CCASE:
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,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1964
Petitioner	:	A.C. No. 46-01867-03904
	:	
v.	:	Docket No. WEVA 91-1965
	:	A.C. No. 46-01867-03905
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Blacksville No. 1 Mine

DECISION ON REMAND

Before: Judge Weisberger

The Commission, in its decision in this case, (Consolidation Coal Company, 15 FMSHRC 1555 (August 21, 1993)), remanded this proceeding to me to determine whether the violation of 30 C.F.R. 75.1707, set forth in Citation No. 3315803 was significant an substantial, and to assess a civil penalty.

I. Significant and Substantial

According to MSHA Inspector Richard Gene Jones, the violation herein is significant and substantial in that, in the event of a fire in the track entry, with no air-tight separation between the intake and track entries, smoke and carbon monoxide would enter the intake entry. Workers inby would thus be exposed to the hazard of smoke inhalation and carbon monoxide poisoning. He also indicated that a decrease in visibility caused by smoke could cause lack of orientation, which could result in contusions. Jones noted the existence of fire sources such as a high voltage cable, the liberation of methane which would accumulate in a roof cavity,(Footnote 1) and the fact that the gauge of the trolley track is incorrect which causes the trolley pole to jump off the wire, and hit the trolley which causes arcing.

The Commission has set forth in Mathies Coal Company 6 FMSHRC 1 (1984) the elements that must be established to prove a violation is significant and substantial as follows:

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1 The mine is classified by MSHA as one that liberates more than one million cubic feet of methane in a 24 hour period.

> 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. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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).

In analyzing whether it has been established that the violation was significant and substantial, I note the finding by the Commission of the violation by Respondent of Section 75.1707. Further, I find that the violation contributed to the hazard of miners in the intake entry being exposed to the dangers of smoke, should a fire occur in the track entry. Also, the hazards of smoke exposure could certainly result in serious injury as set forth in Jones' uncontradicted testimony.

The issue for resolution, is the likelihood of a fire causing smoke to course from the track entry, through the hole in the stopping at issue, to the intake entry. (See, BethEnergy Mines, Inc., 14 FMSHRC 1232, (August 4, 1992)). In other words, since the hole in the stopping contributed to a hazard only in the event of a fire, it must be established that the event of the fire was reasonably likely to have occurred. (See, BethEnergy, supra).

The mere existence of various potential fire sources cannot support a conclusion that the event of a fire was reasonably likely to have occurred in the normal course of mining operations. There is no evidence of the existence of any fault in the condition of the high voltage cable. Further, on cross-examination, Jones indicated that the portion of the track where the gauge is not correct is not within the P8 Panel, i.e., the

panel at issue.(Footnote 2) He conceded that, accordingly, a fire started by arcing caused by the incorrect track gauge should not affect the P8 panel in issue, unless the fire gets out of control. There is no evidence that this would be reasonably likely to occur. Also, contrary to Petitioner's assertion in his brief that the mine in question has a history of mine fires, the only evidence on this point is the testimony of Jones that there was a fire causing fatalities in 1972. I thus conclude that, inasmuch as the record fails to establish the likelihood of a hazard producing event i.e., a fire, it must be concluded that the violation herein was not significant and substantial (See, Mathies Coal Co., supra).

II. Civil Penalty

In evaluating the negligence, if any, of the Respondent with regard to the specific violation cited herein, not much weight is placed on the fact that on various dates in January and February, 1991, Jones issued citations to Respondent alleging violations of Section 75.1707, supra, with regard to stoppings located at other longwall panels. The issuance of these citations is accorded little weight in evaluating whether Respondent knew or reasonably should have known of the existence of the specific hole in the stopping in question.

Jones indicated that the hole in the stopping was "very obvious" (Tr. 48) and the stopping was approximately 20 to 25 feet from where a person would get off the mantrip. However, there was no evidence as to how long the hole existed prior to the inspection, nor is there any evidence to indicate what caused the hole.

I find, for the above reasons, that there is insufficient evidence to base a conclusion that the Respondent's negligence herein was more than a slight degree. Taking into account the remaining factors in Section 110(i) as stipulated to by the parties, I conclude that a penalty of $100 is appropriate for the violation cited in Citation No. 3315803.

The parties stipulated that the decision regarding Citation No. 3315803 would apply to Citation No. 3315865 (Tr.7). Accordingly, consistent with my decision regarding Citation No. 3315803, I find that the violation cited in Citation No. 3315865 was not significant and substantial, and that a penalty of $100 is appropriate.

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2 The parties stipulated that the site of the incorrectly gauged trolley track is between the P7 and P8 Panels.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay $200 as a civil penalty for the violations found herein.

It is further ORDERED that Citation Nos. 3315803 and 3315865 be amended to reflect the fact that the violations cited therein are not significant and substantial.

Avram Weisberger
Administrative Law Judge

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