

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 1998

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 98-27
Petitioner : A. C. No. 46-01433-04242
v. :
:
:
CONSOLIDATION COAL COMPANY, :
Respondent : Loveridge No. 22 Mine

DECISION

Appearances: Lynn A. Workley, Conference & Litigation Representative, U.S. Dept. of Labor, Morgantown, West Virginia, on behalf of Petitioner;
Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 *et. seq.*, the "Act," seeking a civil penalty of \$506.00, for one violation, on September 10, 1997, of 30 C.F.R. Section 75.323(b)(2)(ii). The general issue before me is whether Consol violated the cited standard as alleged, and if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at bar, Citation No. 3492989, as amended, alleges as follows:

In the number two bleeder entry off the number one entry of 4-Left, there is an accumulation of methane. The No. 2 bleeder entry starts at station number 99 block of the 4-Left number one entry. When tested on the right side of the continuous miner, 1.5% methane was found in a measurement greater than 12 inches from the roof, face and ribs. The section foreman was notified and Mr. Pichardo did no [*sic*] remove the electrical power from the equipment in the affected area in a timely manner.

The cited standard, 30 C.F.R. Section 75.323(b)(2), provides in relevant part as follows:

(2) When 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in

an area where mechanized mining equipment is being installed or removed -

(i) Everyone except those persons referred to in ' 104(c) of the Act shall be withdrawn from the affected area; and

(ii) . . . electrically powered equipment in the affected area shall be disconnected at the power source.

Thomas May, Sr., is an experienced coal mine inspector for the Mine Safety and Health Administration (MSHA) with additional industry experience and two years of college education. On September 1, 1997, at about 8 a.m., he began his inspection at the Loveridge No. 22 Mine, accompanied by Consol safety inspector Richard Moats and representative of miners, Carol Liston. Later in the morning as they approached the No. 2 entry, the mining crew withdrew the continuous miner and began shutting down for lunch. May proceeded toward the face to check the airflow and test for methane. To perform these tests in a tight space he had to move the ventilation tubing. May detected 1.5% methane, again repositioned the ventilation tubing and again detected 1.5% methane. May then informed Moats that he had encountered 1.5% methane.

According to May, Moats then proceeded to the face and performed his own methane check. He extended the ventilation tube and held it on his shoulder. May testified that he was unable to see precisely where Moats obtained his methane reading because his view was obstructed. He later testified that Moat=s reading was not as close to the face as his own. According to May, Moats then momentarily left the area and returned, telling Liston that he needed a ventilation tube at the face. Sometime during the course of these events, Moats told May that he had obtained a 1.3% methane reading. Moats then appeared to cut the power on the miner. May saw however, that a light was still activated on the miner and told Moats that the power should be cut at the power center. Moats purportedly responded that Pichardo, the section foreman, would take care of it. Pichardo then appeared, took his own methane test and told May that he had obtained a .9% methane reading. May maintains that he told Pichardo that he had obtained a 1.5% reading and that he needed to cut the power at the power center. Pichardo then immediately walked to the power center and cut the power.

Within this framework of credible evidence it is clear that there was a violation of the cited standard when 1.5% methane was discovered by Inspector May at the face, an agent of the operator was notified of this and yet power at the power center was not cut for a period of approximately 15 minutes. While the violation may indeed have been caused by the inspector himself when admittedly moving the ventilation tubing at the face, it is now well-established that operators are liable for violations of the Act without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co., v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982); *Fort Scott Fertilizer-Culler, Inc.*, 17 FMSHRC 1112 (July 1995).

In reaching these conclusions, I have not disregarded the testimony of Consol=s witnesses,

Moats, Pichardo and Richardson. Their testimony does not, however, negate the existence of the violation. For example, Moats admits that he did not cut the power at the power center when informed of the existence of 1.5% methane and only attempted to cut the power to the continuous miner. However, Moats claims he tried to tell Pichardo to remove the power at the power center but Pichardo, who is hard of hearing, apparently did not hear him. Moats also promptly attempted to remove the methane by having additional tubing installed and, according to Moats, the methane level was thereby reduced to 1.1% within one to two minutes. The testimony of Pichardo and Richardson also mitigates operator negligence and gravity. After being informed of a potential problem, Pichardo checked the left side of the miner for methane and obtained only a .9% reading. Pichardo also noted that accumulations of methane would likely be on the left side since the ventilation tubing pulls the air out of the right side. In addition, Pichardo testified that when Inspector May told him that he had obtained a 1.5% methane reading and wanted the power off, he in fact cut the power within two minutes - - the time it took him to walk to the power center. Assistant Mine Superintendent Richardson corroborated that once Richardson told Pichardo that he needed to remove the power at the power center he did so.

In evaluating the evidence I conclude that the Secretary's evidence regarding the amount of time between the inspector's notification of the violative condition to the operator's agent, Richard Moats, and the action by Pichardo to cut the power at the power center is the more credible. The inspector estimated that time to have been about 15 minutes. (Gov. Exh. No. 2, Pg. 5). I do, however, credit the operator's testimony that the inspector had adjusted the ventilation tubing before taking his methane tests, and that their own readings were below 1.5%. Thus, Consol officials could reasonably have believed the inspector's readings were not valid and that the methane level was actually below the 1.5% threshold set forth in the cited standard. Their prompt efforts to obtain additional ventilation tubing to clear the methane should also be considered in evaluating negligence. Nevertheless, it is clear that once methane at 1.5 % was found and Consol was informed of this through its agent Richard Moats, the power should have immediately been cut at its source.

The Secretary also maintains that the violation was "significant and substantial" and of high gravity. 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).

On this issue, as with all issues, I am constrained by the evidence of record. In this regard, I find the record evidence inadequate to establish the third element of the *Mathies* test. Critical parts of the inspector's testimony in this regard were ambiguous and somewhat confusing. Moreover, his use of the terms "possibly" and "possibilities" where the standard is "reasonable likelihood" makes it impossible to meet the third element. *See Amax Coal Company*, 18 FMSHRC 1355 (August 1996). His testimony on this issue was in part as follows:

The fact of having the methane accumulation in the face, the auxiliary fan for one is still running. In changing the tube, when you increase the distance from the face to the ventilation device from the end of the tubing, you also increase the possibility of methane accumulation. You use the spad gun which can create a spark. You're working with tubing that has dust in it. You're dragging the tubing, carrying it up there, you get coal, rock inside the tubing. When you put it on the existing tubing, that sucks it back into the fan. Possibilities of spark from the fan itself.

Considering all of the criteria under Section 110(i) of the Act, I find that a civil penalty of \$100.00, is appropriate.

ORDER

Citation No. 3492989 is AFFIRMED without a "significant and substantial" designation and the Consolidation Coal Company is directed to pay a civil penalty of \$100.00 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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