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February 12, 2016

RESOLUTION COPPER MINING LLC, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2013-319-RM Citation No. 8596049; 11/28/2012 Resolution Mine Mine ID 02-00152
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RESOLUTION COPPER MINING LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-299-M A.C. No. 02-00152-309931 Resolution Mine

DECISION ON REMAND

Before: Judge Manning

These cases are before me upon a notice of contest filed by Resolution Copper Mining LLC ("Resolution") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve Citation No. 8596049 issued at the Resolution Mine for an alleged violation of 30 C.F.R. § 57.19076. The Resolution Mine is an underground copper mine that was in the development stage at the time the citation was issued. The copper ore deposit is about 7,000 below the surface.

On April 19, 2013, I issued a decision vacating the citation on the merits. 35 FMSHRC 1072. The Secretary appealed my decision to the Commission. On October 28, 2015, the Commission reversed my decision, determined that Resolution Copper violated the safety standard, and remanded the case to me for a determination whether the violation was of a significant and substantial ("S&S") nature. 37 FMSHRC 2244, 2252.

I have not set forth a detailed description of the facts in this remand decision because the facts are accurately set forth in my decision and the Commission's decision. Nevertheless, a brief outline of relevant facts is helpful in understanding the S&S issue.

The personnel conveyance at issue was designed from scratch specifically for transporting miners and includes multiple safety features. (Tr. 110-112). The conveyance is connected to a rope attachment structure which is, in turn connected to a hoist rope used to raise and lower the conveyance. (Tr. 195). A "crosshead" situated above the rope attachment structure travels on two winch ropes which extend from the surface to the Galloway, a multi-level work platform suspended by four winch ropes. (Tr. 40, 86; Ex. P-3, p. 5). The crosshead, which is connected to the conveyance while traveling between the surface and the Galloway, guides the conveyance down the shaft, preventing it from moving from its zone of travel. (Tr. 44). The enclosed personnel conveyance has a reinforced tapered top and bottom. (Tr. 108, 223-224). Miners traveling in the conveyance are able to communicate with the hoist operator via a bell system, as well as by voice. (Tr. 116). The hoist which raises and lowers the conveyance is equipped with a Programmable Logic Control system, which automatically controls the speed of the conveyance based on its location in the shaft, and an Obstruction Control System which prevents collisions with any known obstructions in the shaft, such as safety doors. (Tr. 58-59, 70, 180).

When these cases were first before me, the issue was whether the conveyance Resolution Copper was using to lower miners into the mine was a bucket, as that term is used in section 57.19076. The standard simply provides that "[w]hen persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station." For the reasons set forth in my decision, I determined that the conveyance was not a bucket and, as a consequence, the speed limits set forth in the safety standard did not apply. On review, the Commission disagreed with my conclusion and held that the conveyance was a bucket so that the speed limits set forth in the safety standard applied.

The Commission remanded the case to me "to determine whether to affirm the inspector's S&S designation." 37 FMSHRC 2252. Upon remand, I encouraged the parties to reach an amicable settlement of the S&S issue and gave them sufficient time to do so. Because the parties were unable to reach a settlement, I gave the parties the opportunity to brief the issue. The Secretary elected to not file a brief. Resolution Copper filed a brief with several attachments.

In addition to challenging the citation at issue in these cases, Resolution Copper filed a petition for modification with the Secretary. The petition for modification case was proceeding at the same time as the present cases. Administrative Law Judge Richard M. Clark of the Department of Labor conducted the evidentiary hearing in the modification proceeding and his decision was appealed to the Assistant Secretary for Mine Safety and Health.[1] After I issued my decision, the Assistant Secretary issued a decision granting the petition for modification in part with conditions. In essence, the decision allows Resolution Copper to operate the personnel conveyances at speeds greater than 500 feet per minute as long as it meets rather detailed and rigorous standards, as specified in the decision. (Resolution Br. on Remand, Ex. B).

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[1] Judge Clark initially determined that the personnel conveyance was not a bucket. On appeal, the Assistant Secretary ruled that only the Commission has the authority to make such a determination and he remanded the case back to Judge Clark. On remand, the judge granted unconditionally the petition for modification. (Resolution Br. on Remand, Exs. A & B).

I. SIGNIFICANT & SUBSTANTIAL

For reasons that follow, I find the violation was not S&S.[2] The Commission, on review, found that a violation of the cited standard had occurred. 37 FMSHRC 2252. I find that, while a discrete safety hazard existed, the Secretary did not meet his burden of establishing that there was a reasonable likelihood that the hazard contributed to would result in an injury.

