

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 96-108
Petitioner : A.C. No. 46-01433-04185
v. :
 : Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

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

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge two withdrawal orders issued by the Secretary of Labor to Consolidation Coal Company (Consol) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Consol violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional issues concerning the validity of Order No. 3321649 are addressed as noted.

At hearing, a settlement motion was submitted with respect to Order No. 3717223. Consol agreed to pay the proposed civil penalty of \$1,800 in full. I have considered the relevant representations and documentation and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the penalty will be incorporated in this decision.

The one order remaining for disposition, Order No. 3321649, issued pursuant to Section 104(d)(1) of the Act¹, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.523-3(b) and charges as follows:

On 5 right section, the S&S Scoop Serial No. 488-1253, Approval No. 2G-2831-2, does not have operative emergency parking brakes. With DC power off and brakes set, the rear pad gapped 3/16 inch from rotor, and front pad gapped 1/8 inch from rotor. When adjusting bolt was turned to tighten brakes, bolt threads were very corroded and could barely be tightened, indicating brakes have been loose for a long time. Violation is very hazardous, requiring increased attention by operator to prevent its occurrence. Violation is repetitious: Citation No. 3717237 issued on 11-20-95 and Citation No. 3717238 issued on 11-20-95, were for inoperative emergency parking brakes on S&S scoops. Citation No. 3717239 was issued on 11-20-95 for inadequate weekly examination of electrical equipment, due to the continued existence of inoperative emergency parking brakes on these scoops. Operator therefore should have known that emergency parking brakes on the 5 right scoop should be checked and either corrected or the scoop removed from

¹ Section 104(d)(1) of the Act reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

service. This scoop was listed in the record of weekly electrical examinations for 5 right on 11-27-95: Dangerous conditions - none found. The Review Commission has determined that a rank-and-file miner acts as an agent of the operator while conducting required electrical examinations in the mine. Since violation existed for a long time, was particularly serious, was repetitious, and operator should have known of its existence, operator had aggravated conduct and violation is unwarrantable.

The Secretary maintains that the order charges a violation under four of the five subsections of 30 C.F.R § 75.523-3(b). In relevant part the standard provides as follows:

Automatic emergency-parking brakes shall -

- (1) Be activated immediately by the emergency deenergization device required by 30 C.F.R. 75-523-1 and 75.523-2;
- (2) Engage automatically within 5.0 seconds when the equipment is deenergized;
- (3) Safely bring the equipment when fully loaded to a complete stop on the maximum grade on which it is operated;
- (4) Hold the equipment stationary despite any contraction of brake parts, exhaustion of any non-mechanical source of energy, or leakage.

On November 28, 1995, experienced electrical engineer and inspector for the Mine Safety and Health Administration (MSHA), Spencer Alvin Shriver, was conducting an electrical inspection at the Loveridge No. 22 Mine accompanied by Doug McClure, Consol's maintenance supervisor and miner's representative, Ted Tuttle. At the 5 Right Section he examined the cited scoop finding that indeed it did not have an operative emergency parking brake. The brake could not function because, when engaged, there remained a significant gap between the brake pad and the rotor estimated by Shriver as 3/16 of an inch on the rear and 1/8 inch on the front. He used a feeler gauge to measure the gaps and found them to be in excess of the .034-inch gauge. While Shriver was able to see, and his feeler gauge was able to reach, only about one-half of surface of the rotors, he found no evidence of warpage. His conclusion, therefore, that the described gaps existed over the entire area of the rotors, is reasonable. I also find Shriver's

testimony to be credible. Under the circumstances the emergency parking brake clearly could not function and therefore the violation existed as charged.

The Secretary further maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on 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, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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.

See also *Austin Power Co. V, Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Inspector Shriver credibly described the basis for his findings in the following colloquy:

JUDGE MELICK: Why did you label that a S and S violation?

THE WITNESS: I considered that there was the possibility of an accident from two ways. One, the scoop could be traveling and in an emergency need to stop

suddenly, and without the automatic parking brakes, that the scoop could not be stopped.

JUDGE MELICK: What about the service brakes? Couldn't you use the service brakes?

THE WITNESS: The service brakes, if they are working, is a viable way to stop the scoop. There are, however, problems that can develop with the service brakes.

They have a hydraulic line or hose which can burst. The parts of the linkage in the service brakes can break. If there is an accumulation of material in the operator's compartment, it can wedge under the service brakes and the pedal can't be depressed.

