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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
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 93-333
	:	A. C. No. 40-02045-03593
v.	:	
	:	S & H Mine No. 2
S & H MINING, INC., Respondent	:	

DECISION

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

Before: Judge Feldman

This case is before as a result of a petition 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). This matter was heard in Knoxville, Tennessee on December 14, 1993. Mine Safety and Health Administration (MSHA) inspectors Ted E. Phillips and Stanley L. Sampsel testified on behalf of the Secretary. Paul G. Smith, president of S & H Mining, Incorporated, and employees Cecil Broadus, Richard Wright and Larry Bullock testified for the respondent. The parties' posthearing proposed findings and conclusions are of record.

This case concerns eleven 104(a) citations that are all designated as significant and substantial. Therefore, the issues for resolution in this proceeding are whether the violations in fact occurred, and if so, whether they constituted significant and substantial violations. In addition, the appropriate civil penalty to be assessed for each established violation must also be resolved. The parties have stipulated to my jurisdiction in this matter and to the pertinent statutory civil penalty criteria in Section 110(i) of the Act, 30 U.S.C. 820(i).

At the hearing, I approved a settlement agreement with respect to Citation No. 4041541. The terms of the agreement will be incorporated in this decision. The respondent has stipulated to the fact of occurrence of the violations cited in four of the remaining ten citations. These are Citation Nos. 4041543, 4041547, 3825085 and 3825086.

The Applicable Significant and Substantial Standard

The Secretary has the burden of proving that a particular violation is significant and substantial in nature. The Commission, in Mathies Coal Co., 6 FMSHRC 1 (January 1984), enumerated the elements that must be established for the Secretary to prevail on the significant and substantial issue. The Commission stated:

> 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 at 3-4.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission further stated:

> 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 addressing the significant and substantial question, the Commission has noted the likelihood of injury must be evaluated in the context of an individual's continued exposure during the course of continued normal mining operations to a hazard created by the subject violation. Halfway, Inc., 8 FMSHRC 8, 12 (August 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985); U.S. Steel Mining Company, 6 FMSHRC 1573, 1574 (July 1984).

Citation No. 3825085

Citation No. 3825085 was issued on March 22, 1993, by MSHA Inspector Ted Phillips for violation of the mandatory safety standard in 30 C.F.R. 75.204(c)(1). This safety standard requires that "a bearing plate shall be firmly installed with each roof bolt." The respondent has stipulated to the fact of occurrence of this violation.

The respondent utilizes resin grout-type bolts which are steel bolts four feet in length inserted into holes drilled four feet long upward into the roof. A resin cartridge is inserted into the hole. The roof bolt operator then spins the bolt into the roof plate and hole applying pressure to the resin in order to form a solid bond between the steel bolt, bearing plate and roof. (Tr. 45). Bearing plates are secured by the roof bolt head and resin on four foot centers, four across the 20 feet width of the entry. The roof bolts and bearing plates along with the right and left rib create a "beam" that draws the rock together providing roof support. (Tr. 21). These "beams" are installed along the full length of the entry, four feet on center.

Citation No. 3825085 was issued by Phillips for a roof bolt on which the bearing plate was not situated firmly against the roof. Instead, due to sloughage of draw rock around the bolt, the bearing plate was approximately six inches from the roof. Phillips testified that the loose plate was located in the number three entry closest to the left hand rib. To the right of this loose plate were three secure plates, four feet on center and the right rib. Four feet in front and four feet behind this row of plates were other similarly installed "beams" consisting of bearing plates, roof bolts and ribs.

As a justification for his significant and substantial designation, Phillips testified that a loose bearing plate could contribute to a roof fall if other bearing plates were loose. However, Phillips conceded that a roof bolt without a secure plate still provides partial roof support because of the bond between the resin and steel bolt. More importantly, Phillips testified that even with the loose bearing plate, an effective support structure was created by the remaining bolts and ribs in that "beam" and by the "beams" to the front and rear of the bolt with the loose bearing plate. (Tr. 52). Phillips stated that he inspected approximately 500 roof bolts in the immediate face area. Of these 500 bolts, only the subject bolt had a loose bearing plate. (Tr. 29-30).

