FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 29, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-162
Petitioner	:	A. C. No. 36-08410-03533
	:	
v.	:	Rosebud No. 2
	:	Mine ID 36-08410
ROSEBUD MINING COMPANY,	:	
Respondent	:	
	:	
ROSEBUD MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2000-109-R
v.	:	Citation No. 7058096; 4/5/2000
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 2000-110-R
MINE SAFETY AND HEALTH	:	Citation No. 7058097; 4/5/2000
ADMINISTRATION (MSHA),	:	
Respondent.	:	Rosebud No. 2
	:	Mine ID 36-08410

DECISION

Before: Judge Weisberger

Appearances: John M. Strawn, Esq., U. S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner; Joseph A. Yuhas, Esq., Hastings, Pennsylvania, for the Respondent.

Statement of the Cases

At issue in this consolidated proceeding are (1) a Petition for Assessment of Penalty alleging two violations by Rosebud Mining Company ("Rosebud") of 30 C.F.R. Section 75.523-2(c) on two different pieces of equipment, and a violation by Rosebud of 30 C.F.R. Section 75.1722(b), and (2) Notices of Contest filed by Rosebud challenging the citations referred to in the Secretary's Petition. Pursuant to notice, the matter was scheduled and heard in Kittanning, PA. Subsequent to the hearing which was held on September 21, 2000, the parties each filed proposed findings of fact and a brief.

Findings of Fact

Citation No. 7058098

Prior to the hearing in this matter the Secretary had filed a motion seeking approval of a settlement regarding citation No. 7058098 for which it had previously sought a penalty of $184.00. The motion seeks approval of a settlement to reduce the proposed penalty to $131.00. Based on the representations set forth in the Secretary's motion, the documentation in the file, and considering Section 110(i) of the Federal Mine Safety and Health Act of 1977, I find that the proposed settlement is appropriate under the terms of the Act, and accordingly I approve it and grant the motion.

Citation Nos. 7058096 and 7058097 (Violation of 30 C.F.R. §75.523-2)

Inspector Lorenz's Testimony - The Roofbolter

Don W. Lorenz, an MSHA supervisory coal mine and health inspector, was present at Rosebud's Mine No. 2, an underground coal mine, when it was inspected on April 5, 2000. As part of the inspection, a roofbolter was examined. The bolter, when being trammed from one working place to another, is operated from a compartment. In contrast, when the bolter is engaged in bolting at the working face, it is operated from the inch-tram controls located outside a compartment in the center of the bolter. The bolter may be stopped by operating brakes or depressing a start/stop switch. In addition, the bolter is equipped with a panic bar. The bar is three quarters of an inch in diameter, and extends 18 inches above the floor of the bolter. It is readily accessible to the miner operating the bolter from either inside of the compartment, or at the inch-tram controls. The panic bar is designed to de-energize the bolter should a miner push against it or lean his body against it, and it is to be used only in an emergency to quickly de-energize the bolter. According to Lorenz, pressure applied to the panic bar from a horizontal or vertical direction would cause it to de-energize the bolter.

Lorenz testified that Dan Barron, an MSHA inspector whom he assisted, tested, with a gauge, the amount of pressure required to operate the panic bar. The gauge, which had not been calibrated by either Lorenz or Barron prior to its use, is approximately 8 inches long, and one half inch in diameter. If the tip of the gauge is placed against an object, and pressure is applied against the top of the cylinder, the cylinder moves downward and a reading may be taken of the amount of pressure applied.[1] Lorenz indicated that approximately seven readings were taken at various points along the panic bar in the area of the inch-tram controls. Barron held the gauge either vertically, "straight in", or at a 45 degree angle to the panic bar, and pushed it with his palm against the bar. More than 30 pounds was required each time to de-energize the bolter. Lorenz indicated that he had told Barron to stop putting pressure on the gauge as soon as the bolter

[1]When pressure is applied to the tip of the gauge, it depresses a spring loaded plunger which slides an "O"ring to a numbered position on the plunger indicating the pounds of applied pressure.

stopped.

On cross-examination Lorenz indicated that the panic bar had moved less than 2 inches in de-energizing, that the gauge does not recognize an application of pressure more than 34 pounds, and that in a situation where only 10 pounds would be required to de-energize the bolter, 30 pounds of pressure could still be exerted against the bar.