JUDGE MELICK: All right.

THE WITNESS: The other way would be if a person stopped the scoop, set the emergency parking brakes, got out of it, and the scoop then started rolling, it could roll over him.

We had some fatalities throughout the country from that source. It could also, if it decided to run very far, could run into electrical equipment, start a fire.

There are several possibilities taken altogether that in my judgment represented a reasonable likelihood of a serious accident occurring.

JUDGE MELICK: Which several possibilities taken together would result in a reasonable likelihood of an accident?

THE WITNESS: The possibility if the scoop is in operation that an emergency would arise and the scoop could not be stopped if the service brakes didn't work.

The other would be if the scoop were parked and the power was turned off, assuming the parking brakes would set, and they did not, and then the scoop would run away.

Also, the tram pedal of the scoop, if it sticks in for any reason, then the service brakes are really not able to stop the scoop. If the panic bar is then operated, it would stop the drive to the wheels, but if the parking brakes don't set then the scoop won't stop, and when the panic bar

is operated, the scoop does not have any steering. It loses steering capability (Tr. 47-49).

Within the above framework it is clear that this violation was "significant and substantial". In reaching this conclusion I have not disregarded Respondent's arguments that the cited defects would have been discovered during the required pre-operational checks of the brakes, that the scoop had operational service brakes, and that it was the practice to leave unattended scoops with their buckets on the ground. While these factors do tend to mitigate the gravity of the violation I find them insufficient to negate the findings herein.

The Secretary also maintains that the violation was the result of "unwarrantable failure". Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

It may reasonably be inferred from the existence of a significant gap between the rotor and the brake pads found on November 28 and the fact that the brake adjustment screw had been so significantly corroded that the cited condition had indeed existed for days or even weeks -- just as Inspector Shriver credibly opined. This evidence alone supports a finding of high negligence and "unwarrantable failure".

The Secretary also observes that Inspector Shriver himself had cited similar conditions on the same type of equipment on November 20, 1995, only eight days before the instant violation was discovered. (Government Exhibits 3 and 4). In addition Shriver had also cited Consol on November 20 for an inadequate examination of electrical equipment and, in particular, the failure to report defective emergency parking brakes on battery powered scoops. According to Inspector Shriver, corroborated by Consol maintenance superintendent Donald Bucklew, following the issuance of the November 20 citations and in connection with the abatement of those violations, the persons who perform the weekly

electrical inspections were re-instructed regarding the necessity to check the emergency parking brakes during such inspections. Inspector Shriver noted that the scoop at issue herein was the subject of such a weekly electrical examination on the midnight shift on November 27, 1995, the day before the order at bar was issued. Accordingly the cited defective brake should clearly have then been discovered and corrected. This evidence also independently supports findings of high negligence and "unwarrantable failure".

Consol nevertheless maintains that the prior citations were issued to scoops in a geographically separate area of the mine and were the responsibility of a separate maintenance group. It implicitly argues, therefore, that the prior negligence, notice and heightened awareness provided by the prior citations cannot be attributed to Consol herein. Operator responsibility cannot however be so compartmentalized as to limit liability for negligence and unwarrantable failure. Clearly the prior negligence, notice and heightened awareness from the prior citations is chargeable to the operator as a whole and is not limited to only those employees who may have participated in the violation or to a portion of the mine where they work. This argument also ignores the evidence that all persons at the mine who perform weekly inspections were purportedly "re-instructed" following the issuance of these citations regarding the necessity of inspecting the emergency parking brakes during such inspections.

Consol further argues that, because the citations issued the prior week for inoperative automatic emergency parking brakes originated from a different problem i.e. they were damaged in moving the scoops, the operator was not placed on notice that greater efforts were necessary for compliance with Section 75.523-3(b) on the 5 Right Section. This argument overlooks however that regardless of the underlying cause of the earlier defects notice was thereby in fact provided to the operator that greater attention needed to be given the inspection of the emergency parking brakes.

Under the circumstances I agree that the violation was the result of high negligence and "unwarrantable failure" and Order No. 3321649 must be affirmed. Considering the criteria under Section 110(i) of the Act, I further find that the proposed civil penalty of \$2,200 is appropriate.

ORDER

Order Nos. 3717223 and 3321649 are affirmed and Consolidation Coal Company is hereby directed to pay a civil penalty \$4,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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