FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 27, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-44
Petitioner	:	A.C. No. 46-01968-04165
v.	:	
	:	Docket No. WEVA 95-95
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01968-04169
Respondent	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 95-96
	:	A.C. No. 46-01455-04040
	:	
	:	Osage No. 3 Mine
	:	
	:	Docket No. WEVA 95-117
	:	A.C. No. 46-01452-04001
	:	
	:	Arkwright No. 1 Mine

DECISION

Appearances: Elizabeth Lopes, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Consolidation Coal Company (Consol) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petitions allege several violations of the Secretary=s mandatory health and safety standards and seek penalties of $14,050.00. For the reasons set forth below, I affirm all citations and orders, modifying two of them pursuant to a settlement agreement, and assess civil penalties of $10,050.00.

A hearing was held on July 18, 1995, in Morgantown, West Virginia. MSHA Coal

Mine Inspector Edwin W. Fetty, Fred D. Smith, David B. Myers, and MSHA Conference and Litigation Representative Lynn A. Workley testified for the Secretary. Michael L. Cole, Larry J. Johnson, William A. Runyan, David R. Pile, Charles Clark, Carl G. Weber, Sr., and Clifford J. Cutlip were witnesses for Consol. The parties also submitted briefs which I have considered in my disposition of these cases.

SETTLED DOCKETS

At the beginning of the hearing, counsel for the Secretary stated that they had settled Docket Nos. WEVA 95-44, WEVA 95-95 and WEVA 95-96. With respect to Docket No. 95-44, the agreement provides that Consol will pay the proposed penalty of $50.00 for Citation No. 3319362 in full and that the penalty for Order No. 3318854 will be reduced from $1,500.00 to $1,000.00. For Docket No. WEVA 95-95, Order No. 3319349 will be modified to delete the Asignificant and substantial@ designation and the penalty reduced from $3,000.00 to $1,500.00. In Docket No. WEVA 95-96, the degree of negligence in Citation No. 3319345 will be reduced from Amoderate@ to Alow@ and the penalty reduced from $4,000.00 to $2,000.00.

After considering the parties= representations, I concluded that the settlement was appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i), and informed the parties that I would accept the agreement. (Tr. 9-13.) The provisions of the agreement will be carried out in the order at the end of this decision.

DOCKET NO. WEVA 95-117

Inspector Fetty was driving on I-79 past Consol=s Arkwright No. 1 mine on July 6, 1994, when his attention was attracted to a crane boom that he believed was too close to some high tension lines. He pulled onto the mine property to investigate the situation. Once he arrived at the scene, he concluded that there was no problem. Unfortunately, for Consol, however, while on the property he noticed a coal feeder on an equipment carrier parked on a spur track in the post pile area. The inspector observed what appeared to be accumulations of coal, coal dust, oil and grease on the feeder and went to inspect it.

Inspector Fetty testified that:

> On July 6 when I observed the feeder, there was accumulation of coal on the sides and the angles of the feeder. There was [*sic*] accumulations of oil and grease in the deck where the motor had been removed. And coal and coal dust was also present there.
>
> And on the trolley and feeder wire side, around the operating controls, there was an excessive amount of fine, loose, dry coal accumulated there.
>
> . . . .

> There was accumulation of the coal through the entire throat of the machine, in between each flight, ranging from one to three inches deep.
>
> . . . .
>
> Like I said, the accumulation existed down on the inside, between the conveyor flights, in the feeder. Also, on the left-hand edge, there was coal around -- accumulated on the sides. Coming up to the next piece there, . . . is your electrical box.
>
> Accumulations was [*sic*] on top of that box and around the other controls, on up, and coming up into the front where you can see the drive motor that drives the conveyor, which had been removed, there was accumulation of oil and grease over the entire area.

(Tr. 39-41)

The inspector further testified that he Aobserved two pieces of conveyor belting, one on the right side, and one on the left side. And the area between the conveyor for approximately 20 inches wide, there was nothing, or nothing down the trolley wire side.@ (Tr. 50.) He stated that he believed that the feeder had not been covered as required because of this opening and because A[t]here was a mark on top of the metal, on top of the feeder, that indicated that at one time the trolley or trolley feeder had contacted this portion of the feeder@ and that the mark Awas fresh, because it was still shiny.@ (Tr. 51.)

