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MSHA V. U.S. STEEL MINING
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FMSHRC-WDC
September 25, 1986

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

v. Docket No. PENN 82-335

U.S. STEEL MINING COMPANY, INC.

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq (the "Mine Act"), and involves one violation of 30 C.F.R. $ 70.101, the mandatory respirable dust standard when quartz is present, 1/ and two violations of 30 C.F.R. $ 75.503, a mandatory standard requiring that electric face equipment

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1/ 30 C.F.R. $ 70.101 provides:

> Respirable dust standard when quartz is present. When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz

into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air (10/20 = 0.5 mg/m).

be maintained in permissible condition. 2/ In citing the violation of section 70.101 and one of the violations of section 75.503, inspectors of the Mine Safety and Health Administration "MSHA") found that those violations were "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act. 3/

At a hearing on the merits before Commission Administrative Law Judge James A. Broderick, U.S. Steel Mining Company, Inc. ("U.S. Steel") admitted the violations, but contested the Secretary's assertion that two of the violations contributed significantly and substantially to the cause and effect of a mine safety or health hazard. Also, U.S. Steel contested the civil penalties proposed by the Secretary for each of the violations. Judge Broderick determined that the violations occurred and that the findings of the significant and substantial nature of the

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2/ 30 C.F.R. $ 75.503 provides:

> Permissible electrical face equipment; maintenance. The operator of each coal mine shall maintain in permissible condition all electric face equipment required by $$ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

3/ Section 104(d)(1) of the Mine Act provides:

> 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 and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by 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 chapter. 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) of this section 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.

30 U.S.C. $ 814(d)(1) (emphasis added).

violations were proper. He assessed a civil penalty of $200.00 for the respirable dust violation, section 70.101, and penalties of $75.00 and $200.00 for the permissibility violations, section 75.503.

The issues before us are whether the judge's findings that the violations are significant and substantial are proper and whether substantial evidence supports the judge's penalty assessments. On the bases discussed below, we affirm the judge's findings as to the significant and substantial nature of the violations and two of the judge's three penalty assessments. Because we find that the judge's negligence finding regarding the third violation is not supported by substantial evidence, we vacate the judge's penalty assessment for that violation and assess a penalty commensurate with the statutory penalty criteria.

I.

We first consider the question of whether the violation of section 70.101 (Citation No. 9901317) is significant and substantial, within the purview of the statute. The facts are not in dispute. U.S. Steel owns and operates the Maple Creek No. 1 Mine, an underground coal mine located in Washington County, Pennsylvania. The citation alleges that the average concentration of respirable dust in the working environment of the designated occupation on mechanized mining unit 010-0 was 1.8 milligrams per cubic meter of air (mg/ms). 4/ At the time, the units based operating under a reduced respirable dust standard of 1.4 mg/m upon a previous respirable dust analysis showing that the respirable dust in the mine atmosphere contained 7% quartz. The citation was terminated when five respirable dust samples of the working environment of the continuous miner operator revealed an average respirable dust concentration of less than 1.4 mg/ms.

In upholding the inspector's finding that the violation was significant and substantial the judge, citing the Commission's decision in Cement Division, National Gypsum, 3 FMSHRC 822 (April 1981), concluded that the violation was reasonably likely to result in a reasonably

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4/ 30 C.F.R. $ 70.207 requires an operator to take valid respirable dust samples from the designated occupation in each mechanized mining unit on a bimonthly basis. 30 C.F.R. $ 70.2(h), in pertinent part, defines a "mechanized mining unit" as "[a] unit of mining equipment including hand loading equipment used for the production of material." 30 C.F.R. $ 70.2(f) defines "designated occupation" as

"the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." In the case of the subject citation, the designated.occupation was that of the continuous mining machine operator.

serious illness. 5 FMSHRC at 1336. 5/ The judge found that exposure to excessive amounts of respirable dust with a quartz content in excess of 5% can contribute to silicosis and to coal workers' pneumoconiosis. 5 FMSHRC at 1336. The judge stated:

> The quartz content in the dust can be a factor in the progression of simple coal workers pneumoconiosis. It can also cause silicosis, a progressive, serious disease of the lungs resulting from deposition of silica in the lung and the body's reaction to it.

