or fatal crushing injuries if the motorman started the train of cars without being aware that a miner was in between cars in the process of manually decoupling. (Tr. 50-51). Baniak referred to two previous fatal accidents associated with miners positioned between mine cars. (TR. 57-58).

Significant and Substantial

It is well settled that 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 Mathis 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

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3 Baniak referred to these safety bars as "sissy bars." (Tr. 62). He stated: that these bars were not always readily available (tr. 60); that using these bars sometimes required the miner to go between cars to position the bar in the eye (tr. 52); that use of these bars is more time consuming than manual decoupling (tr.62); and that these bars cannot be used if the eye is broken (tr.53, 60). (See fn. 6, infra).

> to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In evaluating the potential for serious injury, the hazard created by the violation must be viewed in the context of continued mining operations, i.e., the frequent necessity to decouple mine cars. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). In this case, the hazard contributed to by the violation is, in essence, the attractive nuisance created by defective decoupling devices. Consequently, miners are tempted to go between coal cars to attempt manual decoupling. Decoupling occurs routinely at the tipple and at the rotary dump. (Tr. 102-103). Disengaging mine cars is also necessary in the event of a derailment. Jeffrey Todd Moore, the respondent's safety supervisor, testified that such derailments occur approximately once each month. (Tr. 167). Baniak testified that he has observed miners between cars attempting to uncouple them. (Tr. 56).

The significant and substantial issue as it pertains to this violation is not a matter of first impression. In addressing similar violations committed by this respondent, Commission Judges have consistently concluded that defective decoupling devices pose a discrete safety hazard that is likely to contribute to serious or fatal injuries. See Consolidation Coal Company, 14 FMSHRC 1450 (August 1992); Consolidation Coal Company, 13 FMSHRC 1314 (August 1991).

Moreover, the potential fatal consequences of the violation in issue are not speculative. On April 11, 1974, an employee of the respondent's Monitor No. 4 Mine was fatally injured attempting to uncouple haulage cars. The fatal injuries were sustained when the victim reached between cars to manually disconnect them because of inoperable decoupling devices. Pittsburgh Coal Company (Division of Consolidation Coal Company), 1 FMSHRC 1468 (October 1979). In Pittsburgh, the Commission concluded that "all uncoupling devices [must] be maintained in operable condition" so as not to induce a miner to go between haulage equipment. 1 FMSHRC at 1469.

Despite the inoperable decoupling devices that contributed to the April 1974 fatality of an employee, the respondent contends that the passage of time, purportedly without the reoccurrence of serious injury under similar circumstances,

transforms this violation into a less serious transgression.(Footnote 4) Such an interpretation gives new meaning to the term "remedial nature" of the Mine Act and cannot be reconciled with the legislative intent. The fact that a serious injury associated with inoperable decouplers may not have recently occurred at the respondent's Blacksville No. 2 Mine is fortuitous and must not be considered as a mitigating factor.(Footnote 5) See Ozark-Mahoning Company, 8 FMSHRC 190 (February 1986). Significantly, the history of a relevant fatality is a testament to the serious risk posed by this violation.

I am similarly unconvinced by the respondent's assertion that the training provided to mine personnel and the warning "CAUTION -- STAY OUT" stenciled between the mine cars (as depicted in Gov. Ex. 2) are appropriate mitigating circumstances.(Footnote 6) (Tr. 104). As the Commission has stated,

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4 In his opening statement, counsel for the Secretary presented uncontroverted evidence of 66 mine cars cited for defective decoupling devices at the respondent's Blacksville No. 2 Mine from March 1990 to March 1991, the 12 month period preceding the issuance of Citation No. 3315474. The respondent argues that the absence of injuries despite the frequency of violations is evidence that an injury is not likely to occur.

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5 The respondent contends that there has not been a relevant injury in its Blacksville No. 2 Mine during the past seven years. (Respondent's post-hearing brief, pages 2-3.) This argument is specious in that it fails to consider whether relevant injuries have occurred in other mines that illustrate the serious hazards associated with defective decouplers. In addition, I reject the notion that a showing of an actual relevant serious injury is a prerequisite to establishing a significant and substantial violation.

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6 The respondent also referred to "sissy bars" that are located at various locations throughout the mine that can be used to raise the metal eye to decouple cars. Moore testified that these bars enable miners to decouple without extending themselves between mine cars. (Tr. 165-166). The effectiveness of these bars as a substitute for operable automatic decoupling devices is questionable. Moreover, I suspect that a miner tempted to go between cars despite caution signs may be disinclined to use a "sissy bar" if one were available. Thus, this alternative method of decoupling does not offset the significant and substantial nature of the violation in issue.

"[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." Eagle Nest, Inc., 14 FMSHRC 1119, 1123 (July 1992). Therefore, the significant and substantial designation in Citation No. 3315474 shall be affirmed.

Negligence

The Secretary, citing several factors, seeks to increase the respondent's underlying degree of negligence associated with Citation No. 3315474 from moderate to high. In this regard, the Secretary points to the respondent's history of previous violations as evidence that the respondent had notice of the violative condition. Significantly, despite testimony that the respondent has a policy of marking and removing from service cars with defective decouplers (tr. 169), the cited cars remained in service at the time of Baniak's inspection. (Tr. 28-29). Moreover, as noted above, the respondent's reliance on training to discourage miners from positioning themselves between cars does not overcome the apparent absence of an effective maintenance program for the decouplers given the history of violations.(Footnote 7) (Tr. 27). Accordingly, I find that the Secretary has established by a preponderance of the evidence that the respondent's continued operation of the subject mine cars manifested a high degree of negligence.

Civil Penalty

In considering the statutory criteria for assessing civil penalties contained in section 110(i) of the Act, I note that the respondent is a large operator with a history of similar violations. The fact that these violations have persisted despite the imposition of previous penalties and the high degree of negligence and serious gravity associated with this violation warrant a civil penalty in excess of the minimal penalty initially proposed. I also note that the initial proposed penalty was cumulatively assessed in that the subject citation noted ten mine cars in violation. However, applying the facts of this case to the statutory criteria, I conclude that an individual assessment for each violative decoupling device is the

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7 The respondent conceded that it is obliged to provide proper training to all personnel and that such training is not exculpatory with regard to liability imposed under the Mine Act. (Tr. 173-174).

appropriate sanction.(Footnote 8) Therefore, I am imposing a civil penalty of $3,000 for the numerous violative conditions noted in Citation No. 3315474.

Docket No. PENN 92-814-A

Finally, as noted above, the parties moved to settle Citation No. 3702203, the only citation in issue in Docket No. PENN 92-814-A. The terms of the proffered agreement call for the Secretary to modify the subject citation from a 104(d)(1) citation to a 104(a) citation, thus reducing the respondent's underlying degree of negligence. The significant and substantial designation for this citation remains. The respondent has agreed to pay a civil penalty of $500. This settlement agreement is consistent with the criteria in Section 110(i) of the Act and was approved on the record.

ORDER

Accordingly, Citation No. 3315474 is modified to reflect a high degree of negligence and is AFFIRMED as modified. The settlement agreement modifying Citation No. 3702203 from a 104(d)(1) citation to a 104(a) citation is APPROVED. Consequently, the respondent is ORDERED to pay a total civil penalty in the amount of $3,500 in satisfaction of the two violations in issue. Payment is to be made within 30 days of the date of this Decision, and, upon receipt of payment, these docket proceedings are DISMISSED.

Jerold Feldman
Administrative Law Judge

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8 This result is consistent with Judge Weisberger's assessment of $200 for each car cited for defective decouplers in Consolidation Coal Company, 14 FMSHRC at 1455.

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