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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
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CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
INCORPORATED,	:	
Contestant	:	Docket No. WEVA 92-873-R
v.	:	Order No. 3717931; 4/21/92
	:	
SECRETARY OF LABOR,	:	Arkwright Mine No. 1
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1066
Petitioner	:	A.C. No. 46-01452-03867
v.	:	
	:	Docket No. WEVA 92-1094
CONSOLIDATION COAL COMPANY	:	A.C. No. 46-01452-03868
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Daniel E. Rogers, Esq., Consolidation Coal Company, Inc., Pittsburgh, Pennsylvania, for Contestant/Respondent; Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Barbour

In these consolidated cases arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq., Consolidation Coal Company, Inc. ("Consol") is contesting the validity of an order issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. 814(d)(2). The order alleges a "significant and substantial" violation of mandatory safety standard 30 C.F.R. 75.1725(a) caused by Consol's "unwarrantable failure" to comply with such standard. The order was issued shortly after the issuance of a citation alleging a S&S violation of the same standard. Consol also is disputing the validity of the this citation. A hearing was held in Morgantown, West Virginia.

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At the commencement of the hearing and as relevant to these matters the parties stipulated as follows:

1. Consol is the owner and operator of the Arkwright No. 1 Mine.
2. The operations of Consol are subject to the jurisdiction of the Mine Act.
3. This case is under the jurisdiction of the Commission and its ALJs pursuant to sections 105 and 113 of the Mine Act.
4. The individual whose signature appears in block 22 of Citation No. 3717929 and Order No. 3717931 was acting in his official capacity as an authorized representative of the Secretary.
5. True copies of the citation and order were served on Consol or its agent as required by the Mine Act.
6. The total proposed penalty will not affect Consol's ability to continue in business.
7. The copies of the citation and order attached to the Secretary's petition for civil penalty are authentic with all appropriate modifications or abatements.

Tr. 11-13.

FACTUAL AND PROCEDURAL BACKGROUND

During the midnight to 8:00 a.m. shift on April 21, 1992, MSHA Inspector Richard McDorman conducted a regular inspection at Consol's Arkwright No. 1 Mine, an underground coal mine, located in Monongalia County, West Virginia.

McDorman was accompanied by Consol's safety escort Harold Moore and miners' representative Denise Russell. After the group visited the 11 left longwall section, they arrived at a crosscut wherein the main south high voltage splitter box(Footnote 1) was located. McDorman observed that four bolts were missing from the lids on top of the splitter box and other bolts were broken off in their threaded holes. Pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), McDorman issued Citation No. 3717929, because the splitter box was not maintained in safe operating condition in accordance with section 75.1725(a), a mandatory safety

1A splitter box allows a single incoming power cable to be split or divided to accommodate two separate output power cables. standard for underground coal mines. Section 1725(a) provides:

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"Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Moore lifted a lid with one bolt missing to see what needed to be repaired and the incoming power to the splitter box was immediately "knocked" by a "finger" safety switch installed in the lid. After the power went off, McDorman told Moore he should not restore power to the splitter box.

Moore went to the paging telephone located at the tenant bore hole(Footnote 2) to call the maintenance shop to report what had happened and he heard people on the paging telephone and on the jeep radio "hollering" that they had lost power. According to Moore, Gary Neely, the shift foreman, indicated that the supply motormen had lost power to operate the locomotives on the supply tracks. Motormen hollered that the locomotives were losing the air on their brakes. Gary Samples, the foreman on 11 left longwall section, yelled that he needed power. The tippelman had only partial power. All the belts had gone down. All AC power was off and most DC power was off. Moore told the shop that he needed a mechanic to come look at the splitter box.

Moore returned to the splitter box and told McDorman that he needed to turn the power back on for the safety of Consol's employees. Moore explained that there was no problem with the splitter box, the 11 left longwall needed power, and miners were stranded on sections without vehicles to transport them in case of injury. McDorman warned Moore that turning the power back on would violate section 1725(a) and that he would write another violation. When the mechanics arrived, Moore directed them to turn the power back.(Footnote 3)

About 15 minutes after the power had been restored, Robert Lauklin, the maintenance foreman, arrived at the splitter box, sent one of the mechanics to the shop for parts, and then had another mechanic knock off the power so the lids on the splitter box could be fixed.

