

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 16, 2005

R & D COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. PENN 2005-213-R
	:	Order No. 7007782; 7/26/2005
	:	
	:	Docket No. PENN 2005-214-R
	:	Order No. 7007783; 7/26/2005
	:	
	:	Docket No. PENN 2005-215-R
	:	Order No. 7007784; 7/26/2005
	:	
v.	:	Docket No. PENN 2005-216-R
	:	Order No. 7007785; 7/26/2005
	:	
	:	Docket No. PENN 2005-217-R
	:	Order No. 7007786; 7/26/2005
	:	
	:	Docket No. PENN 2005-218-R
	:	Citation No. 70 07787; 7/26/2005
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. PENN 2005-219-R
	:	Citation No. 7007788; 7/26/2005
	:	
	:	Docket No. PENN 2005-223-R
	:	Citation No. 7007752; 7/13/2005
	:	
	:	Docket No. PENN 2005-224-R
	:	Citation No. 7007753; 7/13/2005
	:	
	:	Docket No. PENN 2005-225-R
	:	Citation No. 7007754; 7/13/2005
	:	
	:	Docket No. PENN 2005-226-R
	:	Citation No. 7007758; 7/14/2005
	:	
	:	Docket No. PENN 2005-227-R
	:	Citation No. 7007608; 7/14/2005
	:	
	:	R & D Coal Mine
	:	Mine ID 36-02053

DECISION

Appearances: Cindy Rothermel, Independent Miners Association, Tremont, PA for the Contestant;
Gale Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary.

Before: Judge Weisberger

The issues in these consolidated proceedings are the validity of (1) citations issued to R & D Coal Company ("R & D") alleging violations of various mandatory standards set forth in Title 30 of the Code of Federal Regulations, and (2) Section 104(b)¹ orders that were issued based on the alleged failure of R & D to abate the cited violative conditions. The pertinent Notices of Contest were consolidated, and, pursuant to the parties' agreement, the cases were scheduled to be heard in Harrisburg, Pennsylvania on August 3, 2005. At the hearing, the Secretary withdrew Order Nos. 7007782, 7007783, 7007787, and 7007788, and vacated Citation Nos. 7007752, 7007753. The Secretary made a Motion to Dismiss, Docket Nos. PENN 2005-213-R, 214-R, 218-R, 219-R, 223-R, and 224-R, which relate to the vacated orders and citations. The motion was not opposed by Contestant, and was granted.

I. Docket No. PENN 2005-227-R (Citation No. 7007760), and Docket No. PENN 2005-217-R (Order No. 7007786)

At the hearing, a bench decision was made relating to the above citation and order. This decision is set forth below, except for changes of matters not of substance.

Citation No. 7007760, alleges a violation of 30 C.F.R. §77.205(a), which provides that, "Safe means of access shall be provided and maintained to all working places." The working place at issue, was a platform used to obtain access to a certain wheel located adjacent to the shaker house, which was part of the tippel. A diagonal ladder-like structure was the exclusive means of access to the platform. This ladder was equipped with iron non-flexible handrails located approximately 20 inches above the rungs of the ladder, also referred to as angle irons, which were about two inches wide and approximately four feet long. The distance between the rungs or angle irons was approximately 20 inches.

The Inspector opined, in essence, that in spite of the presence of handrails, there was not any safe access to the platform where workers would provide maintenance to the wheel, and change its oil. He indicated that the ladder could be hazardous in the presence of rain and/or ice, in which case a person could fall and sustain injuries. Also, he noted the lack of a guard to prevent slipping. He indicated

¹Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("The Act").

that his opinion was also predicated on the fact that if one would have to climb this ladder carrying objects in both hands, that a handrail would not be helpful, and hence using the ladder would be dangerous due to the width of the angle irons.

However, I place more weight on the testimony of the witness for the company, who has operated this mine for over 10 years. He indicated in testimony that was not impeached or contradicted, that access to the wheel was required only approximately three times a year in order to grease it. In that connection, it was his testimony that was not contradicted or impeached, that the only equipment carried by an individual who would access the wheel consists of a grease gun. He indicated that it could be carried in one hand, even in the non-dominant hand, due to its insignificant weight, and its comparatively small size. This testimony was not contradicted or impeached.

Based upon this record, I find that it has not been established that there was an unsafe means of access. In other words, it has not been established that the Operator was not in compliance with Section 77.205(a), supra. Therefore, I find that it has not been established that there was a violation of Section 77.205(a), supra, and accordingly the Notice of Contest is sustained, and the underlying Citation (No. 7007760) shall be dismissed.