In addressing the significant and substantial issue, the Secretary must establish that there is a reasonable likelihood that the hazard contributed to, i.e., a compromised roof support system, will result in an event, i.e., a roof collapse, which will contribute to an injury of a serious nature. While roof

support is a leading cause of serious injury and death in underground coal mines, the determinative question is the likelihood of a roof fall under these circumstances. The Secretary does not contend, nor am I prepared to conclude, that one loose bearing plate with secure roof bolts, plates and ribs both to the right and left, and, front and rear, significantly compromises the effectiveness of the roof support system. In this regard, even Inspector Phillips opined the structural integrity of the "beam" given one loose bearing plate, would not be "exceptionally weak." (Tr. 51-52). Thus, the Secretary has not prevailed on the significant and substantial question. Accordingly, the significant and substantial designation in Citation No. 3825085 shall be deleted. Consequently, I am assessing a civil penalty of $100 instead of the $178 civil penalty initially proposed by the Secretary.

Citation No. 3825086

Inspector Phillips issued Citation 3825086 on March 22, 1993, for an alleged violation of the mandatory safety standard in 30 C.F.R. 75.208 which requires the end of a permanent roof support area to be posted with a readily visible warning, or, to have installation of a physical barrier, to impede travel beyond the permanent support. The citation was issued because a flag or warning device had not been placed at the last row of bolts inby the face in the No. 4 entry to warn miners of unsupported roof where the last bolt on the far right corner inby the face had not been installed.

According to Inspector Phillips, the hazard created by the failure to display the flag or warning device was that a miner could go inby unsupported roof. (Tr. 33). The subject citation concerns a missing roof bolt from the far uppermost right hand corner. (Tr. 55). Immediately, inby the missing roof bolt was a solid rib of coal. To the left and right behind the missing bolt were properly installed roof bolts on four foot centers. (Tr. 55, 56). To the immediate right of the missing bolt was a solid rib of coal. (Tr. 55.) The ribs on the sides provide support in the area. (Tr. 64.).

The final bolt in the No. 4 entry had not been installed in its normal sequence because the floor in the immediate area was too soft to bring in the roof bolt machine. (Tr. 78, 84). The roof bolt machine operator, Richard Wright, testified that before the final bolt could be installed, the soft bottom beneath it would have to be scooped out in order to allow access by the bolt machine. (Tr. 79). However, the continuous miner blocked the area from access by the scoop (Tr. 79). Wright's plan was to return to the area as soon as it was accessible with the scoop, and to install the bolt after the area was cleaned before the next cut of coal was made. (Tr. 80, 88).

Wright was responsible for hanging the flag or warning device at the site of the missing bolt. (Tr. 39). However, Wright testified that he simply forgot to hang the flag. (Tr. 78). The respondent has admitted the fact of the violation but contests the significant and substantial designation.

Phillips testified that the significant and substantial hazard posed by failing to hang a warning device is that a person could go inby unsupported roof and be exposed to the risk of roof fall. (Tr. 32, 33). Phillips testified that the individual most likely to be exposed to this risk was the preshift examiner. Wright testified that David Miles was the preshift examiner. Wright further testified that he informed Miles that the last corner bolt had not been installed. (Tr. 89). In view of Miles' awareness of the missing corner bolt, the respondent asserts that Miles' exposure to unsupported roof was highly unlikely.

In resolving the significant and substantial question, it is helpful to examine the exposure to risk the mandatory safety standard seeks to avoid. In this regard, Section 75.208 requires a visible warning or physical barrier to impede travel beyond permanent roof support. Thus, the safety standard does not recognize verbal warning as an effective preventative measure. In this regard, such warnings can be forgotten or neglected to be communicated to personnel who, for whatever reason, may have a necessity to traverse the area. Thus, I conclude that, in the absence of any physical warning or barrier, the violation cited in Citation No. 3825086 was properly characterized as significant and substantial. Accordingly, the Secretary's proposed civil penalty of $235 is affirmed.

Citation Nos. 4041543 and 4041547

The respondent has stipulated to the fact of occurrence of the violations cited in Citation Nos. 4041543 and 4041547. These citations concern violations of 30 C.F.R. 75.517 on two 440 volt cables providing power to the No. 1 and No. 2 Jeffrey bridge carriers. The citations were issued because the abrasion-resistent cable jackets which surround and protect the softer, insulated electrical wires, had been torn. (Tr. 96, 105). These citations were issued by Inspector Stanley Sampsel on March 22, 1993. Torn cable jackets are frequent occurrences in coal mines. (Tr. 97). Sampsel was unable to recall the length or specific location of the tears in question. (Tr. 104, 113). However, he testified that the tears could be immediately repaired with electrical tape. (Tr. 115). The parties agreed that my resolution of Citation No. 4041543 would govern my decision on Citation No. 4041547.