Finally, the inspector testified that the feeder was not properly grounded for the move A[b]ecause the only method of grounding that was provided, that I observed at the time I was there, there was a piece of track bond twisted around a portion of the feeder and just twisted around the frame of the lowboy.@ (Tr. 55.)

As a result of his observations, Inspector Fetty issued order No. 3122362 under Section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2),[1] alleging a violation of Section 75.1003-2 of the Secretary=s

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[1] Section 104(d)(2) states:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such

Regulations, 30 C.F.R. ' 75.1003-2. The order alleges that:

> A coal feeder was observed setting [*sic*] on a spur track of the main track haulage between the hills of the Arkwright No. 1 Mine. The feeder had been moved from underground under energized 300 vdc trolley wire and trolley feeder wire on a previous shift. The feeder was not cleaned and there were accumulations of fine dry coal and coal dust, oil, grease and wooden material on the coal feeder. The coal feeder was not properly covered on the top and trolley wire side. There was evidence that the energized trolley wire or trolley feeder wire had contacted the center support of the coal feeder, leaving indications of arcing for 9 inches and molten metal splatter. Electrical contact was not maintained between the coal feeder being transported and the rail-mounted low boy barrier. According to a company foreman, the equipment was being moved under the direction of a certified foreman and with a qualified electrician. The condition was observed by at least two foremen. A fire could have occurred causing injuries from smoke inhalation, asphyxiation or burns. Proper safety precautions should have been provided prior to and during equipment move.

(Govt. Ex. 1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.1003-2 requires, in pertinent part:

> (a) Prior to moving or transporting any unit of off-track mining equipment in areas of the active workings where energized trolley wires or trolley feeder wires are present:
>
> (1) The unit of equipment shall be examined by a certified person to ensure that coal dust, float coal dust, loose coal oil, grease, and other combustible materials have been cleaned up and have not been permitted to accumulate on such unit of equipment;
>
> ....

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mine discloses no similar violations.

> (d) The frames of off-track mining equipment being moved or transported, in accordance with this section, shall be covered on the top and on the trolley wire side with fire-resistant material . . . .
>
> (e) Electrical contact shall be maintained between the mine track and the frames of off-track mining equipment being moved in-track and trolley entries . . . .

As a preliminary matter, Consol argues that this regulation does not apply to the coal feeder in question. It bases this contention on *Southern Ohio Coal Co.*, 3 FMSHRC 1449 (Judge Koutras, June 1981), where the judge held Athat section 75.1003-2 only applies to complete or reasonably complete pieces of off-track mining equipment.@ *Id.* at 1455. At issue in that case was whether the boom of an off-track shuttle car being transported on a low-boy was covered by Section 75.1003-2. The case does not support the Respondent=s position.

The boom of a shuttle car is a small part of the shuttle car, while in this case it is the small parts, such as the motor, which have been removed leaving a reasonably complete feeder. Further, as Consol admits in its brief, at a minimum the frame of the feeder was involved in this move. In that connection, the judge noted in *Southern Ohio*, A[s]ince subsection (d) [also alleged to have been violated in this case] mentions only frames, it is evident that the drafters were considering only large, nearly complete, or complete pieces of machinery.@ *Id.* at 1456. Clearly, Judge Koutras considered a frame to be a complete or reasonably complete piece of equipment. I concur, and conclude that Section 75.1003-2 applies to the move of the coal feeder in this case.

This case turns on the credibility of the witnesses. There is no dispute that the feeder was moved out of the mine in three separate moves over the period from July 2 through July 6, 1994. Nor is there any dispute that when Inspector Fetty observed the feeder on the morning of July 6, it was located where the last move had parked it during the early morning hours of that day. However, there is a dispute as to whether the move complied with Section 75.1003-2.

Claiming that it did, Consol=s witnesses testified that the feeder was carefully cleaned before the move on the first day, that it was rock dusted and then completely covered with pieces of conveyor belt which were laced together. They testified that the required, certified person checked the feeder to ensure that it was clean before the move was commenced. The witnesses maintained that it was not uncovered while stopped twice before being moved again and that it was grounded with a clamp attached to the feeder frame and to the Alow-boy@ carrier.

While admitting that two incidents of arcing occurred during the move, they deny that the wire came in contact with the feeder, claiming that on one occasion a trolley wire hanger came loose and swung down hitting the side of the Alow-boy@ and on the other occasion the belting on the feeder pushed up, causing the trolley wire to contact a metal ceiling beam. Consol=s miners averred that what appeared to Inspector Fetty to be an area on the feeder

where the feeder contacted the trolley wire was, in fact, a place where an L-shaped bracket had been cut off of the feeder with an acetylene torch.