Id. 6/ In summarizing his findings regarding the significant and substantial nature of the violation, the judge stated that although "[a]n exposure of 1.8 mg/m3 of respirable dust which contains approximately seven percent quartz ... would not in itself cause silicosis ... [it] would contribute in a substantial way to the risk of acquiring silicosis, 5 FMSHRC at 1336.

In a recent decision the Commission addressed for the first time the question of whether a violation of section 70.101 could significantly and substantially contribute to the cause and the effect of a coal mine health hazard. U.S. Steel Mining Co., Inc., Docket No. WEVA 83-82, etc., 8 FMSHRC (September 22, 1986). There the Commission concluded that, in order to support an allegation that a violation of section 70.101 is significant and substantial, the Secretary must prove:

> (1) the underlying violation of ... [section 70.101]; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

U.S. Steel, slip op. at 6 (quoting from Consolidation Coal Co., 8 FMSHRC 890 (June 1986), appeal docketed, No. 86-1403 (D.C. Cir. July 11, 1986)).

5/ In National Gypsum, the Commission stated:

> [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 an illness of a reasonably serious nature.

3 FMSHRC at 825.

6/ Quartz. is a form of silica described as "A crystallized silicon dioxide." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 884 (1968).

We further concluded that because analysis of the four elements of the significant and substantial test would be essentially the same in each instance when the Secretary proved a violation of section 70.101, upon such proof a rebuttable presumption arises that the violation could significantly and substantially contribute to the cause and effect of a mine health hazard. U.S. Steel, slip op. at 8. We noted that this presumption can be rebutted if the operator establishes that the miners in the designated occupation were not, in fact, exposed to the excessive concentrations of respirable dust, e.g., through the use of personal protective equipment. Id.

In this proceeding the existence of the underlying violation is not at issue because U.S. Steel concedes that it violated section 70.101. Further, U.S. Steel offered no evidence that the miners in the cited designated occupation were not subject to exposure. We conclude that the judge's findings regarding the significant and substantial nature of the violation at issue are supported by substantial evidence and are consistent with the Commission's decisions in Consol and U.S. Steel, supra. Accordingly, the judge's finding that the violation of 30 C.F.R. $ 70.101 is "significant and substantial" is affirmed.

II.

We next address the issues raised regarding the first violation of 30 C.F.R. $ 75.503 (Citation No. 1249541). This violation concerns a conduit on the packing gland of a shuttle car. 7/ During an inspection of the mine an MSHA inspector observed a shuttle car on which a conduit had pulled out of the packing gland. The shuttle car was transporting coal cut by a continuous mining machine and was being "used inby the last open crosscut." Section 75.503. The judge found that operation of the shuttle car with the defective packing gland violated section 75.503. 5 FMSHRC at 1337.

In considering the statutory penalty criteria, the judge found that U.S. Steel was negligent, noting the inspector's testimony that it "had been cited for the same condition 'quite a few times.'" 5 FMSHRC at 1337. U.S. Steel challenges this finding, arguing that the conduit frequently pulls out of the packing glands during normal operations "no matter what the operator does." U.S. Steel asserts that it performed required weekly permissibility examinations (30 C.F.R. $ 75.512-2) and that its failure to discover the instant violation before the MSHA inspector did was not the result of its negligence.

7/ A conduit is described as a "tube ... for receiving and protecting electric wires." Dictionary of Mining and Related Terms

248. A packing gland is described as an "explosion-proof entrance for conductors through the wall of an explosion=proof enclosure, to provide compressed packing completely surrounding the wire or cable...." Id. at 787.

We conclude that the judge's finding of negligence in connection with this violation is supported by substantial evidence. Testimony by both the MSHA inspector and U.S. Steel's general maintenance foreman indicates that at the mine, conduits frequently pull out of packing glands, resulting in electric face equipment being in non-permissible condition. Tr. 267-278; 285-286. Given U.S. Steel's awareness of this particular, recurring problem (which it suggests, but does not establish, is attributable to a design defect), the assertion that performance of a weekly permissibility exam precludes a negligence finding must be rejected. Weekly exams are the minimum inspection requirements imposed by 30 C.F.R. $ 75.512-2. In light of U.S. Steel's awareness of this specific and recurring permissibility problem, more than the minimum level of attention to the packing glands was called for but, insofar as this record indicates, was not provided before electric face equipment was used in coal production. Given the nature of permissibility violations in general and the specific facts of record surrounding this citation, the judge's negligence finding is affirmed. 8/

III.

