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SOL (MSHA) V. S & H MINING
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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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 92-455
	:	A. C. No. 40-02045-03577
v.	:	
	:	Docket No. SE 92-456
S & H MINING, INC., Respondent	:	A. C. No. 40-02045-03578
	:	
	:	S & H Mine No. 2

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Imogene A. King, Esq., Frantz, McConnell & Seymour, Knoxville, Tennessee, for Respondent.

Before: Judge Feldman

The above proceedings are before me as a result of petitions 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 heard on June 17, 1993, in Knoxville, Tennessee. The pertinent jurisdictional stipulations and stipulations concerning the civil penalty criteria contained in section 110(i) of the Act are of record.

The parties moved to settle the citation in issue in Docket No. SE 92-456 after presentation of the Secretary's direct case. The terms of the settlement agreement concerning this case were approved at the hearing and will be incorporated as part of this decision.

Remaining Docket No. SE 92-455 was tried in its entirety. This docket involves two 104(a) citations, designated as significant and substantial, associated with alleged operational violations of the respondent's No. 1 and No. 4 conveyor belt mantrips. Specifically, the respondent has been cited for violation of the mandatory safety standard specified in section 75.1403-5(a), 30 C.F.R. 75.1403-5(a). This mandatory safety standard provides:

> Positive-acting stop controls should be installed along all belt conveyors used to transport men, and such controls should be readily accessible and maintained so that the belt can be stopped or started at any location. (Emphasis added).

The threshold issue for determination is whether the positive-acting stop controls (the stop cords) were "readily accessible" as contemplated by the applicable mandatory safety standard. Inspector M. J. Hughett and Supervisor Harrison R. Boston testified on behalf of the Secretary. The respondent called Paul G. Smith, President of S & H Mining, Inc., and Lonnie P. Carden, an employee of the corporate respondent. The parties' have also filed post hearing and reply briefs which I have considered in my disposition of this case.(Footnote 1)

PRELIMINARY FINDINGS OF FACT

On the morning of April 16, 1992, MSHA Inspector M. J. Hughett arrived at the respondent's No. 2 Mine for the purpose of performing a routine inspection. Hughett was accompanied by Jacksboro Field Office Supervisor Harrison R. Boston. Boston was accompanying Hughett to evaluate Hughett's performance as a coal inspector. (Tr. 58). Hughett and Boston, accompanied by the respondent's Superintendent Charles White, proceeded to travel inby to inspect the mine's conveyor belt system.

The No. 2 Mine utilizes four conveyor belt mantrips for the purpose of transporting miners from the surface to the working face. These four belts are numbered consecutively starting with the belt originating at the surface. Each belt is approximately 28 inches wide and travels at speeds between 200 and 250 feet per minute. To ride the belts to the face, personnel must lie flat on their chests in a prone position. There is a shutoff switch at the head and tail end of each conveyor belt and at the middle of each belt. In between each of these switches is a positive-acting stop cord that is hung to enable miners to stop or start the belt at any location. The stop cord is installed along the belt line on the miner's left side as the miner is facing inby. Boston testified that the mandatory safety standard requires the stop cord to be readily accessible by positioning it where the

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1 The respondent filed proposed findings on August 5, 1993. Due to a delay in obtaining the transcript of this proceeding, the Secretary was permitted to file his proposed findings, which also served as reply findings, on August 30, 1993. The respondent filed reply findings on September 7, 1993.

cord can be seen and reached by "just sticking [one's] arm straight out." (Tr. 66). As a result of his inspection, Hughett issued citations alleging violations concerning the condition of the stop cord for all four conveyor belts.(Footnote 2)

Citation No. 3382643 - No. 1 Conveyor Belt

The No. 1 belt entry is a comparatively old entry with numerous timbers and cribs on each side of the belt to support the roof which has sloughed and fallen over the years. (Tr. 23, 88). This belt line is approximately 250 feet long. The height of the belt entry from floor to ceiling is between 28 and 34 inches. (Tr. 26, 52, 59, 104). Clearance from the level of the belt line to the roof, however, is only 24 inches. (Tr. 52, 104, 152). Approximately 25 feet inby from the portal is an area with diminished clearance which is approximately 45 feet long. (Tr. 148). In this area, the ceiling is approximately 6 inches lower than the remainder of the roof along the No. 1 belt entry due to additional collars that have been installed to support an area of draw rock. (Tr. 130). In this cross-timbered area, clearance from the belt line to the roof decreases from approximately 24 inches to 18 inches. (Tr. 152).

