

CCASE:

SOL (MSHA) V. CONSOLIDATION COAL

DDATE:

19840113

TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

January 13, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. WEVA 80-116-R

WEVA 80-117-R

v.

WEVA 80-118-R

WEVA 80-659

CONSOLIDATION COAL
COMPANY

DECISION

This consolidated proceeding presents the question of whether roof control violations cited in a section 104(d)(1) citation were significant and substantial, within the meaning of Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). The Commission's administrative law judge concluded that the violations by Consolidation Coal Company ("Consol") were significant and substantial, and affirmed the citation. 4 FMSHRC 747 (April 1982)(ALJ). 1/ We granted Consol's petition for discretionary review, which challenged only the judge's significant and substantial findings. For the reasons that follow, we affirm.

1/ This same proceeding was originally before another Commission administrative law judge, who affirmed the citation after finding a significant and substantial violation under the then-applicable, pre-National Gypsum case law. 2 FMSHRC 2862 (October 1980)(ALJ). We declined to grant Consol's petition for review of that decision. Thereafter, Consol petitioned the United States Court of Appeals for the Fourth Circuit for review of the judge's decision, which had become a final decision of the Commission pursuant to 30 U.S.C. § 823(d)(1)(Supp. V 1981). The Court remanded the case with instructions that the Commission reconsider the issues in light of our intervening decision in National Gypsum, *supra*. *Consolidation Coal Co. v. FMSHRC*, No. 80-1862, 4th Cir., October 13, 1981 (unpublished opinion). Because the Commission judge who originally heard the case had left the Commission, the case was reassigned on remand to the judge whose decision is now before us on review.

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On October 30, 1979, during an inspection of Consol's Shoemaker Mine, near Moundsville, West Virginia, an inspector of the Department

of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Consol under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 814(d)(1)(Supp. V 1981). The citation alleged a violation of 30 C.F.R. § 75.200. 2/

This citation, which is the sole subject of this proceeding, stated:

The approved mine roof control plan was not being followed in 4 Right 5 North section (037) and on the section supply track in that roof bolts were spaced from 4 feet 7 inches to 7 feet 6 inches apart and from bolt to coal rib in approximately 350 different locations that were measured in the (intake air) No. 1 entry from 30 to 33 room and 31, 32, and 33 rooms, and in the track from 6 to 18 stopping for a total of approximately 1500 feet in length and more bolts may be spaced wide....

The inspector included in the citation his findings that the violations were significant and substantial and were caused by the operator's unwarrantable failure to comply with the standard.

As alleged by the inspector, the spacing of roof bolts in about 350 locations in the 4 Right 5 North working section exceeded the 4 foot-6 inch maximum permitted by Consol's roof control plan. The greatest concentration of over-wide bolts, including some that were 7 feet or more apart, was along the section's supply track. The inspector testified that although roof conditions generally were good, the roof was cracked, loose, or unsupported between bolts in three unspecified locations and could fall at any time. A roof fall caused by a clay vein had occurred under supported roof when Consol first advanced this section, in about August or September 1978. Roof falls also had occurred in unsupported areas of the section. Two witnesses had observed pieces of fallen rock under supported roof at unspecified times and in unspecified locations. One of these witnesses had heard of employees receiving minor lacerations from pieces of falling rock. However, no lost-time injuries from roof or rock falls apparently had been reported in this section.

All miners working in the section had been exposed to the overwide bolts on every shift for at least six months, because they walked under the widest-spaced bolts in the supply track on the way to the dinner hole and the tool storage area. Fewer employees than the normal production crew of 7-8 were working in the section on October 30, 1979, when the citation was issued. Consol had voluntarily closed the section on October 26 after receiving a citation that day for roof bolting violations. Nonetheless, on October 30 at least one mechanic and one maintenance foreman were working in the section, and an unspecified number of roof bolters were also abating violations there.

2/ In relevant part, 30 C.F.R. § 75.200, a mandatory safety standard dealing with roof control, requires operators to adopt and comply with roof control plans approved by the Secretary of Labor.

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On remand from the Fourth Circuit, Consol conceded before the Commission judge that the over-wide roof bolts violated its roof control plan and hence constituted a violation of 30 C.F.R. § 75.200, but denied that the violations were significant and substantial. The judge analyzed this case in light of National Gypsum, relying in large part on the findings of fact made by the Commission judge who originally heard the case. In concluding that the violations were significant and substantial, the judge acknowledged the evidence establishing generally good roof conditions. He attached greater weight, however, to the evidence that there had been at least one prior roof fall and that widely-spaced bolts increased the possibility of roof falls. He also relied on the inspector's testimony that the roof was loose, cracked, or unsupported in three locations and could fall at any time.

The judge narrowly interpreted the original judge's finding that there was no evidence of roof cracks, splits, or loose bolts, as not including the widest-spaced bolts in the supply track.

4 FMSHRC at 769-70. In the judge's view, the fact that employees had worked and traveled safely in the section for six months prior to the October 30 citation did not prove the absence of a hazard which could result in a serious injury. In this regard, he noted that after the initial October 26 citation, a considerable amount of additional bolting had been necessary and that the abatement work was proceeding on the day of the section 104(d)(1) citation. 4 FMSHRC at 769.

