FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 6, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-50
Petitioner	:	A. C. No. 46-01318-04419
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Robinson Run No. 95

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994), "the Act," charging the Consolidation Coal Company (Consol) with one violation of the mandatory standard at 30 C.F.R. § 75.370(a)(1) and proposing a civil penalty of $5,000.00 for that violation. At hearings on November 14, 2000, Consol admitted the violation as alleged and challenged only the Secretary's "significant and substantial" and "unwarrantable failure" findings. The general issues before me then are whether the violation was "significant and substantial," whether it was the result of the operator's "unwarrantable failure" and what is the appropriate civil penalty to be assessed for the violation considering the criteria under Section 110(i) of the Act.

The order at bar, number 4867384, issued October 6, 1999, pursuant to Section 104(d)(2) of the Act, charges as follows:[1]

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[1] Section 104(d) provides as follows:

(1) "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

> The currently approved mine ventilation plan is not being complied with on the 084-0 mmu, 13-0 Longwall section, in that only 435 fpm velocity was measured at the No. 10 shield with a properly calibrated anemometer. This is the fourth citation that has been issued for inadequate air velocity on this section. Citation No. 7142544 was issued on 08/25/1999. Citation No. 4866439 was issued on 10/04/1999. A methane/dust face ignition occurred on 09/16/1999. Citation No. 7142156 was issued on 09/30/1999 for failure to comply with the applicable respirable dust standard.

The cited standard requires in essence that the operator follow the ventilation plan that has been approved by the District Manager for the Department of Labor's Mine Safety and Health Administration (MSHA). In this case there is no dispute that the relevant ventilation plan required that the air velocity at the cited location be maintained at 500 feet per minute (Jt. Exh. No. 1 Para. 10).

Gregory Fetty is Chief of the Health Section in MSHA District 3. On October 6, 1999, he was working as an MSHA inspector at the Robinson Run No. 95 Mine for the purpose of abating a September 30, 1999, excessive dust violation. Fetty took an air velocity reading at the No. 10 shield and found only 440 feet per minute (fpm) where 500 fpm was required by the ventilation

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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."

(2) 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 mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

plan.[2] The violation was abated by placing a curtain between the No. 1 shield and the headgate rib and by tightening the gob check curtain in the No. 3 entry (Gov't Exh. No. 1).

The Secretary 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 safety 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 Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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).

According to Inspector Fetty, several health and safety hazards were presented by the violation at issue including the inhalation of excessive respirable dust contributing to black lung disease and the contribution to a fire or explosion resulting from a face ignition because methane would not be promptly removed from the longwall face. Fetty opined that, in the latter cases, fatal injuries were reasonably likely. Fetty also noted that the subject mine was under the "Section 103(i)" gassy mine spot inspection program involving mines liberating more than 1,000,000 cubic feet of methane in a 24-hour period. He also noted that there had been an ignition on September 16, 1999, on the same 13D longwall face. Within this framework of evidence and the reasonable inferences to be made therefrom, I conclude that indeed, the violation was "significant and substantial" and of high gravity.

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[2] The parties apparently agree that Inspector Fetty found 440 cfm not the 435 cfm alleged in the order at bar.

In reaching this conclusion I have not disregarded Consol's argument that, because the violation was quickly abated, it was short lived and therefore, the hazard, if any, was minimized. However, under present law, in determining whether a violation is "significant and substantial" the likelihood of an injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement, *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Consol also appears to argue that the Secretary failed to prove that this violation "would necessarily lead to an explosion, a fire or black lung." As previously noted, however, the correct standard of proof requires only that the Secretary establish by direct evidence or by reasonable inference a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury or illness. *U.S. Steel Mining Co.*, at 1836. That standard of proof has been met herein.

The Secretary also argues that the violation was the result of Consol's "unwarrantable failure" and high negligence. In this regard the Secretary argues that prior violations for inadequate ventilation were issued at the same location on August 25, August 30, 1999, and, on September 30, 1999 (Gov't Exhs. No. 3 and 4).[3] The Secretary also argues that Inspector Fetty had discussed with the operator at a closeout conference on October 4, the importance of compliance with the ventilation requirements. The Secretary also alleged but failed to prove that the anemometer utilized by the section foreman was not properly calibrated and that he was not using any correction or error factor in calculating air velocity. Fetty acknowledged however, that he did not know how the section foreman actually took his air readings for compliance purposes. Finally, Inspector Fetty testified that he relied in part also upon what he apparently believed was a serious deficiency in the air velocity, *i.e.,* 440 fpm when 500 fpm was required by the ventilation plan.