The weight of the miner causes the No. 1 belt to operate in a cupped or concave manner analogous to the shape of a hammock. (Tr. 120). Thus, the edges of the belt are higher than the middle of the belt. The bottom rollers that move the belt are set into holes dug in the floor. The top rollers which are 2 inches wider than the belt are slightly higher than the edge of the belt line. (Tr. 136-137).

Upon inspecting the No. 1 conveyor, Hughett concluded that the stop cord was not readily accessible along the entire length of the belt. His conclusion was based on excessive slack in the line which caused it to hang lower than the belt line so that it could not be reached. (Tr. 18). Hughett described the inaccessible slack areas as existing "all the way" along the belt line. (Tr. 23). He also testified that the cords "swagged" down below the belt line between each timber to which the cord was attached,

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2 Citation Nos. 3382644 and 3382645 were issued for violations in connection with the stop cord controls along the No. 2 and No. 3 conveyor belts. (Gov. Ex. 5, 6). The violative conditions cited in these citations are different from those cited in the citations in issue concerning the No. 1 and No. 4 belt lines. (Tr. 34). The citations issued for the No. 2 and 3 belt lines were uncontested by the respondent and the proposed civil penalties for these citations were paid. (Tr. 26).

although he could not recall the distance between the timbers. (Tr. 35, 41). Boston testified that the cord was not clearly visible for approximately 50 percent of the distance along the belt. (Tr. 118).

In rebuttal, Smith testified that the stop cord was hung from 6 to 8 inches above the belt at all locations along the No. 1 belt line except for the 45 foot area that was cross-timbered. (Tr. 132, 149). Smith further testified that in this cross-timbered area, the stop cord was intentionally installed at a lower level than the timbers so that it would be easier to reach because the miners tend to duck under this low clearance area. (Tr. 130, 152). Smith described the location of the stop cord in this area as approximately 2 to 3 inches beneath the top level of the top roller. (Tr. 156).

Citation No. 3382643 was terminated by Hughett on April 22, 1992, wherein Hughett concluded that the ". . . stop control along the No. 1 belt line was installed to a properly [sic] working condition." Smith testified that the only action taken to abate this citation was to raise the stop cord 6 inches on the lateral timbers in the 45 foot cross-timbered area. (Tr. 139).

Citation No. 3382646 - No. 4 Conveyor Belt

The No. 4 conveyor belt, which advances as the working face advances, was approximately 1800 feet long from the belt drive to the tail piece when inspected by Hughett on April 16, 1992. Although the width of the No. 4 belt is the same as that of the No. 1 belt, the clearance from floor to roof is considerably greater along the No. 4 conveyor belt. (Tr. 146).

Hughett testified that the stop cord was inaccessible at a distance of "3 or 4 feet" from the belt line in three or four different places. (Tr. 28, 48). Other than these three or four places, Hughett testified that the placement of the stop cord complied with the regulations. (Tr. 48). Boston testified that the pull cord was inaccessible at distances from "3, 5 or 6 feet out from the belt" in six, possibly eight locations. (Tr. 117, 118). Hughett noted no problem with the installation height of the stop cord. (Tr. 46). Boston testified that the stop cord was unreachable for approximately 20 percent of length of the No. 4 conveyor belt. (Tr. 117). Boston further testified that "the [cord for the] No. 4 belt was definitely more accessible than the No. 1 [belt]." (Tr. 119). Finally, Boston testified that he determined the cord's accessibility by sticking his arm straight out to see if the cord could be reached. (Tr. 66, 67).

Lonnie Carden, an employee of the respondent, is a certified beltman with foreman's papers. (Tr. 190, 191). At the time of the inspection, Carden's responsibilities included performing the preshift examinations on the No. 1 through No. 4 conveyor belts.

(Tr. 179, 180). Carden was also responsible for the maintenance of the No. 4 belt, including operation of the pull cords and belt switches. (Tr. 191). Carden stated that on April 16, 1992, at approximately lunch time, he rode the No. 4 belt outby behind Hughett and Boston. (Tr. 195, 200). Carden observed Boston reach his hand out to evaluate the stop cord distance. (Tr. 192, 193). Carden admitted that Boston could not reach the cord at certain locations. However, Carden testified that, at these locations, Boston remained in the middle of the belt extending his arm directly from that point without making any effort to shift his body which would have brought him into contact with the cord. (Tr. 198). Carden, who was familiar with the No. 4 conveyor belt, stated that in order to reach the cord at those locations it was only necessary for Boston to slide or move his body slightly toward the cord. (Tr. 198).