The second violation of 30 C.F.R. $ 75.503 (Citation No. 125017) concerns a missing bolt on the control compartment of a shuttle car. During an inspection of the mine an MSHA inspector observed a shuttle car parked near the loading ramp. The car was energized but was not then being used; other shuttle cars were being used to load coal. Upon examining the car, the inspector observed that a bolt was missing on the cover plate of the control compartment. (The control compartment on the shuttle car contains electrical contractors. The cover plate of the control compartment isolates electrical arcing from the mine atmosphere.) The inspector cited U.S. Steel for a violation of 30 C.F.R. $ 75.503 and found that the violation was "significant and substantial" within the meaning of 30 U.S.C. $ 814(d)(1). See nn. 2 & 3, supra

In upholding the violation, the judge found that the violation was properly designated significant and substantial and that U.S. Steel was negligent. 5 FMSHRC at 1337. On review, U.S. Steel concedes that the violation occurred but argues that the violation was not significant and substantial and that there is insufficient evidence of record to support the judge's negligence finding.

We conclude that substantial evidence supports the judge's finding that the violation significantly and substantially contributed

to the cause and effect of a mine safety hazard. The inspector stated that with the bolt missing if methane entered the control compartment arcing could cause an ignition. An MSHA electrical inspector testified that

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8/ U.S. Steel's argument that $20.00 is the only appropriate penalty for non-significant and substantial violations has previously been addressed and rejected. See e.g., U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

the purpose of the control panel cover plate is to keep such an ignition confined. If methane should enter the compartment and ignite, the cover plate prevents the flame and heat of the ignition from reaching the outside atmosphere. When a bolt is missing, the integrity of the cover plate is weakened and its capacity to contain the explosion is diminished. An ignition may escape the compartment and propagate a larger ignition and explosion. This testimony by the two inspectors was not refuted by U.S. Steel.

When the citation was issued, the shuttle car was energized. The Maple Creek No. 1 Mine liberates more than one million cubic feet of methane in a twenty-four hour period. The inspector stated, and the assistant mine foremen agreed, that there had been a methane ignition at the mine in the year preceding the hearing. We agree with the judge that under the particular facts and circumstances surrounding this violation the inspector properly determined that the violation was of a significant and substantial nature.

In assessing U.S. Steel's negligence for penalty purposes, the judge stated, without explication, that "the absence of the bolt should have been known to [U.S. Steel]" and that "the violation was the result of [U.S. Steel's] negligence." 5 FMSHRC at 1337. U.S. Steel argues that the record does not establish that it acted negligently in connection with this violation. We agree. The burden of establishing an operator's negligence under section 110(i), 30 U.S.C. $ 820(i), rests on the Secretary. Unlike the permissibility violation discussed herein-above, nothing in the record pertaining to this violation suggests that at the time of the issuance of the citation U.S. Steel knew or should have known that the bolt was missing. The shuttle car involved was not being operated and had not been used in production during the shift that was then ongoing. Tr. 330. In response to questions, the MSHA inspector indicated that he was unable to determine whether the operator was aware of the missing bolt (Tr. 296) and that various possible explanations for the missing bolt could include a "set up" of the violation (Tr. 305), a "jarring out" during previous use of the shuttle (Tr. 308), or a miner's removal of the cover plate and an inadvertent failure to replace this bolt. Id In sum, the inspector revealed that he had no real basis for forming a firm belief as to why the bolt was missing or why U.S. Steel should be found negligent. We conclude that although the fact that the bolt was missing is sufficient to establish the violation, it does not constitute substantial evidence of U.S. Steel's negligence in connection with the violation. Accordingly, the judge's finding of negligence is vacated and the penalty assessment is reduced from $200 to $100.

IV.

For the foregoing reasons, the decision of the administrative law judge is affirmed in part and reversed in part. 9/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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9/ Chairman Ford did not participate in the consideration or disposition of this matter.

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