In defense of the Secretary's allegations of "unwarrantable failure" and high negligence Consol presented the reports for the three pre-shift examinations preceding the issuance of the order at bar performed at the No. 10 shield. The most recent pre-shift examination prior to the issuance of the order showed a reading of 605 (presumably feet per minute) at the No. 10 shield measured during the examination between 5:00 a.m. and 7:15 a.m., on October 6, 1999 (Resp.'s Exh. No. 4). The examination preceding that showed 612 (presumably feet per minute) at the No. 10 shield and the exam preceding that showed 730 (presumably feet per minute) at the No. 10 shield. In addition, the pre-shift examination for the preceding day, October 5, 1999, showed

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[3] At hearing the Secretary sought to amend the citation at bar by also referencing a charging document issued October 4, 1999, for a similar violation of inadequate air in the cited section. However, because the Secretary had failed to disclose this information in a timely manner, the proposed amendment was denied. The admission of that charging document was also barred for purposes of establishing "unwarrantable failure" because the Secretary's failure to disclose her intended use of that document in a timely manner. In any event, even had that prior charging document been admitted and considered, it would not have been sufficient under all the circumstances to support a finding of unwarrantability or greater negligence than found herein.

readings at the No. 10 shield of 700, 600 and 625 (presumably feet per minute). The uncontradicted and credible record thus shows that for the six pre-shift examinations preceding the issuance of the order at bar the air measurements at the No. 10 shield were well above the minimum required by the ventilation plan.

In further defense of the unwarrantable failure allegations, Consol cites the testimony of longwall section foreman Gary Graham that he obtained an air reading on October 6, 1999, only five or ten minutes before 9:00 a.m., and found 535 fpm at the No. 10 shield. Since the order at bar was issued at 9:05 a.m., it is apparent that Graham's readings were obtained only 10 to 15 minutes before inspector Fetty found the air reading had dropped to 440 fpm at the No. 10 shield. Graham also testified that it required only five minutes to tighten the curtains necessary to bring the air readings up to the requisite level. Graham also observed that the curtains had been tight at that location when he passed earlier around 9:00 that morning and noted that when he later returned to that location after the order had been issued he observed that the curtain had been torn out from the spad. Graham opined that this could have been caused by someone passing through the curtain in the interim. He noted that the other curtain had been loosened by moving the shield.

Longwall section foreman Graham's testimony is not disputed and his credibility is not otherwise challenged. Under the circumstances I accord Graham's testimony significant weight and conclude that indeed he checked the air velocity at the No. 10 shield only ten or fifteen minutes before the violative condition was discovered by Fetty. Fetty's lower and violative air reading was apparently the result of curtains becoming loosened subsequent to their examination by Graham, thereby causing the decrease in ventilation. Because of the extremely brief period during which the violative condition therefore existed, the permissible air reading obtained only shortly before the violation was discovered and the fact that the six preceding pre-shift reports showed air readings well above the requisite level, I cannot find that the violation herein was a result of "unwarrantable failure" or high negligence.

I do find however, that the violation was the result of moderate negligence based on Graham's admission that they had been having trouble keeping air at the face for several weeks before the order in this case was issued. At the same time I also note that the mine foreman had instructed Graham to take four to five readings per shift to monitor the problem. Under all the circumstances the order at bar must be modified to a citation under Section 104(a) of the Act.

Civil Penalty

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Gravity has been found to have been high and negligence to have been moderate. Respondent has a significant history of violations as shown by Gov't Exh. No. 10. It has been stipulated that Consol is a large mine operator. There is no dispute that Consol demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. There is no evidence that the penalty imposed herein would have any effect on the operator's ability to continue in business. Within this framework of evidence I find that a civil penalty of $2,500.00, is appropriate.

ORDER

Order No. 4867384 is hereby modified to a citation pursuant to Section 104(a) of the Act. Consolidation Coal Company is hereby directed to pay a civil penalty of $2,500.00, for the violation charged in Citation 4867384 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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