

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 11, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-108
Petitioner	:	A. C. No. 36-07416-03743
v.	:	
	:	Enlow Fork Mine
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anthony G. O'Malley, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Elizabeth S. Chamberlin, Esq., CONSOL Inc., Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor against Consol Pennsylvania Coal Company (Consol) pursuant to section 105(d) of the Federal Mine Safety and Health of 1977, 30 U.S.C. ' 801, *et seq.*, the Act, alleging two violations of mandatory standards and seeking a civil penalty of \$540 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act.

At hearing the parties agreed to settle Citation No. 3674196 by deleting the significant and substantial findings and reducing the civil penalty to \$200. The proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act and an order directing payment of that amount will be incorporated in this decision.

The citation remaining at issue, No. 7066284, alleges a significant and substantial violation of the standard at 30 C.F.R. ' 75.1725(a) and charges as follows:

The B-14 belt conveyor at the transfer area is not being maintained in a safe operating condition. The belt scraper, installed on the underside of the bottom belt, was observed positioned in a manner which permitted the belt splice areas of the belt to come into contact with one of the right inby side support chains, 3/8" chain link, creating undue stress on the installation. One of the support chains on the left inby side had already broken creating this hazardous condition.

Management removed the belt from service immediately upon determining this condition to be hazardous.

The cited standard, 30 C.F.R. ' 75.1725(a), provides that A[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.@

Edward Lewetag, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) with significant industry experience, was inspecting the Enlow Fork Mine on February 9, 1998, accompanied by another MSHA inspector and two Consol employees, Safety Director Robert Gross and Safety Inspector Daniel Clark. Near the transfer area of the B-14 belt Lewetag heard a loud banging noise. While standing in the right inby travelway Lewetag then observed that the noise came from the belt scraper. The belt scraper is used to clean debris from the belt after dumping. The 2-foot-wide and 5-foot-long scraper had a metal framework with rubberized material drawn up against the bottom belt. The belt at this location was 52 inches wide. Lewetag observed that the 3/8 inch guide chain suspended from the roof had come loose thereby forcing the right hand portion of the scraper to fall out of alignment in an inby direction toward the inby left walkway. The failure of the guide chain also had the effect of permitting the splices on the conveyor belt to come in contact with the right inby support chains and come-along cables of the scraper assembly. This contact between the belt splices and the scraper assembly chains and come-along cables caused the scraper and the scraper assembly to bounce about.

According to Lewetag, the scraper assembly could thereby become detached from its AJ@hooks and the scraper could then be ejected into the left side walkway. He further noted that if a miner happened to be standing in the left inby walkway and the belt scraper ejected to that side, body contact would likely be at waist level or below. He concluded that it would be Areasonable@for these events to occur and if the scraper contacted a person it would cause injury. According to Lewetag, the pre-shift and on-shift examiners on each of the 3 shifts, the belt foreman and miners performing belt cleaning were likely to be exposed to the hazard.

As noted, Robert Gross, the Enlow Fork Mine Safety Supervisor, accompanied Lewetag on this inspection. Gross acknowledged that the subject scraper had indeed come loose because of the loose alignment chain and that each time a splice in the belt caught the mounting bracket the scraper would jerk. Gross disagreed however with Lewetag's assessment of a hazard. Gross opined that if the scraper became disconnected it would likely fall onto the drip pan below and strike the mounting bracket. According to Gross, the scraper would therefore be restrained and could not be projected into the walkway. Gross observed that other scrapers had come loose before and had always been found in the drip pan. Gross also thought that, in any event, there was no probability of the scraper coming loose. Consol Safety Inspector Daniel Clark also observed the cited condition. The scraper was admittedly out of alignment and splices on the bottom belt were catching and causing the scraper to jump. Clark nevertheless concluded that this did not constitute an unsafe condition.

In *Alabama By-Products Corp.*, 4 FMSHRC 2128 (December 1982), the Commission addressed the standard to be applied when determining the validity of alleged violations of the mandatory standard at issue and stated that Ain deciding whether equipment or machinery is in

safe or unsafe operating condition we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.@

I have absolutely no doubt that Inspector Lewetag acted and testified in good faith. However, based on the credible testimony of Consol's Safety Supervisor, Robert Gross, and Safety Inspector Daniel Clark, corroborated by photographs showing the configuration of the subject scraper assembly and its relationship to the mounting chain for the drip pan and the belt structure, I do not believe the inspector was adequately informed of all of the factual circumstances sufficient to meet the *Alabama By-Products* standard. Thus the Secretary's only proffered theory of a hazard (that the scraper assembly would be projected into a miner passing along the walkway) cannot be supported.

Under all the circumstances I do not find that the Secretary has met her burden of proving the violation charged in Citation No. 7066284.

ORDER

Citation No. 7066284 is hereby **VACATED**. Citation No. 3674196 is hereby **AFFIRMED**, but without significant and substantial findings and Consol Pennsylvania Coal Company is hereby directed to pay a civil penalty of \$200 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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