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SOL (MSHA) V. US STEEL MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 1, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 82-387

U. S. STEEL MINING CO., INC.

DECISION

The issues before the Commission are whether the administrative law judge properly found two violations of mandatory safety standards to be significant and substantial ("S&S") within the meaning of 30 U.S.C. § 814(d)(1), section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), and whether the penalties assessed by the judge are appropriate under the statutory criteria set forth at 30 U.S.C. § 820(i), section 110(i) of the Mine Act. 1/ The violations in issue, both conceded by USSM, involve (1) noncompliance with the prohibition against transporting compressed gas cylinders on mantrips [30 C.F.R. § 75.1106-2(c)], and (2) inadequate guarding of a trolley wire [30 C.F.R. § 75.1003]. The judge assessed penalties of \$250 for the cylinder violation and \$750 for the wire guarding violation. 5 FMSHRC 1474 (August 1983)(ALJ). For the reasons that follow, we affirm.

On May 6, 1982, an authorized representative of the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), conducted a haulage system inspection at USSM's Gary No. 50 mine in Pineville, West Virginia. The citations in this case were issued on that date by MSHA Inspector Earl Barnett. During his inspection, Barnett was accompanied by USSM senior mine inspector Russell Burge and miners' representative Floyd Cox.

1/ U. S. Steel Mining Co. ("USSM") also maintained that under the single penalty assessment criteria published by the Secretary of Labor at 30 C.F.R. § 100.4 the Commission is limited to a penalty assessment of \$20 if a violation is found not to be S&S. This issue was decided adverse to USSM's position in U. S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984). We adhere to that holding.

Citation #1066938

The cited standard, 30 C.F.R. § 75.1106-2(c), and other relevant standards in the subpart, provide as follows:

§75.1106-2 Transportation of liquefied and nonliquefied compressed gas cylinders; requirements.

(a) Liquefied and nonliquefied compressed gas cylinders transported into or through an underground coal mine shall be:

(1) Placed securely in devices designed to hold the cylinders in place during transit on self-propelled equipment or belt conveyors;

* * *

(3) Equipped with a metal cap or "headband" (fence-type metal protector around the valve stem) to protect the cylinder valve during transit; and

* * *

(b) In addition to the requirements of paragraph (a) of this section, when liquefied and nonliquefied compressed gas cylinders are transported by a trolley wire haulage system into or through an underground coal mine, such cylinders shall be placed in well insulated and substantially constructed containers which are specifically designed for holding such cylinders.

(c) Liquefied and nonliquefied compressed gas cylinders shall not be transported on mantrips.

While inspecting a three-compartment, self-propelled personnel carrier or mantrip ^{2/} that belt crew miners had boarded to take into the mine, Inspector Barnett observed one oxygen cylinder and one acetylene cylinder lying unsecured on the floor of one of the two covered compartments of the carrier. None of the miners who had boarded the mantrip was in the compartment where the cylinders were located. Both cylinders had attached valves, but no hoses or gauges. There was a metal cap over the oxygen valve; the acetylene valve was recessed into the top of the cylinder. ^{3/}

^{2/} U. S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 679 (1968), defines mantrip as "[a] trip made by mine cars and locomotives to take men rather than coal, to and from the working places."

^{3/} The cylinders were in nylon-reinforced, plastic bags that are used for carrying or dragging the tanks. The bags do not prevent the tanks from rolling or otherwise provide protection.

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MSHA Inspector Barnett issued the citation alleging a violation of 30 C.F.R. § 75.1106-2(c) and informed USSM inspector Burge that the

tanks should not be transported on a mantrip. After observing their removal, Barnett, accompanied by miners' representative Cox, left the area. Both Barnett and Cox believed that the tanks were taken into the shop. At the hearing it was established that the tanks were taken into the mine by placing them on another mantrip. The tanks were placed in the same open compartment occupied by miners and were steadied during transit by the miners. The testimony given by Barnett and Cox at trial focused on the condition observed and cited, not on USSM's method of abating the violation. It was not until USSM presented its case that the actual method of transport was established.