Therefore, the judge concluded that there was a reasonable likelihood that the hazards presented by the widely-spaced roof bolts as well as the areas described by the inspector as being loose between the bolts at several locations, constituted a significant and substantial hazard to those miners working and traveling through the cited areas. The danger presented was a roof fall, particularly in the track entry, where the roof bolt spacing was the widest, and the real potential for a fall in any of the locations was the direct result of the violation.

4 FMSHRC at 770.

The sole question before us is whether the roof control violations were "of such a 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)(1). We have previously interpreted this statutory language as follows:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard 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.

National Gypsum, 3 FMSHRC at 825. Noting that the Mine Act does not define "hazard," we construed the word to "denote a measure of danger to safety or

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health." 3 FMSHRC at 827. We indicated further that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health.... In other words, the contribution to cause and effect must be significant and substantial." Id (footnote omitted).

As we stated recently, 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; 3/ (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. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

On review, Consol does not contest the first and fourth elements of proof that is, the judge's finding of a violation or the reasonably serious nature of the injury. Rather, Consol argues that the evidence does not support the judge's conclusions that the over-wide spacing between the roof bolts could contribute to a hazard, and that there was a reasonable likelihood any such hazard would result in injury.

We disagree.

As to Consol's first argument, substantial evidence amply supports the judge's finding that the large numbers of over-wide roof bolts created a hazard of roof falls. Mine roofs are inherently dangerous and even good roof can fall without warning. 4/ As Consol's roof control plan states, the plan merely establishes the minimum requirements for adequate roof support. Exh. G-1, at 4.

3/ We note that this case involves a violation of a mandatory safety standard. Pending before us is a case which challenges the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intmate no views at this time as to the merits of that

question.

4/ Roof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining. As we have stated:

A prime motive in enactment of the 1969 Coal Act was to "[i]mprove health and safety conditions and practices at underground coal mines" in order to prevent death and serious physical harm. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. [Citations and footnotes omitted.]

Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982).

(Footnote continued)

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On October 30, the day of the citation, roof bolts were spaced in excess of Consol's plan in about 350 locations. Some of the bolts in the supply track were 7 to 7 and a half feet apart, i.e., they exceeded by 2 and a half to 3 feet, the 4 and a half foot spacing permitted by the plan. Consol's own general mine foreman conceded that such overwide spacing increased the possibility of roof falls.

4 FMSHRC at 769; Tr. 74. Further, the operator did not rebut the inspector's testimony that in three locations the roof was cracked, loose, or unsupported, and could fall at any time. Thus, we conclude that despite the generally good conditions and the absence of reportable injuries in the previous six months, these over-wide bolts created "a measure of danger to safety or health." National Gypsum, 3 FMSHRC at 827. We therefore affirm the judge's holding that there was a hazard.

The remaining question is whether the judge properly concluded that there was a reasonable likelihood that the hazard contributed to by the roof control violations would result in injury. Substantial evidence also supports this conclusion. The widely-spaced bolts found in 350 locations on October 30, in some instances up to 3 feet wider than permitted, represented a serious deviation by Consol from the minimum requirements of its roof control plan. (As the judge noted, bolts were too widely spaced in these 350 locations even after Consol had added 140 bolts as a result of the October 26 citation.) This large number of widely-spaced bolts and the often considerable distances between the bolts amounted to a widespread and serious departure from the minimum requirements for adequate roof support in the mine. Such major non-compliance dangerously increased the likelihood of roof fall accidents.

As noted above, every miner on every shift for six months was

exposed to the hazard created by the over-wide bolts along the supply track. The fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall. There was testimony as to past falls, and the inspector also stated that there was bad roof in three locations in the section. While fewer miners than usual were in the section on October 30 (because Consol had closed the section on October 26), at a minimum the mechanic and the maintenance foreman working there were exposed to the hazard. Had a roof fall occurred, there is a reasonable likelihood of injury because of this exposure. In light of the foregoing, we affirm the judge's holding that a reasonable likelihood existed that the hazard contributed to by the roof control violations would result in injury, and consequently that the violations were a major cause of a danger to safety. 5/

Fn. 4/ continued

Roof falls remain the leading cause of death in underground mines. Despite decreased production and an overall decline in fatalities from 1981 to 1982, fatalities resulting from falls of roof, face, and rib in underground coal mines increased from 41 deaths in 1981 to 52 deaths in 1982. Mine Safety and Health Administration, U.S. Department of Labor, Mine Injuries and Worktime, Quarterly 17 (Closeout Ed. 1981); Mine Safety and Health Administration, U.S. Department of Labor, 8 Mine Safety and Health, inside back cover (Spring-Summer 1983); see also Mine Injuries and Worktime, Quarterly 17 (Closeout Ed. 1982).

5/ We affirm the judge's holding on the bases specified above, but do not otherwise endorse his evidentiary analysis of this issue.

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In reaching this result, we reject Consol's subsidiary argument that the judge's holding is inconsistent with National Gypsum. Consol's widespread and serious noncompliance with the minimum requirements of its roof control plan, which created the likelihood of serious injury, is indeed the type of situation we contemplated in National Gypsum. 3 FMSHRC at 825-27.

For the foregoing reasons, we affirm the judge's holding that the violation was significant and substantial.

Richard V. Backley, Commissioner

Frank F. Jestrab,

Commissioner

L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and in their affirmation of the decision of the judge below. However, for the reasons expressed in my dissent in National Gypsum, *supra*, I disagree

with their analytical approach as set forth here and in that decision.

A. E. Lawson, Commissioner

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