Sampsel justified his significant and substantial finding by testifying that torn outer jackets expose the softer insulated electrical wires in the cable. These wires could be further

compromised by subsequent wear and tear within the mine. These cables are frequently handled by mine personnel. Thus, electrical injury could occur to a miner coming into contact with open phase wires while handling the cables. (Tr. 106-7). Since the inner insulation was not damaged, Sampsel conceded that the cable could be repaired without turning the power off. (Tr. 121).

In challenging Sampsel's significant and substantial designation, the respondent argues that its personnel would have promptly discovered and repaired the compromised outer jackets before further damage to the inner insulated wires occurred. (Tr. 121). However, the issue of significant and substantial must be viewed in the context of continuing normal mining operations. U.S. Steel Mining Company, Inc., supra. Periodic preventative or remedial maintenance on the part of an operator is presumed. However, the use of caution by mine personnel is not an appropriate consideration for mitigation of a significant and substantial violation. See Eagle Nest, Incorporated, 14 FMSHRC 1119, 1123 (July 1992). Consistent with the Commission's Eagle Nest decision, I conclude that a maintenance program does not mitigate the degree of risk associated with an undetected or unremedied violation.

I credit Inspector Sampsel's testimony that continued mining operations could expose the inner insulated electrical wires to further damage. Sampsel also testified that miners frequently have occasion to move or otherwise come in contact with these trailing cables. Under such circumstances, exposure to exposed wires could result in serious electrical injury. Consequently, I conclude that there was a reasonable likelihood, in the context of continued mining operations, that the more delicately insulated electrical wires inside the torn cable could become further compromised and contribute to the serious electrical injury of a miner exposed to these wires. Accordingly, the significant and substantial designations in Citation Nos. 4041543 and 4041547 are affirmed. Consequently, I am also affirming the proposed civil penalties of $288 for each of these citations.

Citation Nos. 4041548, 4041549, 4041550 and 4041551

Citation Nos. 4041548, 4041549, 4041550, 4041551, were all issued for alleged violations of 30 C.F.R. 75.1722(a). This mandatory safety standard provides, in pertinent part, that exposed moving machine parts which may be contacted by individuals, and which may cause injury, shall be guarded. These four citations concern alleged inadequate guarding of chain drive shafts on the No. 1 and No. 2 Jeffrey bridges and the No. 1 and No. 2 Jeffrey carriers. As the four guarding citations address essentially the same type of equipment, i.e., the motor drive assemblies that move the conveyors attached to the left of the motor drive assemblies, the parties agreed that these citations would be considered collectively. (Tr. 9-10, 170).

These four citations concern the adequacy of the factory installed guarding of the motor drive assemblies of bridges and carriers manufactured by the Jeffrey Manufacturing Company. These bridges and carriers are connected to the continuous miner. The coal cut by the continuous miner is loaded on conveyors on these bridges and carriers which conveys the coal from the face to the belt conveyor system which in turn transports the coal to the surface. (Tr. 169).

The subject bridges and carriers were purchased by the respondent as new equipment in 1978. (Tr. 217). The four cited pieces of equipment came from the manufacturer with, yellow, metal, factory-installed guards, which are demonstrated in the closed position in photograph C of respondent's exhibit three and in the open position in photographs A and B of respondent's exhibit three. These guards cover the motor drive assemblies which are located immediately to the right of the conveyor. Each drive assembly consists of a gray motor and a black, ribbed speed reducer. (Tr. 198, 199). The motor and reducer are connected by a drive shaft which measures 1 3/8 inches in diameter and 18 inches in length. (Tr. 188, 199, 207, 215; respondent's exhibit 4). The factory-installed guard is three inches higher than the drive shaft. The guard has a curved lip which covers the side of the drive shaft. (Tr. 215; respondent's exhibit 3).

Located along the drive shaft, approximately three inches from the gray motor, is a shearing hub which is approximately five inches in diameter. (Tr. 202). The factory-installed guard, which measures 14 inches in length, covers the drive shaft and shearing hub. (Tr. 202). Clearance between the shearing hub and guard is only one-half inch. (Tr. 203). The shearing hub, which is more than 3 1/2 inches larger in diameter than the drive shaft, prevents access to the remainder of the guarded drive shaft. (Tr. 209). Paul Smith estimated that the dimensions and placement of the factory-installed guards resulted in an exposure of a three inch length of drive shaft between the gray motor and the guarded shearing hub and an exposure of one inch of drive shaft between the guard and the black, ribbed speed reducer. (Tr. 208-9).