McDorman told Moore he was ready to go and they went to the mine safety office. Pursuant to section 104(d)(2) of the Mine Act, McDorman then issued Order No. 3717931 because Moore had known the splitter box was in unsafe operating condition, had known the requirements of section 1725(a), and nonetheless had

2The tenant bore hole brings power from above ground to the bottom of the mine. At the bottom, there is a power set to turn the power on and off and a circuit breaker. The power cable goes to the splitter box located approximately 100 feet (one crosscut away) from the tenant bore hole.

3The mechanics are electrically certified by the state.

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ordered the splitter box into operation, creating the same likelihood and severity of potential injury that existed when the citation was issued.

CITATION NO. 3717929

McDorman issued Citation No. 3717929 for failure to maintain the splitter in safe operating condition. In his opinion, the lid to the splitter box did not have a sufficient number of bolts to prevent it from being lifted. According to testimony at the hearing, the splitter box is a yellow(Footnote 4) metal box approximately 15 to 22 feet long, 4-1/2 to 10 feet wide, and 3-1/2 to 4-1/2 feet high, with three to five lids on top weighing 20 to 70 pounds each. One-half to three-eighth-inch bolts keep the lids securely attached atop the splitter box. The splitter box receives high voltage power, i.e., 7200 volts AC, and separates the power to supply two sections of the mine. A 4 aught (4/0) cable enters one end of the splitter box supplying power. Two similar cables exit the other end. There is a layer of insulation around the 4/0 cable until it enters the splitter box. Inside the box, the insulation is removed and there are bare high voltage wires connected to metal bus bars, or termination points. Both of the ongoing cables are connected to the same bus bars or connection points. There are high voltage warning signs at the splitter box and the cable is fenced to keep people away from it.

McDorman testified that he never has seen a splitter box without some type of retaining device on the lids. Michael Kalich, an MSHA electrical inspector, testified that he never has observed a splitter box without its lids bolted or welded to the framework of the splitter box. McDorman testified that there were three lids on top of the splitter box weighing about 20 pounds each and there was one bolt on each side of each lid, i.e., two bolts per lid or 6 bolts per splitter box. McDorman stated that since he found four missing bolts, one lid had no bolts to prevent it from being removed. Moore testified that there were five lids on top of the splitter box weighing 40 to 60 pounds each and there were two bolts on each side of each lid, i.e., four bolts per lid. Lauklin testified that there were about five lids on top of the splitter box weighing about 60 to 70 pounds each and there was one bolt on each side of each lid, i.e., two bolts per lid. Regardless of the number of lids on top of the splitter box and the number of bolts in each lid, it is undisputed that Moore was able to lift one lid.

When the splitter box is energized, no one is permitted to lift a lid. The splitter box has to be deenergized before a lid is raised by going outby the splitter box to the next device that would deenergize the cable that feeds the splitter box and then

4All electrical installations at the mine are painted yellow.

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deenergizing, locking, tagging, and grounding it to bleed off the capacity charge(Footnote 5) to the cable before opening the lid. Under these conditions, a certified electrician is permitted to unbolt and remove a lid.

Each lid on the splitter box is equipped with a lid switch, which is a safety device to deenergize incoming power to the splitter box when a lid is lifted. When the lid is down, the finger-style switch is bent and the circuit is closed. When the lid is lifted, the spring-loaded lid switch raises to a vertical position and opens the circuit which deenergizes the power at its source. Lid switches are generally made of plastic or metal and they fail on occasion. Inspector McDorman has seen lid switches that did not work on several occasions on similar high voltage splitter boxes. Kalich has encountered eight switches that did not work.

If a lid switch did not work or did not operate the circuit properly, then the components inside the splitter box would not be deenergized. They would carry the full voltage of the system. Even if the lid switch worked properly and turned off the power, the high voltage cable would still have a capacity charge in it that would continue to energize the components of the splitter box.(Footnote 6)

THE VIOLATION

As noted, Section 75.1725(a) requires stationary equipment to be maintained in safe operating condition and unsafe equipment to be removed from service immediately. I find lifting the lid could allow a person's hand or arm into the splitter box, and injury ranging from a slight electrical shock to an electrocution could result. I conclude therefore that the missing bolts, which facilitated unauthorized lifting of the lid of the splitter box, rendered the equipment unsafe and therefore that Consol violated mandatory safety section 75.1725(a) as charged in the citation.