A citation was issued to Rosebud alleging a violation of 30 C.F.R. Section 75.523-2(c) which provides as follows :

> Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

According to Lorenz, the violation was significant and substantial. In this connection he indicated that due to the low height of the roof in the area where the roofbolter operates, i.e. 36 to 38 inches, it is necessary to operate the bolter from a kneeling position at the inch-tram controls. Further, according to Lorenz, since the entries at issue are 18 to 20 feet wide, the bolter operator would be only 4 feet from a rib when bolting the first row of bolts in a sequence, and he might be squeezed against the rib by a sudden movement of the bolter. Lorenz indicated that it is difficult for the bolter operator to see a person stationed along or in front of the bolter. Thus, according to Lorenz, if the roofbolter would not be quickly deenergized, it might hit this person, causing a crushing injury to his legs or pelvis.

Inspector Lorenz's Testimony - The Scoop

According to Lorenz, the panic bar on the scoop essentially functioned like one on the bolter, except that it was hinged at a 45 degree angle, and could be activated by being hit from any direction. In addition, the scoop also could have been stopped by applying its brakes, or pushing a start/stop switch. According to Lorenz, approximately 3 or 4 readings were taken by putting pressure on the gauge against the panic bar on the scoop, and that 24 pounds of pressure was required to move the panic bar sufficiently to de-energize the scoop. A citation was issued alleging a violation of Section 75.523-2(c) supra.

According to Lorenz, the violation was significant and substantial. He explained that due to the low height of the roof, the operator of the scoop would have to stick his head out from the compartment of the scoop in order to operate it, and thus he could get his head caught against a rib or a curtain. He also noted that the travelway was muddy, and contained a lot of rocks, and the scoop would slip from side to side in order to get traction. Also, he indicated that should the operator of the scoop lose control the scoop it could knock out supporting cribs that might be in the area, causing the roof to fall. In such an event a crushing injury could result.

William C. Beasley's Testimony - The Gauge

William C. Beasley, an MSHA professional engineer, is employed as the chief of the quality engineering branch. Rosebud did not object to the Secretary's proffer of Beasley as an expert in quality certification. According to Beasley, in order to test the accuracy of the gauge at issue, he clamped it and dropped three different weights on the plunger, at differing speeds. Each weight was dropped three times. Beasley indicated that if the weight was dropped very rapidly the readout on the gauge varied by up to 2 pounds. He also indicated that if a weight was applied not directly above the tip of the gauge, the readout on the gauge was reduced by 1 pound. According to Beasley, applying the weights not directly above the center of the gauge but rather off to a side, replicates applying the gauge to a surface at an angle. He also indicated that if the "o" ring should slide up the plunger, it could cause a variation of approximately a pound. Also, if the gauge is applied too quickly, the value can be increased up to two pounds. Beasley concluded that the gauge was reasonably accurate within a range of plus or minus 2 pounds.

Beasley indicated that the tests that he performed were done in September 2000. He said that when the gauges were received by MSHA in January 2000 they came with a certification from the manufacturer, and there was no reason why the gauge would lose its effectiveness from January to April. He indicated that the gauge spring is stable, that there are only a few things that can cause it to go out of calibration, and that no field adjustment is possible. He opined that this particular gauge was suitable to provide good information regarding the release point for the panic bars at issue.

On cross-examination both Beasley and Lorenz conceded that the inner portion of the gauge cylinder containing the spring is not totally sealed, and that it is possible for moisture or dust to get inside the cylinder.

Testimony of Rosebud's Mine Superintendent

Gerald Hefferan, Rosebud's general mine superintendent, was the only witness proffered by Rosebud. He indicated that he had operated the scoop that was cited. According to Hefferan, a person engages the panic bar by pushing in an inward and upward motion. He indicated that to operate the panic bar on the bolter, one needs to apply horizontal pressure. Hefferan opined that force applied to the panic bar in a downward or upward direction would "probably" (Tr. 126) bend the bar or the gauge, but would not de-energize the machine.