On April 22, 1992, Hughett terminated Citation No. 3382646 on the basis of his conclusion that the positive-acting start and stop control along the No. 4 belt was installed "properly." (Gov. Ex. 3). However, both Smith and Carden testified that they took no action to abate this citation because they could not find an area where the stop cord was inaccessible. (Tr. 181, 182).

FURTHER FINDINGS AND CONCLUSIONS

Fact of Occurrence

As noted above, the question for resolution is whether the stop cords on the No. 1 and No. 4 belts were readily accessible as required by section 75.1403-5(a). Webster's Third New International Dictionary, (1986 Edition) ("Webster's") defines "readily" as "with fairly quick efficiency; without needless loss of time; reasonably fast; with a fair degree of ease; without much difficulty; with facility; easily."

No. 1 Conveyor Belt

With respect to the No. 1 belt line, it is uncontroverted that the stop cord was obscured for a significant distance (approximately 45 feet). Both Hughett and Boston testified that the stop cord was swagged and the cord was not visible because it was hanging below the belt.

Significantly, Smith's testimony tended to support the observations of Hughett and Boston. Smith conceded that the stop cord was "an inch at the most" below the belt line. (Tr. 131). Smith also described the swag in the cord as "maybe a half an inch below the rollers." (Tr. 131). Although Smith characterized the cord in this 45 foot area as "visible," he stated that you "couldn't see the cord if you were looking at the roller, but you could see between the rollers, and the belt is down between the rollers, and you can see between them and see the cord there

if it were swagging below that." (Tr. 132-133). In a further acknowledgement that the cord was obscured, Smith testified that "you can put your head up to the edge and see out over the belt . . .if you hang your head out over the belt you could stick it into a timber also. But you've got to know what you are doing, and you can come to the edge and you can look down." (Tr. 135).

Applying the operative term "readily" accessible, it is clear that an object that cannot be easily visualized cannot be construed to be readily accessible as contemplated by section 75.1403-5(a). Thus, I conclude that the Secretary has met his burden of establishing that a violation of the applicable mandatory safety standard did in fact occur at the No. 1 conveyor belt.

No. 4 Conveyor Belt

Turning to the No. 4 belt line, the issue is whether the stop cord was a lateral distance of 3 to 6 feet from the edge of the belt at several locations as the Secretary alleges, or, within reach by shifting the position of one's body on the belt as the respondent argues. The Secretary must bear the burden of establishing the fact of a violation. In this case, Hughett and Boston have provided contradictory and inconsistent testimony concerning the number of locations where the cord was allegedly unreachable and the distances at these locations from the cord to the edge of the belt. (See Tr. 28, 117, 118).

Moreover, the Secretary has failed to rebut Smith's claim that no remedial action was taken to abate Citation No. 3382646 because the stop cord was accessible along the entire length of the No. 4 belt. Significantly, Hughett's April 22, 1992, termination of Citation No. 3382646 fails to specify what action was taken to abate the alleged violation. Nor does Hughett's contemporaneous notes taken on April 22, 1992, which were described by the Secretary's counsel as "sketchy," specify what action, if any, was taken to abate the citation. (Tr. 219). Hughett's recollection concerning the respondent's abatement efforts was vague and faulty. (See Tr. 214-222). Finally, Hughett testified that he may have been over-zealous in the presence of Boston who was evaluating his performance as an inspector. (Tr. 44-45).

Boston's testimony also does not effectively rebut the respondent's assertion that no corrective action was taken. Boston testified that he does not have any reason to believe that the conditions were not corrected. However, he indicated that he does not have an independent recollection of what was done to terminate the citation. (Tr. 111). Later in Boston's testimony during cross-examination as a rebuttal witness, Boston testified that his recollection concerning the respondent's abatement had

been refreshed by reading Hughett's notes. (Tr. 235-236). However, these notes are silent concerning abatement at the No. 4 conveyor belt. (Tr. 220-222; Gov. Ex. 12).