Now, with regard to Order No. 7007786 that was issued for failure to abate the above-mentioned citation, that too shall be dismissed. The predicate for the Section 104(b) order was the failure to abate a validly issued citation, i.e., No. 7007760. In light of my decision, finding that citation not to have been properly issued, there then is no longer a predicate for the Section 104(b) order. Accordingly, the Notice of Contest, which is the subject of Docket No. PENN 2005-217-R is sustained, and Order No. 7007786 shall be dismissed.

II. Docket No. PENN 2005-225-R (Citation No. 7007754) and Docket No. PENN 2005-215-R (Order No. 7007784)

A. Violation of 30 C.F.R. § 1605(k)

MSHA Inspector, Jack McGann, inspected the subject mine on July 13, 2005. He observed that the right side of a roadway that ran from the main road to a parking lot and hoist house, did not have any berm for a distance of approximately 40 feet in length between a walkway to a shaker house and a coal stockpile. According to McGann, within a few feet of the edge of the right-hand side of the road, there was a twenty-five foot drop-off that sloped downward at a 75 ° angle. McGann opined that due to frequent fog on the roadway in the early morning, and lack of light in the winter, road traffic could be hazardous. He was concerned that, due to the lack of a berm, vehicles could fall off the road in these conditions, especially taking into account that the road slants toward the unbermed side. McGann issued a citation alleging a violation of 30 C.F.R. §77.1605(k) which provides as follows: “Berms or guards shall be provided on the outer bank of elevated roadways.”

According to David Himmelberger, the Operator of the site in question, a natural rock strata that he measured as being 18 inches above the roadway, is located in the area where the Inspector said that a berm is to be provided . Accordingly, he was of the opinion that there was not any violation.

Based on the testimony and the parties' stipulation, I find that, for an approximately 40 foot section of the roadway in question, there were not any berms provided. Although Himmelberger testified to the presence of a "rock strata" 18 inches above the roadway, the record does not establish whether this height was uniform throughout the strata or just at one measured point. Nor is there evidence of the length, width, total area of the strata, or its precise location in relation to the approximately 40 feet of roadway that was above the drop-off. Thus, it can not be concluded that the rock strata constituted a sufficient berm in the cited area.

Since there were not any berms along an elevated road with vehicular traffic at the cited area, I find that the Secretary did establish a violation of Section 1605(k)

B. Negligence

According to the uncontradicted testimony of Himmelberger, he has operated the mine for ten years; over this period of time and in the twenty-five year history of the mine, there have not been any accidents or injuries due to the absence of a berm. Taking this into account, I find that the level of the Operator's negligence to have been very low.

C. Significant and Substantial

Within the framework of this record, and taking into account the Inspector's testimony that the violation was not significant and substantial, I find that the violation was not significant and substantial.

D. Order No. 7700760

On July 13, 2005, when McGann issued Citation No. 7007754, he discussed abatement with Himmelberger, and the latter told him that the cited condition had been in existence for twenty to twenty-five years, and it constituted a was a violation, it should have been cited in the past. According to the Inspector, Himmelberger did not ask for more time to abate the violation as he said he did not think it was a violation. McGann set the abatement time for the following day, July 14.

On July 14, McGann issued a modification to the initial citation by eliminating the significant and substantial finding, and lowering the level of negligence and the likelihood of an injury or illness. Also, the Inspector issued a modification extending the abatement time to July 20 to allow the Operator more time to build berms. According to McGann, after he informed Himmelberger of the extension, the latter told him that he did not consider the conditions to be a violation. When McGann returned to the site on July 26, he noted that there were not any berms on the cited roadway,

and the conditions were the same as on July 13. According to the Inspector, he did not consider a second extension of the abatement time because when he had asked Himmelberger if he intended to install berms the latter told him no, "... we'd go to court over it" (Tr. 55) McGann then issued an order under Section 104(b) of the Act, which, as pertinent, provides as follows:

(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement shall not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the Operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In contesting a Section 104(b) order the issues to be litigated are the reasonableness of the time set for abatement, or the Secretary's failure to extend that time. (Energy West Mining Co., 18 FMSHRC 565, 568 (Apr. 1996)) In analyzing these issues it must be considered "... whether the inspector abused his discretion in issuing the order." (Energy West, supra, at 569).

