

CCASE:
SOL (MSHA) V. PITTSBURG AND MIDWAY COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 28, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 91-202
Petitioner : A.C. No. 29-00095-03561
 :
v. :
 : York Canyon Underground Mine
PITTSBURG AND MIDWAY COAL :
MINING COMPANY-YORK CNYN :
COMPLEX, :
Respondent :

DECISION AFTER REMAND

Before: Judge Morris

After the remand of the above case, the parties were granted an opportunity to file supplemental briefs.

The Secretary declined to submit a supplemental brief but stated by letter filed December 14, 1994, that the facts authored in the FMSHRC decision of November 17, 1993, justify a finding that the violation was "S&S".

P&M filed a statement in lieu of supplemental briefs.

In its order of remand the Commission vacated the Judge's finding that the violation was not S&S and directed the Judge to reconsider and evaluate all of the evidence bearing on the S&S issues. Finally, if the Judge found the violation was S&S, he should then assess an appropriate penalty.

THE EVIDENCE

MSHA Inspector DONALD JORDAN issued Citation No. 3243321 at the York Canyon Underground Mine. The citation alleges a violation of 30 C.F.R. 77.400(a).(Footnote 1) (Tr. 30; Ex. P-15).

1 The cited regulation reads:

- (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts

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He issued the citation because a feeder slide, a moving machine part adjacent to a walkway was not guarded. The area where the feeder slide is located must be examined several times a shift. The tail of the belt needs to be greased. (Tr. 31).

Mr. Jordan stated that the handrail adjacent to the walkway was 12 to 18 inches from the feeder slide. The handrail does not prevent anyone from reaching into the feeder slide when greasing or cleaning the equipment. The feeder slide was about waist-high. (Tr. 32).

The operator abated this violation by installing a mesh guard.

Mr. Jordan believed this was an S&S violation because someone, upon reaching into the unguarded area while it was in motion, could become entangled and be seriously injured. (Tr. 32). The result could be lost work or restricted duty.

Mr. Jordan considered the operator's negligence to be moderate. (Tr. 33).

MICHAEL KOTRICK, P&M manager for safety, testified that a supervisor enters this isolated area to do a methane check and a preshift examination. A utility man or clean-up person enters the area one to three times a shift, depending on the type of coal being run through the plant. (Tr. 58, 77). He may summon a repairman if necessary. (Tr. 77).

The walkway adjacent to the feeder slide is 36 inches wide and is made of a heavy metal grating. Water is used to clean the area. (Tr. 77, 78).

As an individual approaches the hazard area, there is a cement wall on one side and a handrail on the other. The unguarded hazard is 12 to 18 inches beyond. (Tr. 780). If someone slipped, he would probably grab for the railing which also serves as a balancing point. As you walk along, you can hold the railing. However, it is not much of a physical barrier as it consists of one-half inch to two-inch pipe. (Tr. 79).

Mr. Kotrick would not say that no one showers the area but it's easier to wash it into the sump and pump it back into the cleaning system. (Tr. 79).

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which may be contacted by persons, and
which may cause injury to persons shall be
guarded.

DISCUSSION

WAS THE VIOLATION S&S?

A violation is properly designated S&S "if, based upon 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:

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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 1093-104 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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) (emphasis in original).

Following the Mathies formulation, I conclude the record establishes that there was an underlying violation of 77.400(a) in that the moving machine part, the feeder slide, was not guarded. Also, there was a measure of danger contributed to by the violation.

The third paragraph of the Mathies formulation is established by the facts. Mr. Jordan described the hazard as "the tail of the belt that needs to be serviced--greased, if you will." (Tr. 31-33). A worker servicing the equipment would be exposed to the hazard of becoming entangled with the unguarded machine parts. In sum, I agree with Inspector Jordan that the violation was S&S because someone reaching toward the unguarded feeder slide to grease or clean it could become entangled in the moving parts and be seriously injured. (Tr. 32-33).

In addition to the hazard described above, there also is a hazard involving a supervisor and utility cleanup man entering

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this area on the narrow walkway. A utility man enters the area as frequently as three times a day. Washing down the area will likely result in some residual dust or water on the walkway. This could cause some unsure footing and, if the worker slips, he could fall into the unguarded machine part which is only 12 to 18 inches away.

Mr. Kotrick testified for P&M, that if a worker slipped, he would probably grab for the railing which serves as a balancing point. (Tr. 78, 79).

I am not persuaded by Mr. Kotrick's evidence. The railing can hardly serve as a guard and P&M does not contend it is a guard. In addition, Mr. Kotrick conceded the handrail did not provide much of a physical barrier. Finally, if any workers were carrying objects, the handrail would provide little protection, since their hands would be occupied.

Based on the credible evidence, I conclude that there was a reasonable likelihood that the hazard contributed to will result in an injury.

The fourth element of the Mathies formulation is also established. An injury will be of a serious nature if a worker becomes entangled in moving machine parts.

P&M argues that a generalized concern that maintenance workers may work around unguarded equipment does not by itself support an S&S designation. An S&S designation is established if the evidence supports the Commission's mandates concerning S&S. In the instant case, the workers were within 1.5 feet of the unguarded machine parts. This fact and the previously discussed criteria require the S&S designation.

P&M also contends the Secretary failed to prove potential risk to maintenance and repair workers. Specifically, P&M asserts Petitioner produced no evidence of the frequency of such work while the equipment was operating.

I reject P&M's argument. The evidence establishes that a supervisor enters the area for a methane check and a preshift examination. A utility cleanup worker enters the area one to three times a shift. (Tr. 77). It is not the Secretary's obligation to prove that each unguarded machine part was operating at all times. Further, P&M offered no evidence supporting its position.

P&M further criticizes the Secretary's argument concerning the cement wall on the opposite side of the walkway. P&M's argument fails to establish a defense to the violation.

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After carefully considering all of the evidence, I conclude P&M's violation of 77.400(a) was S&S. Citation No. 3243321 should be affirmed.

CIVIL PENALTIES

The statutory criteria to be followed in assessing civil penalties is contained in Section 110(i) of the Act.

P&M's history of previous violations, as contained in Exhibit P-2 indicates the operator was assessed and paid penalties on 70 violations in the two years ending March 26, 1991.

P&M is a large operator and the penalty will not affect its ability to continue in business. (Stip. 3).

The gravity of the violation was high since a worker could be severely injured if he became entangled in the machine parts.

P&M demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation.

For the foregoing reasons, I consider that a penalty of \$150.00 is appropriate and I enter the following:

ORDER

Citation No. 3243321 is AFFIRMED and civil penalty of \$150.00 is ASSESSED.

John J. Morris
Administrative Law Judge

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