Discussion

Violation of 30 C.F.R. §75.523-2

In essence, it is Rosebud's position that the Secretary has failed to establish that it violated Section 75.523-2 supra. In this connection, Rosebud cites the fact that Barron, who applied

pressure to the bar with the gauge, did not receive any training regarding usage of the gauge, nor was it calibrated prior to its use. Further, Rosebud argues inter alia, that "... [Barron] could have inadvertently applied pressure at an improper angle, applied pressure too long, applied pressure too rapidly, misread the position of the "o" ring and got improper readings, or any combination of those errors could have led to the improper readings." (Sic.) Also, it is argued that since there is no direct evidence that the gauge was applied at the correct angle to deenergize the equipment, and since Barron was not called by the Secretary, a finding on the issue adverse to the Secretary might be inferred. For the reasons that follow, I do not find Rosebud's arguments, based on inferences, to outweigh the Secretary's evidence.

Section 75.523-2 supra, requires, as pertinent, regarding panic bars on the equipment at issue, i.e., a bolter and a shuttle car, that a "[m]ovement of not more than 2 inches of the actuating bar ... resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body ... shall cause deenergization of the tramming motors of the ... equipment."

Based on the uncontradicted and unimpeached testimony of Lorenz, I find that, on the date cited, an MSHA inspector tested the panic bar of the scoop and bolter at issue at several locations with a handheld pressure gauge, and in each instance the gauge indicated that an application of more than 15 pounds of pressure was required to move the panic bar sufficiently to de-energize the equipment.

I find most significant Lorenz's testimony that after Barron's measurements were taken, the gauge was offered to Mike Green, Rosebud's mine foreman, and Hefferan, and that both "tried it and got basically the same reading" (Tr. 25). Since this testimony was not contradicted by Hefferan, who subsequently testified, I accept it. Accordingly, since actual testing by Rosebud's agents basically confirmed Barron's readings, I reject Rosebud's argument, based only on inferences, that Barron's testing was inaccurate.

Further, I accept the unimpeached and uncontradicted testimony of Beasley that the gauge at issue was verified to be accurate. Also, based on his expertise, I accept his uncontradicted testimony that in testing of the gauge with various weights placed off-center on the gauge, the actions of applying the plunger of the gauge to the surface of a panic bar at an angle would be replicated, and readings would not vary more than 2 pounds. Thus, even if Barron applied the gauge at an angle, his reading would have been accurate within 2 pounds. More importantly, I take cognizance of Beasley's opinion, that was not impeached or contradicted, that the gauge in question was suitable to provide good information regarding the release point for the panic bars at issue. Due to his expertise, I accept this opinion.

For all the above reasons, I find that the weight of the evidence establishes that Respondent did violate Section 75.523-2(c) regarding the panic bars on the cited bolter and scoop.

Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "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)(l). A violation is properly designated significant and substantial "if based upon 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), 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); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Rosebud did not impeach or contradict the opinion of Lorenz that the violation herein contributed to the hazard of a miner being injured, and that due to the positioning of the operator of the bolter, as a consequence of the low height of the roof and the difficultly of the operator to see a person along the bolter or in front of it, the hazard of a crushing injury, contributed to by the violation herein, was reasonably likely to have occurred. Further, Respondent did not impeach or contradict Lorenz' testimony that such an injury would likely have been a crushed leg or pelvis. Regarding the scoop, Respondent did not impeach or contradict Lorenz' testimony that, in addition to the positioning of the operator which results in limited visibility, the scoop traveled along a muddy travelway which caused the machine to slip side to side in order to get traction.

Within the above context, I find that both violations were significant and substantial.

Penalty

The parties stipulated that Rosebud demonstrated ordinary good faith in attaining compliance after the issuance of the citations at issue, and that the assessment of a penalty would not effect its ability to continue in business. Taking these factors into account, along with the Respondent's size of Rosebud's business as stipulated to by the parties, and it's history of violations, as stipulated to by the parties, the lack of any evidence to indicate that Rosebud's negligence was more than low, and the gravity of the violation as indicated by the type of injuries that could have resulted, I find that penalties of $184.00 are appropriate for each of the two violations.

Order

It is **Ordered** that, within 30 days of this Decision, Rosebud pay a total civil penalty of $499.00.

Avram Weisberger
Administrative Law Judge

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