Barnett testified that the cited condition could result in a mine fire or explosion due to several causes. Vibration of the mantrip on the track and rolling about of the unsecured acetylene tank could loosen the valve, allowing escape of highly flammable gas. A source of ignition was provided by the trolley wire because of the possibility of arcing or sparking. Similarly, rolling of the oxygen cylinder could cause the cap to loosen and the valve to break, creating a projectile. Barnett also testified that valves on both tanks could break in case of a derailment or collision in which the tanks were tossed around or thrown from the vehicle. 4/ While testifying Barnett acknowledged that if the tanks were in proper containers and securely fastened there would not have been a hazard. The inspector did not cite USSM for failing to secure the tanks because, in his view, they should not have been on the mantrip and because he believed the hazard abated when the tanks were removed. 5/ In Barnett's view it was "very likely" that an accident could occur as a result of the violation and "reasonably likely" for serious injury to occur. Tr. 26.

Miner representative Cox stated that the usual practice in the maintenance department was to carry tanks in the front of open jeeps with the driver. He corroborated Barnett's testimony regarding the hazards attendant to transporting the tanks in the same vehicles in which miners were transported.

USSM inspector Burge testified that he knew of no instances at the mine when vibration was sufficient to dislodge a valve or when gas escaped during transport. In his view there was no chance for the cited condition to contribute to an injury.

4/ Barnett stated that there are frequent derailments and collisions at this mine, with its 46 miles of track, but he could not state specifically how often they occur. However, he testified that he had been involved in a derailment during this inspection and was there to inspect the mine because of a prior head-on collision of mine vehicles. Cox subsequently testified that gas cylinders being

transported in the vehicles involved in the prior collision had been found lying along the track, but that none had ruptured or had broken valves.

5/ See 30 C.F.R. §§ 75.1106-2(a)(1) and 2(b).

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Burge testified that he had received verbal guidelines from MSHA's local Pineville office authorizing the transport of cylinders in personnel vehicles if they were placed in separate compartments and the only miners on the vehicles were part of the crew that would use the tanks (e.g., belt crew, mechanics). Burge also stated that the Pineville office reaffirmed the policy after the citation in issue was written. Barnett testified he was unaware of the policy and disputed Burge's assertion that during the inspection Barnett authorized the actual method of transport.

The Commission Administrative Law Judge accepted USSM's representation regarding the Pineville office policy because the Secretary failed to submit rebuttal evidence, although the record remained open for 72 hours after trial for receipt of such evidence. However, the judge concluded on the basis of *Old Ben Coal Co.*, 2 FMSHRC 2806 (1980) and *King Knob Coal Co., Inc.*, 3 FMSHRC 1417 (1981) that confusion over the requirements of the cited standard caused by the oral advice of a Pineville official would be relevant only in evaluating USSM's negligence for the purpose of penalty assessment. He further noted that, in any event, USSM failed to comply with the Pineville policy because miners other than those who would use the tanks were on the vehicle, the policy did not include a waiver of the requirement of 30 C.F.R. § 75.1106-2(a)(1) that the cylinders be secured, and the tanks were transported in the same compartment as the miners. 6/ The judge credited the testimony of Barnett and Cox with respect to hazards resulting from the cited condition and concluded:

The preponderance of the evidence clearly supports a finding that it was reasonably likely that hauling unsecured cylinders in the mantrip bus could contribute to the cause and effect of a mine safety hazard which could result in an injury of a reasonably serious nature.

5 FMSHRC at 1484. The judge assessed a penalty of \$250 based on the statutory criteria in section 110(i) of the Mine Act, finding that USSM is a large operation with a favorable or moderate history; that the penalty would not affect the operator's ability to continue in business; that USSM exercised good faith by abating the hazard within the time provided; and that USSM exhibited ordinary negligence because the tanks were transported both unsecured and in the same compartment as the miners.

USSM argues on review that: (1) the evidence relevant to the cited

condition does not establish an S&S violation under Cement Division, National Gypsum Co.,³ FMSHRC 822 (April 1981); (2) the judge applied the National Gypsum test and the penalty criteria to the abatement method rather than the cited violation; and (3) the valves on the tanks were adequately protected.

6/ To the extent that the judge's discussion of the merits of the S&S findings includes consideration of the method of abatement subsequently employed rather than the condition cited, we accept USSM's objections and reject those considerations. However, on the basis of the evidence produced by the Secretary and the relevant findings of the judge based on that evidence, the error is harmless. See note 7 and accompanying text *infra*.