In support of these citations, Inspector Sampsel testified that the factory-installed guards were deficient in their design and length. In this regard, although Sampsel conceded that the guards effectively shielded the center of the drive shaft, he opined that a person could "stick [his] hands" past the ends of the guards into the shaft itself. (Tr. 171, 173-4). In addition, Sampsel stated that there was enough clearance between the guards and the shafts to enable someone to "reach right in" to the moving parts. (Tr. 174). Although Sampsel expressed concerns with regard to the clearance between the guard and shafts, he stated that the violations were attributable to the length of the guards. (Tr. 182). Sampsel testified that miners tend to hold

on to the carriers and bridges "as kind of a crutch" as they traverse the belt entries. Therefore, Sampsel expressed his concern that a miner could inadvertently come into contact with the drive shaft if he inattentively grabbed the carrier or bridge system for support. Sampsel opined that under such circumstances a miner could sustain serious moving part contact injuries to his hand or arm. (Tr. 175, 176).

Section 75.1722(a), the cited mandatory safety standard, requires that "...shafts...and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." This mandatory safety standard contemplates guarding that satisfies a fitness for purpose standard. Significantly, Inspector Sampsel testified a primary purpose of the subject guarding is to prevent individuals who may suddenly grab the bridges and carriers for support from inadvertently sticking their hands between the end of the guard and the moving drive shaft. Paul Smith conceded the primary exposed area was a three inch length of drive shaft between the gray motor and the guarded shearing hub. This three inch area, which is adequately depicted in the photographs in respondent's exhibit 3, poses a risk of hand injuries to personnel who may suddenly grab the drive shaft area. Consequently, there is an adequate basis for concluding the factory-installed guarding was insufficient in length in violation of Section 75.1722(a).

Although I have concluded that the subject guards posed a risk to mine personnel, it is the degree of risk and the likelihood of injury that must be evaluated in order to determine if these citations were properly designated as significant and substantial. Sampsel testified that the guards shielded the major portion of the moving drive shaft. Smith's testimony that approximately three inches of the drive shaft was exposed is supported by the photographic evidence. Consequently, while I have concluded that miner's were exposed to risk, the minimal area of mine shaft area exposure does not warrant a finding that injury was reasonably likely to occur. Thus, the significant and substantial designations shall be deleted from these guarding citations. Accordingly, I am assessing a penalty of $75 for each citation.

Citation No. 4041556

Citation No. 4041556 alleges a citation of 30 C.F.R. 75.370(a)(1) in that the respondent failed to comply with it approved ventilation plan because a check curtain was not located at the end of the permanent belt line. The purpose of a check curtain at the end of the permanent belt structure is to prevent air from traveling up the belt line to the working face in the event of a fire or other emergency. (Tr. 231, 235). The respondent admits the check curtain was not installed at the time the citation was written by Inspector Sampsel at 11:00 a.m. on

March 23, 1993. However, the respondent asserts that at the time of the citation, it was in the process of advancing the belt forward one break. (Tr. 245-6). Consequently, it argues that no mining was under way because the belt line is inoperable during the set-up process. (Tr. 246, 248).

Inspector Sampsel testified that he believed coal production had taken place the morning he issued the citation. (Tr. 237-8). However, he could not specifically recall whether production was actually occurring at the time the citation was issued. (Tr. 240) Significantly, Sampsel's contemporaneous notes made at 11:00 a.m. on March 23, 1993, do not reflect that the operator had suspended production activities. (Tr. 265-266).

In considering the respondent's assertion that no production activities were in progress, I had the following exchange with respondent witness Larry Bullock:

> THE COURT: Mr. Bullock, were you aware that a citation had been written on that date for no check curtain and no regulator?
>
> THE WITNESS: Yes.
>
> THE COURT: Did you ever talk to Inspector Sampsel about the fact that the reason the check curtain and regulator was not installed was because the belt line was being advanced?
>
> THE WITNESS: No, I didn't.
>
> THE COURT: To your knowledge, did anybody else ever tell that to Mr. Sampsel?
>
> THE WITNESS: Not to my knowledge.
>
> THE COURT: Does that seem strange to you in the context of check curtains [having] to be removed and replaced, and in the interim period while a belt is being advanced [the check curtain] is not going to be in place?
>
> Do you have any explanation for why the personnel at the mine didn't tell Inspector Sampsel, it is not in place because we are in the process of moving?
>
> THE WITNESS: No, I don't.