A discrete safety hazard existed. Inspector Lunsford designated the citation as S&S, noting in the body of the citation that hoisting persons in the bucket at speeds up to and including 1200 feet per minute, which exceeds the maximum allowable speed of 500 feet per minute, exposes the persons to serious bodily injuries should an incident occur. The Commission, on review, in describing the testimony of the Secretary's expert, Thomas Barkand, stated that "after testifying about how guided rope conveyances have a lesser degree of control, [Barkand] subsequently testified about how, in the event of a strike, the kinetic energy transfer would injure miners." 37 FMSHRC 2248. Notably, record evidence established that, in the event of a collision, the increased speeds at which the conveyance was cited for traveling would have resulted in 5.8 times the amount of kinetic energy being released than if the bucket were traveling at the 500 feet per minute maximum speed set forth in the mandatory standard. (Tr. 234, 253). I am bound by the Commission's decision and agree that a discrete safety hazard existed.

I also note the finding of the Assistant Secretary of Labor for Mine Safety and Health that Resolution's use of technology to help mitigate the likelihood of the bucket colliding with an obstruction did not completely neutralize the risk created by the added kinetic energy that would be released in the event the bucket did collide with a shaft obstruction while traveling at speeds higher than allowed by the mandatory standard. (Resolution Br. on Remand, Ex. B p. 20). He remanded the modification proceeding to Judge Clark to further develop a factual record on this issue as well as other issues. *Id.* at pp. 30-33.

The Secretary has not met his burden of establishing that there was a reasonable likelihood that the hazard contributed to would result in an injury. The Secretary bears the "burden of proving each alleged violation by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30

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[2] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co.*, Inc., 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.") I reach my conclusion based on the lack of evidence provided by the Secretary regarding the third S&S factor, the evidence provided by the operator regarding the steps taken to prevent any collisions, and evidence that any "collision" would most likely involve only a glancing strike.

This case came to me in an unusual manner. At the request of the parties, the court did not conduct a hearing. Rather, the parties agreed to be bound by the evidence produced at the hearing on Resolution's petition for modification of the cited standard before Judge Clark. The Secretary did not call the issuing inspector to testify at the modification hearing and, instead, called only Thomas Barkand. In reaching my initial decision that the conveyance was not a bucket, I relied entirely on evidence produced at that hearing. The Secretary did not offer evidence on the S&S factors at that hearing because S&S issues were not before Judge Clark. The Secretary also declined to brief the S&S issue on remand in the present case and did not seek to reopen the record so that he could introduce additional evidence to address S&S issues.

Following the remand of this case to the undersigned, the court contacted the parties to discuss how the case should proceed if a settlement of the S&S issue could not be reached. The parties represented to the court that they "propose[d] to agree to the facts of significance to the [S&S] issue through stipulation or otherewise (sic), and submit simultaneous written argument on [their] respective positions[.]" (E-mail from Laura Beverage, Counsel for Resolution Copper Mining, LLC, to Jason Grover, Counsel for the Secretary of Labor, and Judge Richard Manning (Dec. 3, 2015) (included in the official record)). However, no such stipulations or agreed upon facts were ever filed with the court. Instead, the operator filed a brief on remand, while the Secretary declined to file a brief but, instead, rested on the record. While the Commission has observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998), there is no testimony in the record from the issuing inspector. Rather, the only testimony offered by the Secretary at the modification hearing was that of Barkand who was not present at the time the citation was issued and did not address the S&S factors in his testimony.

Although Barkand testified and the operator's witnesses agreed that more kinetic energy would be released if the rope guided personnel conveyance struck an obstruction while traveling at speeds in excess of the standard's maximum allowable speed of 500 feet per minute, Barkand acknowledged that he did not know if the increase in speed increased the *potential for a collision*. (Tr. 140, 234, 266).

The testimony presented by both parties makes clear that two types of potential obstructions could exist in the normal path of the personnel conveyance, those that are known and those that are not anticipated. Known obstructions would include doors that are sometimes closed within the shaft, while unanticipated obstructions would include ventilation tubing that was installed in the shaft to provide fresh air underground. The operator's witnesses offered substantial testimony regarding the hoist's Obstruction Control System and Programmable Logic Control which automatically slow down and stop the conveyance from colliding with any known obstructions in the shaft. (Tr. 59, 73-80, 180, 184-187; Ex. P-17). The Secretary did not offer any evidence disputing the capabilities of these safety systems. I find that, given the presence of

these systems, it was unlikely that the personnel conveyance would collide with one of the known obstructions in the normal travel area of the conveyance. While Barkand stated that the conveyance could collide with an unknown obstruction that entered the normal travel area of the conveyance, he offered next to no testimony on how that would occur and only opined that "I'm not sure where [the obstruction would come from], you know. There's a lot of scenarios or possibilities[.]" (Tr. 267). I cannot accept Barkand's general and speculative statement that there are "a lot of scenario's and possibilities" without more support.