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On review the Secretary maintains that the judge's S&S finding is supported by substantial evidence and his penalty assessment is proper. The Secretary does not dispute the existence of MSHA's Pineville office policy, arguing instead that MSHA is not estopped from enforcing the standard because of a prior incorrect interpretation and that there is no evidence that MSHA ever approved a transport method as hazardous as that cited. The Secretary also argues that confusion over compliance responsibilities is relevant only to penalty assessment under *King Knob Coal Co., Inc., supra*. Further, in his view, USSM's failure to secure the tanks was properly considered by the judge because the failure increased both the gravity and negligence of the violation and undermined USSM's asserted compliance with local policy.

The Commission has held that a violation is properly designated S&S "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." *National Gypsum, supra*, at 825. In *Mathies Coal Co., 6 FMSHRC 1, 3-4* (January 1984), the Commission further explained: 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.

See *U.S. Steel Mining Co., Inc., Docket No. PENN 83-63* (August 28, 1984); *U.S. Steel Mining Co., Inc., Docket No. PENN 83-39*, slip op.

at 2-3 (August 23, 1984).

In this case, USSM has conceded the violation; the issue is whether the violation was significant and substantial. The judge credited the testimony of Barnett and Cox, implicitly rejecting Burge's testimony that the valves on the tanks were protected adequately and that the cover on the compartment in which they were placed provided further protection. The judge found that miners were exposed to hazards which could be presented by an explosion of leaking acetylene gas or the creation of a projectile due to the leakage of oxygen. He also found a reasonable likelihood of injury if miners were struck by cylinders being tossed about in a collision or derailment. The judge specifically found it reasonable to expect these occurrences on USSM's extensive rail system, particularly noting Barnett's derailment experience. See note 4 *supra*. On the basis of the record evidence discussed above, we hold that substantial evidence supports the judge's findings (see note 6 *supra*) and his conclusion that the violation was significant and substantial under the test set forth in *National Gypsum, supra*, and its progeny.

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The judge properly applied *King Knob Coal Co., supra*, in which the Commission held that although an incorrect interpretation of a regulatory requirement by an MSHA official does not have the force and effect of law and will not serve to negate liability for violative conduct, detrimental reliance on that interpretation is properly considered in mitigation of penalty. For this reason, we reject USSM's argument that MSHA's approval of its method of transport negates an S&S finding. We also hold that the judge's finding of ordinary negligence is supported by substantial evidence, and we affirm his penalty assessment of \$250 as consistent with the statutory penalty criteria. 7/

Citation #1066940

The cited standard, 30 C.F.R. § 75.1003, is a statutory provision that provides in pertinent part:

§ 75.1003 Insulation of trolley wires, trolley feeder wires and bare signal wires: guarding of trolley wires and trolley feeder wires.

[STATUTORY PROVISIONS]

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings;

(c) At man-trip stations.

Barnett, Cox and Burge traveled to the B-Panel section of the underground mine and parked behind an 18-foot portal bus or mantrip that was located 40 feet outby the end of the track, under 5-foot-high, 250-volt trolley wire. Only the first 10 feet of the wire at the end of the track was guarded.^{8/} Supplies that apparently had been unloaded on the prior shift were observed along both sides of the track for a distance of 20 to 25 feet outby the bus. It was assumed by the members of the inspection party that the bus had been exited at the end of the track under 10 feet of guarded wire, leaving 8 feet of the bus under unguarded wire. Barnett issued a citation that alleged, "[t]he trolley wire at the end of the supply track in the B-panel section where men and supplies are unloaded was not adequately guarded.

7/ The judge also stated that the MSHA Pikeville office guidelines did not include permission to transport tanks in the same compartment as the miners. This conclusion is not relevant to the cited condition and is rejected. See note 6 supra. Nevertheless, because the judge's S&S finding and penalty assessment are supported on alternative grounds relevant to the condition cited, the error is harmless.

8/ USSM was engaged in retreat mining. The 10 foot section of guarding on the wire was apparently the portion that remained after the track was pulled back.

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The center compartment of the portal bus was uncovered, the two end compartments were covered. When at the end of the track, the inby covered compartment and part of the open compartment would be under guarded wire. The open section has a capacity of 8 miners. Normally, however, only the operator and the foreman ride in that section. Supply cars have 2 1/2 feet of clearance below the wire; lower personnel carriers have 4 feet of clearance.

