

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 30, 2004

R S & W COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. PENN 2005-58-R ¹
	:	Order No. 7007058; 12/15/2004
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	R S & W Drift Mine ID 36-01818
	:	

DECISION

Appearances: Randy Rothermel, President, R S & W Coal Company, Inc., Klingerstown, PA, for the Complainant;
Andrea Appel, Esq., U.S. Department of Labor, Philadelphia, PA, for the Respondent.

Before: Judge Weisberger

At issue in this proceeding is an imminent danger order issued on December 15, 2004, pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977 (The Act). The matter was heard, on an expedited basis on December 21 & 22, 2004, in Harrisburg, Pennsylvania.

After the hearing, a bench decision was issued. The decision, except for corrections of matters not of substance and omissions of language not relevant to this decision, is set forth as follows:

I.

R S & W operates a coal mine. The imminent danger order relates to various conditions observed along a 70 foot length haulage track. The track was traversed by a locomotive and five cars, either loaded with approximately five tons of coal or three tons of rock. These cars also regularly ran on the tracks when transporting miners.

¹This matter is **Ordered** severed from Docket Nos. PENN 2005-55-R *et al.*

On December 15, 2004, MSHA Inspector Michael Dudash observed a number of conditions that he indicated contributed to his finding of an imminent danger.

1. Crack in the rail and inadequate fishplate.

Dudash observed a crack in a rail that was approximately four inches from the south end of the rail. The crack went all the way through the rail. A fishplate connected this rail and the adjacent rail to the north. According to the inspector, the fishplate was connected to these two rails by four bolts, but only three of the four bolts were effective; two on the north side and only one on the south side. The inspector indicated that the rail was subject to various stresses. The dumping of coal or rocks by the cars created torsion stress on the rails. Another type of stress was created by downward pressure, and its release caused when the cars ran on the tracks.

Additionally the inspector testified that the fishplate was not in contact with the vertical web of the track.

The inspector indicated that it was reasonably likely that due to the various stresses the track could shift causing the cars to derail or overturn. In such an event, an injury of a reasonably serious nature was reasonably likely to occur because the west side of the track was over an opening which would lead to somebody falling 25 feet and landing on top of coal or rock.

David Winand, who works for R S & W worked on the site for six years. He testified that the fishplate, which he termed a splice bar, had been installed one to one and a half years ago. He said it had not been previously cited. Also, he never saw it stretch or flex.

Randy Rothermel, R S & W's superintendent testified that he never saw the track move, and has not seen any signs of stress.

2. Unsupported rail ties.

In addition, along a 36 foot length of track ten railroad ties that had been installed perpendicular to the tracks extended 14 inches beyond a wall that supported the rails and the ties. As a consequence, 14 inches of the each tie, designed to support the rail, was over a void twenty feet above the ground, and as a consequence, the rail resting on these ties also was unsupported.

3. The lack of a device to prevent cars from overtravelling or

overturning.

Further, in the area where coal was dumped, which extended approximately 30 feet, there wasn't anything present to prevent cars from overtravelling and/or overturning if a rail would dislodge or if support would fail.

4. The lack of rails to prevent a person from falling.

Additionally, there were no protective rails along the elevated west side of the tracks in an area of the tracks where miners shovel, and remove wheels from cars when they are dumped. Due to the absence of protective rails a person could have stumbled on the ties or coal and rocks between the ties, and fallen off the west side of the tracks and landed on the ground 25 feet below.

5. A gap between rail ties.

Lastly, the inspector observed that a 14 inch gap between the ties that extended 30 feet and was five feet above the surface along one of the dumping areas.

II.

The inspector issued a Section 107(a) imminent danger order. He indicated that each of the above conditions contributed to the finding of an imminent danger.

Additionally, the inspector indicated that more rail spikes were needed to anchor the rails. However, he did not indicate the basis for his conclusion that additional ties were needed. He indicated that also a basis for the imminent danger order, was that the outside (western) rail was reasonably likely to fail, connections were exposed, and there was no support under the rails.

Gregory Mehalchik, an MSHA engineer, testified that the outside rail was subject to torque tension. According to him; it needed two adequate supports, but there was only one. He didn't indicated any basis for that conclusion.

Mehalchik opined that the track was highly likely to fail due to the weight on it and the torsion effect. He also referred to erosions which deprive support and the freeze-thaw effect.