5After the power is turned off and before the cable is grounded, the high voltage cable stores a capacity charge that continues to energize components of the splitter box.

6One could reasonably expect to find from 0 to 100 milliamps in capacity charge on the cable. A 50 milliamp shock would be severe enough for a person to lose feeling in his hand. Further, if the charge was a 100 milliamp shock, under wet conditions, it could be fatal.

S&S

A "significant and substantial" 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 or health hazard." 30 U.S.C. 814(d). The Commission has held that a violation is significant and substantial within the meaning of section 104(d)(1) if, based on the particular facts surrounding the 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 further explained:

In order to establish that a violation of a mandatory safety 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.

The Commission also has held that the significant and substantial nature of a violation must be determined in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-1574 (July 1984). The Commission has emphasized that "the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis omitted).

The hazard presented by the absence of bolts is unauthorized entry into the splitter box, which could result in electrical burns, electrical shock, or electrocution. Kalich testified that since 1970, there have been 70 miner fatalities involving high voltage and since 1985, there have been 2 fatalities involving miners who opened boxes while the circuits were energized. In one instance, the lid switch did not work. In the other the circuit was defective. In addition, there have been fatalities due to unauthorized access of high voltage equipment, e.g., a belt cleaner entered a high voltage compartment and was electrocuted and a utility man entered a high voltage room and was electrocuted. I credit Kalich's testimony and I find that even if the lid switch worked and deenergized the power, while the potential severity of an injury might be lessened, the likelihood of an injury occurring would not be reduced because of the capacity charge on the cable. Thus, the unbolted lid contributed to an electrical shock hazard and whether the shock

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was caused directly by the current or by the capacity charge the resulting injury was reasonably likely to be serious in nature.

In addition to the underlying violation, the discrete safety hazard and the reasonably serious nature of the potential injury caused by the violation, I conclude that the injury was reasonably likely to occur.(Footnote 7) The missing bolts facilitated and encouraged unauthorized entry in that in the event of a malfunction requiring entry into the box, the temptation would have been for a miner immediately to raise the lid and correct the problem rather than to wait for a certified electrician to unbolt the lid and begin repair work. I am convinced this ease of access made an electrical injury reasonably likely, which I assume is why the lids were bolted in the first place. In other words, based on the occasional failure of lid switches, the possible presence of a capacity charge on the cable, and the previous fatalities resulting from unauthorized entry into other high voltage boxes, I find that a reasonable likelihood existed that unauthorized entry into the splitter box would have resulted in a serious injury if normal mining operations had continued, and I find that the violation was S&S.

CIVIL PENALTY

Because a significant electrical injury or even a fatality could have resulted for the violation; I conclude the violation was serious. In addition, I agree with McDorman that it was due to Consol's negligence. The mine has a large history of previous violations. The Secretary has proposed a civil penalty of \$288 for the violation. Given the gravity of the violation, the mine's large history of previous violations and Consol's large size, I conclude that a civil penalty of \$500 is appropriate.

ORDER NO. 3717931

Inspector McDorman issued Order No. 3717931 for putting the cited splitter box back into operation following its removal from service minutes earlier pursuant to the citation. Moore knew that McDorman considered the splitter box to be in unsafe operating condition and that turning the power back on would violate section 1725(a). However, Moore testified that he ordered the splitter box back into operation to alleviate safety concerns in other areas of the mine. The violation in the order was attributed to a high degree of negligence on Consol's part.

⁷The splitter box is located 25 to 35 feet away from the supply track.

THE VIOLATION

Moore decided unilaterally to restore power to the splitter box without first having the lid bolts replaced. In so doing he returned the splitter box to service in an unsafe condition. Because the splitter box was then not maintained in safe operating condition, McDorman was right to again cite Consol for a violation of section 75.1725(a). I conclude that issuance of the separate order alleging a violation of the same standard was valid and that the violation existed as charged.

S&S

The second violation of section 75.1725(a) was not S&S in that injury was not reasonably likely to occur. Rather, entry into the splitter box by untrained and unauthorized personnel was highly unlikely after the power was restored. The condition of the splitter box was known to everyone, McDorman was on the scene and repair work was underway within 15 or 20 minutes.