The Consol witnesses hypothesized that the accumulations observed on the feeder by Inspector Fetty resulted from roof and rib sloughage, as well as accumulations knocked off of water pipes, during the move. Finally, they assert that the reason the feeder was not completely covered by conveyor belting when observed by the inspector was that the movers started to remove the belting on completing the move before deciding to leave that task to the day shift.

I find the testimony of the inspector to be the most believable in this case. Generally, there has been no showing that Inspector Fetty had any reason or motive to make up what he observed. In fact, while the conclusions that he drew from his observations are clearly challenged by Consol, his observations are not. On the other hand, the Respondent=s employees, who were involved in committing a violation, if one is found, had an obvious reason for shading the truth. Furthermore, Fetty=s observations are corroborated by a disinterested witness.

Section 75.1003-2(a)(1)

Turning first to the accumulations of coal, coal dust, oil and grease and wood material observed by the inspector, his description is very detailed and describes accumulations in places and to extents that could not have resulted from sloughage and dislodgements onto a covered feeder during the move. This testimony was supported by the testimony of Fred Smith, a retired miner who had no apparent motive to dissemble.

Mr. Smith testified that he saw the feeder on July 6 when he moved it from the track spur to the No. 8 shop and A[i]t had a heavy debris, like bug dust, coal and oil, all over the equipment, all over the whole machine.@ (Tr. 117.) He further stated that Ait didn=t look like it had been hosed off like the other machines I have hauled out of that mines [*sic*] and other mines@ and that in his opinion A[w]ith the fine dust and accumulation of the oil, it would have to be accumulated where it was in operation.@ (Tr. 117.) Finally, he said that it was unlikely that the accumulations had occurred while the feeder was being moved because they were under sloped parts of the feeder.

In addition, the Respondent took some pictures of the feeder the next day at the shop. (Jt. Exs. A-L.) Although both the inspector and Mr. Smith testified that the feeder had been cleaned up by July 7 and appeared cleaner than when they saw it on July 6, it is apparent from these pictures that there were still accumulations of combustible materials on the feeder. Consequently, I conclude that the Respondent violated subsection (a)(1) of the regulation by not ensuring that the feeder had been cleaned up prior to the move.

Section 75.1003-2(d)

The evidence concerning whether the feeder was properly covered during the move is

not as explicit. The inspector based his conclusion on this issue on his observation of the gap in the covering and the presence on the feeder of an area in the gap which appeared to have come in contact with the wire. Mr. Smith agreed with Inspector Fetty that the shiny area appeared to be a place where the feeder contacted the wire. Conversely, the Respondent explains the gap as being an unfinished attempt to uncover the feeder after the move was completed and the shiny area as being the result of a brace being cut off of the feeder.

Only Mr. Clark and Mr. Weber testified concerning uncovering the feeder. Mr. Clark stated: AWe just started to peel back one piece. That was it.@ (Tr. 322.) Mr. Weber related: AI moved one piece and I think the motorman and Chic Martin started to take another piece off, moved it around.@ (Tr. 362.) However, none of this explains the 20 inch gap observed by the inspector. If one piece were partly peeled back, it would have been obvious to the inspector. Further, if one piece had been removed and another moved, the gap would have been larger than 20 inches and presumably the piece that had been removed would have been present in the area.

With regard to the shiny area, both Inspector Fetty and Mr. Smith testified that this was different in appearance from areas that had been cut with a torch and they were able to point out the difference in the photographs where there is no dispute that a part had been cut off of the feeder. While Consol=s witnesses all maintained that a part had been cut off at the shiny spot, they did not attempt to explain why there was a difference in the appearance of the cuts. In fact, there is an observable difference. (Jt. Exs. E and L.)

Based on the evidence available, there are only two explanations for the shiny area. Either a part was removed from the area, or the feeder came in contact with the wire. Based on the difference between the areas known to have been cut and the area in question, I find that the shiny area resulted from contact with the wire. Based on all of the evidence on this issue, I conclude that the feeder was not covered as required by subsection (d).

Section 75.1003-2(e)

Inspector Fetty did not see a proper ground on the feeder at the time he observed it. At that time, no explanation was given to him of the reason the feeder did not appear to be properly grounded. However, the next day he was informed that a ground clamp had been used and he was provided with the clamp that was allegedly used. On receiving the clamp, the inspector tested it with his equipment for continuity. Continuity was not obtained.