Both Barnett and Cox testified that miners exiting the open center compartment were in danger of contacting the energized wire should they rise before exiting the compartment. Barnett also stated that miners could lose their balance and fall backward onto the wire, becoming exposed to burn or electrocution hazards. Barnett stated that the location of the supplies he observed indicated they had been unloaded under unguarded wire, but he did not know whether the wire had been energized at the time the supplies were unloaded. He testified, however, that the citation would have been written regardless of the presence of supplies because miners had arrived and would be arriving at the mantrip station during the shift. In his view, the inadequate guarding should have been apparent when the area received a preshift examination and when the foreman arrived earlier

with the crew.

Burge testified that it was not hazardous for miners to exit vehicles in areas of unguarded wire because they exit in a direction away from the energized wire. He was not aware of any instances at the mine in which miners contacted a trolley wire. Burge also stated that a power cut-off switch located 160 feet outby the end of the track was used to de-energize the wire whenever supplies were unloaded or picked up for use on the working section during the shift. Burge's testimony differed from Barnett's regarding the specific location of the supplies, but he acknowledged that timbers were located 3 to 4 feet from the wire.

The judge found that miners would be exposed to the hazard of contacting unguarded wire if they exited a mantrip or jeep and became unbalanced, an event he considered reasonably likely to occur. 5 FMSHRC at 1493-4. He also found, based on a concession by Burge, that any miner who moved the vehicle out of the supply area to facilitate the loading or unloading of supplies would be entering and exiting the mantrip under energized, unguarded wire. 5 FMSHRC at 1491. With respect to USSM's claim that the wire would be de-energized before supplies were obtained from along the track, the judge found that the miner responsible for turning the power on and off would be exposed. Finally, the judge found that any persons arriving at the working section during the shift would be exposed, as was the inspection party, when they exited and returned to their vehicle. 5 FMSHRC at 1493. The judge concluded,

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[I]t was reasonably likely that the violation could have resulted in an injury of a reasonably serious nature. I find that the inspector properly considered the violation to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, supra.

5 FMSHRC at 1494.

The judge found a high degree of negligence on USSM's part, concluding that the violation was readily observable and the section of wire guarding that remained should have been a reminder that extension of the guard was necessary. He also found the violation to be of serious gravity because of the potential for shock or electrocution. A penalty of \$750 was assessed.

USSM argues on review that the judge improperly based his decision on hazards to miners going to the cut-off switch, a claim that USSM was denied an opportunity to defend against. The operator also argues that record evidence does not support the judge's finding that serious injury was reasonably likely as a result of the violation or his findings regarding negligence and gravity.

We conclude that substantial evidence supports the judge's S&S finding that the trolley wire violation at the mantrip station exposed miners exiting the portal bus or mantrip to the hazard of contacting the 250-volt energized line and sustaining serious injury. Notwithstanding the evidentiary dispute regarding the energized status of the wire when supplies were loaded and unloaded, the evidence clearly establishes that the wire was energized when miners exited the open compartment of the bus at the mantrip station in sufficient proximity to the wire to be exposed to burn or electrocution hazards. We note in this regard that the inspector specifically stated he would have written the citation even had he not observed the supplies along the track. The citation charged a violation at the end of the supply track where men and supplies are unloaded. This location is both a mantrip station and an area where miners are required to work and regularly pass under the wire within the meaning of the cited standard. USSM conceded that violation. It is only the S&S designation of the violation that is before us. Accordingly, we need not and do not decide whether USSM also violated the standard at the location of the cutoff switch or at the location where the inspection party parked its jeep. Furthermore, we reject USSM's argument that the judge's decision was based on the exposure of a miner going to the cut-off switch. Substantial evidence supports the judge's S&S findings for the violation as cited. Substantial evidence further supports the judge's findings of a high degree of negligence and serious gravity for the reasons he gave.

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Accordingly, the judge's conclusion that citations #1066938 and #1066940 were significant and substantial within the meaning of section 104(d)(1) of the Mine Act, and his penalty assessments of \$250 and \$750, respectively, are affirmed. 9/

Richard V. Backley, Commissioner
L. Clair Nelson, Commissioner

9/ The terms of office of our former colleagues, Commissioner Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

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