Mehalchik testified that in his opinion all of the five conditions set forth above would contribute to an accident. He was asked a number of times to explain the reason for his opinion that there was an imminent danger of an

accident occurring within a short period of time. His testimony is not very persuasive with regard to meeting that burden.

He first indicated his opinion was based on the existence of gaps between the rails, the absence of and hand rails along with the fact that people work in the area, the presence of a danger of falling through the gap, or going over the side of the track, the possibility of a sudden failure of the rail which could lead to a derailment, and the possibility of a failure of a fishplate or rail which could occur suddenly due to fatigue caused by the placing of loads on and off the rails.

In another portion of the testimony Mehalchik was asked to explain the basis for his conclusion that there was an imminent danger. He explained that in the area of the crack there was a connecting bar over a void, also that there was a lack of support for rails where the ties extended unsupported 14 inches beyond the wall, which causes a lack of support for the rails, which causes a bending effect. Further, that fishplates were not supported.

At another point in his testimony he was asked to explain that basis for the imminent danger, and he explained that fatigue could come into play, that this occurs over time, and that there was some erosion. He indicated that signs of fatigue on various items of metal are observable. However, he did not see any fatigue or evidence of bolt shearing.

It certainly can be argued that all the conditions in combination add up to a series of conditions that can lead to a conclusion that an accident injury-producing event was reasonably likely to have occurred at some time given continued mining operations. It could have occurred within the next couple of minutes, or it could have occurred over a number of years. These are considerations when deciding if cited conditions are significant and substantial. Dudash and Mehalchik found that the conditions cited reasonably would have led to an injury-producing event within a short period of time, but they didn't provide a basis for their conclusion.

In deciding whether the Secretary established the existence of an imminent danger, I'm guided by a number of factors. (1) Section 3(j) of the Act that defines imminent danger. (2) more importantly, an analysis of Commission law, briefly referred to by the Secretary, Utah Power & Light, 13 FMSHRC 1617, 1621 (1991), followed by Wyoming Fuel Co., 14 FMSHRC 1282 (1992), which is followed by Island Creek, 15 FMSHRC 339 (1993) and the more recent case of Blue Bayou Sand & Gravel, 18 FMSHRC 853 (1996) cited by the Secretary. Considering all these cases and putting weight on the most recent case, Blue Bayou, supra, I conclude that the test of an imminent danger is the existence of a hazardous condition or conditions that have a reasonable potential to cause death or serious injury within a short period of time. I don't find that spelled out in the

Secretary's case or in the evidence.

In this connection, I refer to a number of matters brought out by the Company. First of all, with regard to some specifics, the splice bar that was cited, according to the testimony of Winan, had been in place a year and a half or two years. Second, Winand, who is at the site daily and has been there for the last six years, has never seen any stretching or flexing of rails.

Rothermel testified that he laid a level perpendicular to the rails, and ". . . it was level" (Tr. 260). The splice bar used by the Company was, according to the Company's uncontradicted testimony, thicker than an L-shaped bar. I find that testimony of the Company's witnesses credible as it is logical that the bar in question has the effect of connecting three pieces of a rail; the broken piece, the solid piece to the south, and the solid piece to the north. I find Rothermel's testimony credible that he never saw the joint move. There aren't any signs of stress on any part. The fishplates, according to the testimony of the Company's witness, which was not contradicted, were bolted on both sides of the track. Also, although 14 inches of the 100 inch long ties extended over unsupported area, the remaining 86 inches of the ties was supported, at grade connected to the wall, and attached to cement, all of which provides a high degree of support.

More importantly, I note that none of the conditions referred to by the Secretary's witnesses, have just occurred. They've been in existence some time. According to the uncontradicted testimony of the Company's witnesses, the crack has been in existence more than five years. The amount of extension of the ties over unsupported area existed since 1990. The other cited conditions have existed since 1990, a period of more than 15 years. This is very significant evidence negating a finding of any imminence of an accident or injury-producing event leading to someone being injured.

For all these reasons I find that it has not been established that there was any imminent danger as defined in the case law, and 107 order shall be dismissed.

ORDER

It is **ORDERED** that the Notice of Contest is sustained. It is further **ORDERED** that Order 7007058 be dismissed.

Avram Weisberger
Administrative Law Judge

Distribution:

Randy Rothermel, President, R S & W Coal Company, Inc., 207 Creek Road, Klingerstown, PA 17941

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

/sb