Within the context of the record herein, I find that it has not been established that there was an abuse of discretion on the part of the Inspector. When the Inspector initially set the abatement time the Operator did not seek additional time nor did it indicate that the abatement time was unreasonable. The Inspector then further extended the time and in discussing the extension with the Operator, the latter again did not request additional time or argue that the time set was unreasonable. When the Inspector returned on July 26, he observed that there was not any abatement, nor had effort been made to abate the violative condition. There is no indication that the Operator requested additional time. Therefore, within the context of this record, I find that the Inspector's discretion was not abused, and that, accordingly, the Notice of Contest to the Section 104(b) order is dismissed.

III. Docket No. PENN 2005-226-R (Citation No. 7007758) and Docket No. PENN 2005-216-R (Order No. 7007785).

A. Violation of 30 C.F.R. § 205(e)

On July 14, 2004, McGann observed a wooden platform approximately four feet by five feet that was located four to five feet above the ground. The platform served as the only access to a storage trailer. He indicated that there were not any hand rails on the platform. According to the Inspector, the lack of hand rails constituted a hazard since a person could fall off the platform, which would be more likely in the event of rain or the presence of snow or ice on the platform. Also, pieces of metal, beams, and pipes that were located on the ground in the vicinity of the platform could increase the likelihood of an injury. McGann concluded that it was reasonably likely that a

person could fall off the platform and break a bone. He termed the Operator's negligence moderate because the condition had been in existence for a number of years. McGann issued a citation alleging a violation of 30 C.F.R. § 77.205(e) which provides, as pertinent, that elevated walkways, and elevated ramps, "... shall be provided with handrails,"

Himmelberger did not deny that there were an absence of handrails. He argued that the installation of handrails would impede the loading of material from a truck to the ramp and then into the trailer which is the sole use of the ramp, i.e., as a loading dock. Based on the testimony of the Inspector, I find that a violation of Section 77.205(e) has been established.

B. 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)(1). 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).

Based on the uncontradicted testimony of the Inspector, I find that the lack of a handrail did contribute to the hazard of a person falling off the ramp and injuring himself. According to the Inspector, such an accident was reasonably likely to have occurred. However, he did not explain in any detail the basis for this conclusion aside from indicating that in general, the size of items carried by an employee on the ramp and the presence of rain, ice, or snow could affect the likelihood of a fall occurring.

On the other hand, it was the uncontradicted and unimpeached testimony of Himmelberger that in the time that he owned the mine, approximately 10 years, no one was hurt or injured while loading or unloading on the platform. Within this context I find that the third element of Mathies, i.e., the reasonable likelihood of an injury-producing event, has not been established. Thus, I find that the violation was not significant and substantial.

C. Order No. 7007785

On July 14, McGann issued Citation No. 7007758 at 9:15, a.m., on July 14, and an abatement time was set for 1400 the same day. At approximately 2:00 p.m. McGann talked to Himmelberger about the citation but the latter did not ask for more time to abate the condition. Nor did he give any reason why he could not comply.

Due to a death in his family, McGann was unable to return to the site until July 26, at which time he discussed all outstanding citations with Himmelberger. The Inspector decided not to extend the abatement for the citation at issue, because 12 days had expired from the issuance of the citation on July 14 until July 26 when he revisited the mine and the condition still had not been abated. Also, Himmelberger had not indicated to him that he needed more time to abate. The Inspector then issued a Section 104(b) order.

Within the context of the above evidence, I find that it has been established that there was not any abuse of discretion on the Inspector's part in either setting the initial abatement date, nor in not extending it. In addition to the Inspector's testimony, I take into account the parties' stipulation that the company had not requested any additional time to abate nor did it contend that the time set for abatement was unreasonable.

Order

It is **Ordered** as follows: (1) that based on the Secretary's vacation of the following Citation Nos.: 7007752, 7007753, and withdrawal of the following Order Nos.; 7007782, 7007783, 7007787 and 7007788, these Citations and Orders shall be **Dismissed**; (2) that the following Docket Nos. be **Dismissed**: PENN 2005-213-R, 214-R, 218-R, 219-R, 223-R, and 224-R; (3) that Docket Nos. PENN 2005-215-R and 225-R be **Dismissed**; (4) that Citation No. 7007758 be **Affirmed**, except that

it shall be **Amended** to not significant and substantial; (5) that Docket No. PENN 2005-226-R be **Dismissed**; (6) that Order No. 7007785 be **Affirmed**, and Docket No. PENN 2005-216-R be **Dismissed**; and (7) that Notices of Contest PENN 2005-217-R and PENN 2005-227-R be **Sustained**, and Citation No. 2007760, and Order No. 2007786 be **Dismissed**.

Administrative Law Judge
Avram Weisberger

Distribution:

Cindy Rothermel, Independent Miners Association, 44 N. Crescent, Tremont, PA 17981

Gale Green, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

/sb