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SOL (MSHA) V. BETHENERGY MINES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 92-31  
A. C. No. 36-00958-03917

v.

Mine No. 84

BETHENERGY MINES,  
INCORPORATED,  
RESPONDENT

DECISION DENYING SETTLEMENT MOTION

Before: Judge Fauver

This case involves a petition for assessment of civil penalties under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The parties have moved for approval of a settlement. The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes to reduce the alleged violation from "significant and substantial" to "non-significant and substantial" violations, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825, (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4, (1984). This evaluation is made in terms of "continued normal mining operations" (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), and must be based on the particular facts surrounding the violation. (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, (1987)).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued

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possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the 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" ( 104(d) (1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice. . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated,"(FOOTNOTE 1) and expressly places S&S violations below an imminent danger.(FOOTNOTE 2) It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

The Proposed Settlement  
Citation No. 3689748

Inspector Violet Statlers issued 104(a) Citation No. 3689748 on July 31, 1991, alleging a violation of 30 C.F.R. 75.1704. The Inspector observed that the alternate escapeway out of the 53P active section was not maintained in safe travelable condition for all persons, including disabled persons, because of an accumulation of water from rib to rib, 18 to 20 inches deep, in a low slope between the end of the track and the load center for a distance of 15 to 20 feet. The Inspector found that failure to observe the safety standard was due to moderate negligence because the violative condition would have been readily apparent to an experienced mine foreman. He found that injury to one person was reasonably likely to occur as a result of this hazard, and, therefore, that the violation was "significant and substantial." MSHA proposed a penalty of \$265.

The settlement motion states that, after further review, particularly the facts that (1) SCSR's are stored at the entrance to the intake escapeway, (2) a CO monitor system was in place which would alert miners if there was smoke in the alternate escapeway before smoke became thick, and (3) if the water was an impediment the adjacent belt entry could be traveled until the

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water was bypassed, MSHA seeks (FOOTNOTE 3) to modify the citation as follows:

- a. Item 10 a, change to "unlikely."
- b. Item 10 c, change to "non S&S."

The motion does not state or present facts sufficient to conclude that the water accumulation in the alternate escapeway did not present a substantial possibility of injury or harm to miners who might try to use the escapeway in an emergency including fire, smoke, or an effort to take an injured or unconscious person out of the mine.

Citation No. 3689771

Inspector Alvin L. Shade issued 104(a) Citation No. 3689771 on July 31, 1991, alleging a violation of 30 C.F.R. 75.1712-3(a). The Inspector observed that the bathing facilities at the truck repair shop were not maintained in a sanitary condition as mildew was accumulated on the walls approximately four feet in height. The Inspector found that failure to observe the safety standard was due to moderate negligence because the violative condition would have been readily apparent to an experienced mine foreman. He found that injury or sickness was reasonably likely to occur as a result of this hazard, and, therefore, that the violation was "significant and substantial." MSHA proposed a penalty of \$206.

The settlement motion states that, after further review, particularly of the fact that this was not the main shower area and there was no condition found presenting an immediate hazard, MSHA seeks to modify the citation as follows:

- a. Item 10 a, change to "unlikely."
- b. Item 10 c, change to "non S&S."

The motion does not state or present facts sufficient to conclude that the mildew condition did not present a substantial possibility of resulting in injury or sickness.

The parties may file an amendment to delete the requested modifications, or file a revised motion showing reasonable factual bases for the proposed modifications.

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Accordingly, the settlement motion is DENIED.

William Fauver  
Administrative Law Judge

FOOTNOTES START HERE-

1. Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.
2. Section 104(d) (1) limits S&S violations to conditions that "do not cause imminent danger. . . . "
3. The motion states that MSHA has already modified the citation. However, MSHA has no authority to settle, reduce, or modify a charge of violation after a petition for civil penalty has been filed with the Commission, without approval of the presiding judge or the Commission. The motion is therefore deemed to be a request for approval to modify the citation.