FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-119
Petitioner	:	A. C. No. 46-01968-04281
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

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

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging a violation by Consolidation Coal Company (Consol) of 30 C.F.R. ' 75.333(c)(3).[1] In addition to citing Consol for this violation, the Secretary also issued an imminent danger order under section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). A hearing was held in Pittsburgh, Pennsylvania, on December 2, 1998.

On January 25, 1999, Respondent filed a post-hearing brief. On February 12, 1999, the Secretary filed a post-hearing brief.

Findings of Fact and Discussion

On March 3, 1998, MSHA Inspectors William L. Sperry and Richard Lee Stefanick inspected the 9 S longwall section at Consol=s Blacksville No. 2 underground coal mine. Francis

[1]/ 30 C.F.R. ' 75.333(c)(3) provides as follows: A[w]hen not in use, personnel doors shall be closed.@

Nickler, Consol=s safety supervisor accompanied the inspectors. Upon entering the No. 4 entry through a man-door from the No. 3 track entry, an intake air entry, methane monitors worn by the inspectors and Nickler emitted an audible alarm indicating the presence of methane. Methane readings taken in the belt entry at various locations between the 93 block and the 111 block indicated methane readings between 0.8 percent and 2.2 percent. Also, in a cavity located in the roof above the 110 block, the methane reading exceeded 5 percent. The explosive range of methane is between 5 and 15 percent. An imminent danger withdrawal order was issued requiring the withdrawal of the miners from the area.

Due to the extensive presence of methane in concentrations above than 2 percent, along with the presence in the cavity of methane in an explosive range, I find that the inspectors did not abuse their discretion in issuing the withdrawal order. Indeed, Nickler acted with alacrity in taking the initiative in ordering withdrawal of all of the miners.

Upon noting the presence of methane, and the absence of air movement, Nickler and the inspectors tried to determine the cause of the methane buildup. They were informed by Mike Cole, a foreman, who appeared angry and visibly upset, that a man-door in a metal stopping between the No. 3 and 4 entries had been propped open, and a man-door at the 67 block was open. There is no dispute that these doors were open in violation of the section 75.333(c)(3), supra, and I find that Consol violated section 75.333 (c)(3), supra.

Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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." 30 U.S.C. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is not contested that a violation of section 75.333(c)(3), supra, occurred, and that this violation contributed to the hazard of a fire or explosion, in that it resulted in reduced air flow that led to an accumulation of methane in an explosive range. Hence, I find that the first two elements set forth in Mathies, supra, have been satisfied. At the time the violative condition was cited, the section was not yet producing coal, and the belt entry at issue was deenergized. The area was generally well rock dusted and there was not any equipment present in the belt entry that was in such a physical condition as to constitute an actual ignition source. There is some evidence that rail bonding was to have been performed that day in the adjacent No. 3 entry, but there is no evidence that any torch or welding work was being performed at the time. However, as explained by the inspectors, the presence of high voltage cable, switches, and rectifiers that could generate sparks, constituted potential ignition sources. Also, although welding and the use of torches, clearly ignition sources, was not being performed at the time of the violation, it is clear that a reasonable likelihood of injury existed had normal mining operations continued i.e., the bonding of the tracks (see, *Rushton Mining Co.*, 11 FMSHRC 1432 (August 1989)). It is too speculatively to find, as essentially argued by Consol, that the likelihood of an explosion would have been minimized by the requirement of an examination prior to energizing the belt line.

Within the above framework of evidence, and taking into an account the existence of methane in explosive concentrations, the extent of the area in the entry where methane was found, and the fact that there were no conditions in existence at the time of the violation that would have prevented any further buildup of methane, I find that it has been established that the violation was significant and substantial.

Penalty

The inspectors testified that the violation could have resulted in a violent explosion causing fatalities to the miners that were present in the section at issue. This testimony was not contradicted or impeached. I thus find that the level gravity of this violation was relatively high, especially considering the fact that it resulted in an accumulation of methane in an explosive range.

There is no clear evidence as to exactly how long the violative condition had been in

existence prior to its being cited. It appears that Consol=s management did not have notice or knowledge of the violative condition until approximately 10:00 a.m., on March 3, when the methane detectors detected methane. In this connection, it was Nickler=s uncontracted testimony that he reviewed the Weekly Ventilation Examination book and that the preshift and on-shift air readings taken on March 2 and 3, were between 34,950 and 81,200. Also, according to Nickler, the last required weekly examination of the belt prior to March 3, 1998, occurred on February 24, 1998, and the next required examination was to have been performed during the afternoon shift on March 3. Other examinations of the belt on February 25, 26, 27, 28 and March 2 did not contain any notations of either decreased air flow, abnormal methane readings, or open doors. Further, according to Nickler, all miners are provided with 8 hours annual training which includes 45 minutes on ventilation. Also, new employees are provided with a copy of Consol=s safety rules which, inter alia, contain the following language: A[d]o not damage, remove, or change any ventilation device@ (Respondent=s Ex. 1, par. 16). Additionally, Nicker testified that he conducts weekly safety meetings with all miners. A written statement provided to miners at such a meeting on February 23, 1998, contains the following language[2] A[k]eep all mandoors properly closed, . . . ALL EMPLOYEES HAVE A PERSONAL RESPONSIBILITY TO MAKE CERTAIN MANDOORS ARE KEPT CLOSED AS REQUIRED.@ According to Nickler, once he found out that one of the doors had been propped open, he conducted an investigation and learned that three miners had been working in the area the prior shift. He stated that he interviewed these employees and that no one confessed to having propped the door open. Nickler indicated that there was not any foreman in the area. According to Nickler, had he known who had left the doors open, the person responsible A. . . would have subjected himself to strong disciplinary action up to discharge@ (Tr. 243-244). On March 3, after the violitive conditions had been cited, Nickler met with all miners from all shifts and told them that Aabsolutely no doors, no doors are to be left open, no regulators are to be tampered with, and if anybody is . . . caught tampering with ventilation controls they would be discharged@ (Tr. 246). Since none of Nickler=s above testimony was rebutted, contradicted, or impeached, I therefore accept it. However, Consol had been cited on three occasions, within a 2 year period prior to March 3, 1998, for having left personnel doors open in violation of section 75.333(c)(3), supra. Thus, I find that Consol should have been put on notice that its training and supervision may not have been adequate to sufficiently redress this very serious problem. Taking all the above into account, I conclude that the violation herein resulted from Consol=s moderate negligence. Considering the remaining factor as set forth in section 110(i) of the Act, and especially considering the high level gravity as set forth above, I find that a penalty of $6,000 is appropriate.

[2]/ Three asterisks are set forth to the left of this language. Nickler explained that these denote areas of specific interest.

ORDER

It is **ORDERED** that the section 107(a) withdrawal order be affirmed as written. It is further **ORDERED** that, within 30 days from the date of this Decision, Consol pay a total civil penalty of $6,000 for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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