In an effort to overcome the inconsistencies in the testimony of Hughett and Boston, the Secretary faults the respondent for its failure to call its Superintendent, Charles White, to corroborate Hughett's and Boston's account. (Petitioner's Brief, 13-14). However, the Secretary has the burden of proving the fact of a violation. The respondent is under no obligation to assist the Secretary in this endeavor. If the Secretary considered White's testimony to be crucial, he was free to subpoena him as an adverse witness. See Brown v. United States, 414 F.2d 1165, 1167 (D.C. Cir. 1969). Having failed to do so, the Secretary is not entitled to a beneficial inference that White, if called, would have buttressed the Secretary's case. Significantly, White does not possess the requisite unique or special knowledge with regard to Hughett's or Boston's observations that warrants an adverse inference against the respondent. Cf. NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. 1980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2d Cir. 1969) (cases permitting an adverse inference concerning missing witnesses' statements or motivations).

Thus, on balance, I credit the testimony of Carden and Smith that the cord was reachable in the areas in question by simply sliding or moving the body toward the edge of the belt and reaching for the cord. (Tr. 166, 181, 184-185, 198). Having concluded that the cord was reachable by leaning and reaching out over the edge of the belt, I find that the Secretary has failed to demonstrate that the stop cord was not readily accessible. Therefore, Citation No. 3382646 shall be vacated.

Significant and Substantial

The remaining issue is whether Citation No. 3382643 issued for the No. 1 conveyor belt was properly designated as significant and substantial. A violation is deemed to be "significant and substantial" if there "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Company, Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498 (1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (1987).

Hughett testified that the function of the stop cord is to enable a miner to deenergize the belt in case of an emergency. (Tr. 12). Hughett and Boston testified that an ever present hazard is roof material falling on the belt. In such an event, given the concavity of the belt, it is possible that a miner could sustain serious injury by being carried on the belt underneath fallen roof material. In this regard, the testimony reflects that the No. 1 belt line is located in an area that is prone to roof fall. (Tr. 23, 87, 88). Moreover, in view of the number of timbers and cribs required to support the roof, Boston testified that it would be almost impossible to jump off the No. 1 belt because of the lack of lateral clearance along the belt line. (Tr. 122).

Boston characterized the hazard contributed to by this violation as twofold. The first hazard, as noted above, is that a miner could not stop the belt in case of an emergency because he could not locate the stop cord. The second hazard is the risk associated with injury to the hand or arm if a miner extended his upper extremities beneath the belt. In such an event, the rollers, which are spaced 8 to 10 feet apart, can cause a serious crushing injury to the hand. There are also wood supports installed against the belt itself which can cause serious injuries to the head or hand as the miner maneuvers for the cord. Thus, it is apparent that this violation exposes the miner to significant injuries by virtue of his inability to deenergize the belt as well as by the act of blindly reaching for the cord. As such, the Secretary has established that there is a reasonable likelihood that the hazards contributed to by this violation will result in a serious injury given continued mining operations. Consequently, Citation No. 3382643 was properly designated as significant and substantial.

Negligence

Citation No. 3382643 notes a moderate degree of negligence with regard to the violation associated with the No. 1 belt. Negligence is commonly referred to as a measure of one's carelessness. In this regard, Smith testified that the stop cord was intentionally hung lower in this 45 foot cross-timbered area because it was an area of lower clearance where miners tend to duck their heads down. (Tr. 153). Therefore, the respondent was of the opinion that hanging the cord in a lower position made it easier for miners to reach. (Tr. 130-140). While I find that this concern is outweighed by the risk of hand injury associated with placing the hand under the belt and rollers, the respondent's rationale for the placement of the cord is an

appropriate mitigating factor. Therefore, the underlying degree of negligence associated with Citation No. 3382643 shall be reduced to low. The gravity, however, in view of the risk of significant injury, remains serious. Consequently, I am assessing a civil penalty of $200 for this citation.

Docket No. SE 92-456

As previously noted, the parties moved to settle Citation No. 3382587 which is the subject of Docket No. SE 92-456. The respondent has agreed to pay a civil penalty of $75 in return for the Secretary's agreement to remove the significant and substantial designation. The motion to approve settlement was granted on the record and is incorporated herein.

ORDER

Based on the above findings of fact and conclusion of law, it IS ORDERED that:

l. Citation No. 3382646 IS VACATED.

2. Citation No. 3382643 IS AFFIRMED although the underlying negligence is reduced from moderate to low.

3. The settlement motion concerning Citation No. 3382587 IS APPROVED and the significant and substantial designation IS DELETED.

4. The respondent SHALL PAY a total civil penalty of $275 within 30 days of the date of this decision. Upon receipt of payment, these cases ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Imogene A. King, Esq., Frantz, McConnell & Seymour, P. O. Box 39, Knoxville, TN 37901 (Certified Mail)

dcp