Mr. Cutlip testified that the clamp did maintain continuity when tested by the inspector. However, I do not credit this testimony. Mr. Cutlip made extensive contemporaneous notes at the time the order was issued, (Govt. Ex. 5 and Resp. Ex. 10), yet this incident, which if true demonstrates that the company did properly ground the feeder and that the inspector was lying, is not mentioned. Further, although several other people were present when the test was made, none testified to corroborate this claim.

I find it suspicious that no mention was made of the clamp until the next day and am not convinced that one was used. Nevertheless, even if the one given to the inspector the next day was, in fact, used, it obviously did not provide a proper ground based on the inspector=s testing. Therefore, I conclude that Consol violated subsection (e).

Based on a preponderance of the evidence, I find that Consol did not ensure that the feeder had been cleaned of combustible materials prior to moving it, did not completely cover the top and trolley wire side of the feeder with fire-resistant material while it was being moved, and did not maintain electrical contact between the mine track and the feeder during the move. Accordingly, I conclude that the company violated Section 75.1003-2 of the regulations as alleged.

Significant and Substantial

The inspector determined that this violation was Asignificant and substantial.@ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that 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 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is Asignificant and substantial@ must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Inspector Fetty testified that the widespread accumulations on the feeder were dry and combustible. He further testified that it was reasonably likely that if a trolley wire came in contact with the feeder it would cause arcing that would ignite the accumulations resulting in a fire. The evidence indicates that at least twice during the move contact with the trolley wire or a wire hanger resulted in arcing, although fortunately there

was no ignition. The inspector also testified that if a fire occurred, serious injuries such as burns and smoke inhalation were likely to occur.

Based on this evidence, I find that the *Mathies* criteria have been met. The failure to clean, cover and ground the feeder for the move contributed to the danger of a fire in the mine. A fire was reasonably likely, assuming normal mining operations, and if a fire occurred it could be expected to result in reasonably serious injuries. Accordingly, I conclude that the violation was Asignificant and substantial.@

Unwarrantable Failure

Inspector Fetty also found that this violation resulted from Consol=s Aunwarrantable failure@ to comply with the regulation. The Commission has held that Aunwarrantable failure@ is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). AUnwarrantable failure is characterized by such conduct as >reckless disregard,= >intentional misconduct,= >indifference= or a >serious lack of reasonable care.= [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991).@ *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

In this case the accumulations were widespread and readily apparent to Inspector Fetty and Mr. Smith and, according to the inspector=s notes made at the time of his inspection, members of Consol=s management also. (Govt. Ex. 2.) Indeed they are readily apparent in the photographs taken a day later. Despite this, the move was carried out after a certified person indicated that he had examined the feeder and it was Acleaned and covered.@ (Resp. Ex. 5.)

Clearly, Consol knew what Section 75.1003-2 required for the move of the feeder. Just as clearly, the company made only a superficial attempt to comply with those requirements. At best this resulted from Aindifference,@ at worst it was Aintentional misconduct.@ Consequently, I conclude that this violation resulted from Consol=s Aunwarrantable failure@ to comply with the regulation.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $5,500.00 for this violation. However, it is the judge=s independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that Consol is a large mine operator, that the maximum penalty permissible for this violation will not affect its

ability to remain in business and that the company demonstrated good faith in abating the violation. (Tr. 21-22.) For the two years preceding this violation, the company received a moderate number of violations for a mine of this size, including seven for violation of the same regulation. (Govt. Ex. 7.) The evidence in this case demonstrates that the Respondent was highly negligent and that the gravity of the violation was very serious. Considering all of this together, I conclude that the proposed penalty of $5,500.00 is appropriate.

ORDER

Order No. 3318854 and Citation No. 3319362 in Docket No. WEVA 95-44 are AFFIRMED, Order No. 3319349 in Docket No. WEVA 95-95 is MODIFIED by deleting the Asignificant and substantial@ designation and AFFIRMED as modified, Citation No. 3319345 in Docket No. WEVA 95-96 is MODIFIED by reducing the degree of negligence from Amoderate@ to Alow@ and AFFIRMED as modified and Order No. 3122632 in Docket No. WEVA 95-117 is AFFIRMED. Consolidation Coal Company is ORDERED TO PAY civil penalties of $10,050.00 within 30 days of the date of this decision. On receipt of payment, these proceedings are DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

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