Bullock's testimony is consistent with the testimony of respondent witness Cecil Broadus that, to his knowledge, no one conveyed to Inspector Sampsel that the belt curtain and regulator were removed because the belt line was in the process of being

advanced. (Tr. 250).

As previously noted, this citation was issued on March 23, 1993. This hearing proceeding was conducted approximately nine months later on December 14, 1993. If the subject citation was issued as a result of Sampsel's erroneous assumption that mine production was in progress, it was incumbent on the respondent to try to dissuade Inspector Sampsel of this notion at the time the citation was issued. The respondent does not contend that Inspector Sampsel was advised that production had been suspended. Having failed to even attempt to convince Sampsel that production was suspended at the time the citation was issued or during the Health and Safety Conference process provided to discuss the merits of citations shortly after they are issued, the respondent's belated self-serving assertion at the hearing regarding the non-production status must be afforded little weight. Accordingly, the fact of the violation and the significant and substantial nature of the subject citation is affirmed. The Secretary's proposed $178 civil penalty for Citation No. 4041556 is also affirmed.

Citation 4041557

Citation No. 4041557 alleged a violation of 30 C.F.R. 75.1704-2(d). The citation specified that an up-to-dat escapeway map was not provided in the No. 1 Section. The cited escapeway map was shown to Inspector Sampsel by David Miles who is no longer employed by the respondent. (Tr. 268). The respondent asserts that it had a current escapeway map on the surface. However, for reasons unknown to the respondent, Inspector Sampsel was apparently shown an out-of-date map. Although Smith requested a conference pursuant to the procedures set forth in Section 100.6, 30 C.F.R. 100.6, MSHA denied Smith's conference request as untimely. (Tr. 337-38).

It is unfortunate that Smith's request for a conference was untimely. Once again, I find myself in the position of being asked to save the respondent from itself. As the respondent's counsel noted in her proposed findings and conclusions, "...it is conceivable that an up-to-date escapeway map was on the section, ...but for some reason, Inspector Sampsel saw or was erroneously shown an out-of-date map....Equally regrettably, S & H did not question the inspector or voice the opposition to him. Had the parties communicated more fully, a misunderstanding of this type could have been resolved." (Resp.'s Proposed Findings, p.31).

Although the Secretary has the burden of proving the fact of a violation, an operator has the obligation to provide an inspector with sufficient information if it believes a violation has not occurred. I have no reason to doubt Inspector Sampsel's testimony that he was not shown a current escapeway map. If a current escapeway map was not made available to Sampsel, it follows that a current map may not have been provided to mine personnel in the event of an emergency. Consequently, Citation No. 4041557, designated as significant and substantial, shall be affirmed. The $178 proposed assessment shall also be affirmed.

Citation No. 4041541

At the hearing, the parties moved to settle Citation No. 4041541. The terms of the settlement agreement are that the significant and substantial designation in this citation shall be deleted and the proposed penalty of $309 will be reduced to $75. In addition, pursuant to the terms of this settlement agreement, the respondent has submitted to the MSHA District Office a request for modification of its roof control plan in order to resolve ambiguities in the plan concerning corner cuts and permissible widths. The terms of this settlement agreement are incorporated herein.

ORDER

In view of the above, IT IS ORDERED that:

1. Citation No. 3825085 IS MODIFIED by removing the significant and substantial designation. The civil penalty assessed for this citation is $100.00.

2. Citation No. 3825086 IS AFFIRMED. The civil penalty assessed for this citation is $235.00.

3. Citation Nos. 4041543 and 4041547 ARE AFFIRMED. Each of these citations is assessed a civil penalty of $288.00.

4. Citation Nos. 4041548, 4041549, 4041550 and 4041551 ARE MODIFIED by removing the significant and substantial designations. Each of these citations is assessed a civil penalty of $75.00.

5. Citation No. 4041556 IS AFFIRMED. The civil penalty assessed for this citation is $178.00.

6. Citation No. 4041557 IS AFFIRMED. The civil penalty assessed for this citation is $178.00.

7. Consistent with the terms of the parties' settlement agreement, Citation No. 4041541 IS MODIFIED by removing the significant and substantial designation. The respondent has agreed to pay a civil penalty of $75.00 for this citation.

IT IS FURTHER ORDERED that the respondent SHALL PAY, within 30 days of the date of this decision, a total civil penalty of $1642.00 in satisfaction of the citations in issue. Upon receipt of payment, this case IS DISMISSED.

Jerold Feldman
Administrative Law Judge

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