UNWARRANTABLE FAILURE

Under section 104(d)(1) of the Mine Act, 30 U.S.C.

814(d)(1), a finding of "unwarrantable failure" may be made if a violation is caused by the operator's unwarrantable failure to comply with a mandatory safety standard. The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghioghney and Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In Emery Mining the Commission stated:

`Unwarrantable' is defined as `not justifiable' or `inexcusable.'
`Failure' is defined as `neglect of an assigned, expected, or appropriate action.' Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ... [N]egligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by `inadvertence,' `thoughtlessness,' and `inattention.' Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention.

9 FMSHRC at 2001.

Withdrawing the splitter box from service shut down power on the entire south side of the mine. Moore intentionally placed the cited splitter box back into service to remedy safety concerns and Moore told McDorman that he would turn the power

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back on and take another violation rather than jeopardize the safety of his employees.

One and one-half hours before citing the splitter box, McDorman had visited the 11 left longwall section and had spoken with miners who told him that the shields were digging into the soft bottom. Roof rock that was in the pan line of the longwall indicated to McDorman that roof conditions were poor, but he did not observe any unsafe roof conditions that would have required the longwall to continue operations after the splitter box shut down power. On the other hand, Moore testified that in the previous 2 to 3 weeks, the longwall had been mined continuously every shift except on Sundays to try to keep control of the bad roof. Moore stated that the longwall was in a major fault area with extremely bad bottom and roof conditions, and large rocks and loose shale were falling into the pan line and over the top of the pan line out into the walkways. He also stated that the shields could not advance and the tailgate was impassable. Moore testified that in this situation, the rock was removed by running the longwall to keep the pan line moving until the rock was small enough to go into the crusher. Otherwise, the rock had to be broken with a sledgehammer or blown up with rock blaster powder. Moore stated that if power was lost on the longwall the roof conditions could have worsened, exposing miners to falling rock and to the danger's inherent in trying to break or shoot the rock.

On the paging telephone and jeep radio, Moore heard miners' concerns about having lost power. Moore heard that the locomotives could not be operated on the supply tracks. He also heard the motormen expressing concern about the locomotives' brakes. Moore testified that this was a safety problem for the locomotives and the supply cars they were pulling because of the possibility of runaways. The equipment could run either towards a working section, a power center or could have derailed.(Footnote 8) Moore also was concerned that miners were stranded on sections without vehicles to transport them in case of injury. Moore struck me as a conscientious supervisor and I credit his testimony.

Under these circumstances, I conclude that Consol's negligence in restoring the cited splitter box to service was mitigated by Moore's legitimate safety concerns. I do not believe that the violation resulted from Consol's indifference or serious lack of reasonable care. Rather, Consol was diligent in

8A Consol mechanic testified that all the sections are on an incline.

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trying to minimize the hazard at the splitter box(Footnote 9) while at the same time, minimizing other possible mine safety hazards resulting from the power outage. I conclude that the second violation of section 75.1725(a) was not the result of Consol's "unwarrantable failure" to comply with the standard.

CIVIL PENALTY

For the reasons set forth above, I find the violation was not serious and was the result of less than ordinary negligence on Consol's part. As noted, the mine has a large history of previous violations and Consol is large in size. The Secretary has proposed a civil penalty of \$1700 for the S&S violation caused by Consol's "unwarrantable failure" to comply in Order No. 3717931. Given the fact that I have found the violation to be neither S&S nor "unwarrantable" and taking into consideration the civil penalty criteria just mentioned, I conclude that a civil penalty of \$250 is appropriate.

ORDER

Accordingly, Citation No. 3717929 is AFFIRMED and a civil penalty of \$500 is assessed for the violation of section 75.1725(a). The Secretary is ordered to MODIFY Order No. 3717931 to a section 104(a) citation and to delete the S&S and "unwarrantable" findings. A civil penalty of \$250 is assessed for the violation of section 75.1725(a). Consol is ORDERED to pay the civil penalties and the Secretary is ORDERED to make the modifications within thirty (30) days of this decision and upon receipt of payment and modification of the order, these matters are DISMISSED.

David F. Barbour
Administrative Law Judge
(703)756-5232

⁹Lauklin asked Moore if he could station a mechanic at the energized splitter box until the bolts were fixed so no one could get into it and McDorman said that would not suffice.

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