The personnel conveyance was unlikely to travel outside of its normal travel area. Thomas Goodell, the mine's general manager for underground development, explained that the increase in speed would not make the conveyance move out of its normal zone of travel. (Tr. 44, 135). While Goodell and Ryan Gough, the manager of product services for Cementation, the contractor charged with sinking the shaft and operating and maintaining the hoist, both explained that buckets can and do move side to side as a result of rope oscillation during the mucking cycle, the mine never hoists persons while it is engaged in mucking and they have not observed the personnel conveyance swing at any speed. (Tr. 91-93, 133-134, 197). Given the lack of sideways movement of the personnel conveyance, it was unlikely to move outside of its normal travel area and collide with some obstruction.

While the operator's witnesses acknowledged that it is impossible to entirely rule out the possibility of a collision, Gough testified that it would take something catastrophic for that to occur. (Tr. 137-138, 201, 232).

The Commission has explained that the "reasonably likely" requirement set forth in *Mathies* does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation will cause an injury. *Musser Engineering, Inc.* and *PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (emphasis added).

The hazard described in the citation is that the personnel conveyance used by Resolution would be an accident in which someone would be injured. The issue is whether the speeds used by Resolution contributed to this hazard in a way that made such an accident reasonably likely. For the reasons set forth above, I find that the Secretary did not establish this element of the Commission's S&S test. Resolution had in place a number of significant safety measures that make such an accident unlikely. These measures protected miners from potential collisions with anticipated obstructions in the shaft no matter what speed the conveyance was traveling. In addition, there was only speculative evidence as to whether any unanticipated objects in the shaft would contribute to an accident in which miners would be injured because of the higher speed of the conveyance.[3]

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[3] The evidence establishes that the most likely unanticipated obstruction in the shaft would be a ventilation tube that separated from the anchors that attach it to the side of the shaft. Such an event was unlikely and would most likely result in a glancing strike rather than a collision. There was no showing that such a glancing strike was reasonably likely or that such an event

As stated above, the modification hearing before Judge Clark did not specifically address S&S issues. Nevertheless, in the unlikely event that the multiple safety systems described above failed and the conveyance collided with a significant object in the shaft, such as a closed door, any miners in the conveyance would suffer injuries of a reasonably serious nature.

For the reasons set forth above, the S&S designation in Citation No. 8596049 is vacated.

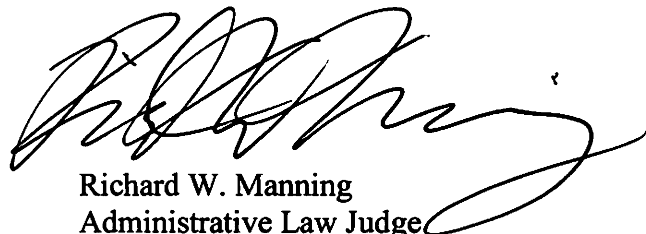
II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Secretary did not present evidence as to Resolution's history of previous violations. Information at MSHA's website indicates that Resolution received one non-S&S citation in the 15 months prior to the issuance of the subject citation. Information at MSHA's website also indicates that Resolution employed about 48 people in the fourth quarter of 2012 and employees worked a total of about 193,000 hours in 2012. As a consequence, Resolution was a medium-sized operator using the Secretary's penalty point system in section 100.3 as a guide. (30 C.F.R. § 100.3; Exhibit A to Penalty Petition). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business.

I affirm all the determinations of Inspector Lunsford except with respect to S&S. An injury was unlikely but if an injury did occur it would likely be permanently disabling. One person was affected by the violation. Resolution's negligence was moderate. Applying my findings, the Secretary's penalty point system at section 100.3 yields a penalty of $100, taking good faith abatement into consideration. Although this penalty point system is not binding on me, I find that a reduction of the penalty from $207 to $100 is appropriate in this instance.

III. ORDER

Citation No. 8596049 is **MODIFIED** to delete the significant and substantial designation and to reduce the gravity to "unlikely." In all other respects the citation is affirmed. Resolution Copper Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of $100 within 30 days of the date of this decision.[4]



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Administrative Law Judge

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would result in injuries at all, much less injuries of a reasonably serious nature. (Tr. 145-46, 223, 265).

[4] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

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