

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 17, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-189
Petitioner : A.C. No. 36-07230-03742
v. :
 : Docket No. PENN 94-383
CONSOL PENNSYLVANIA COAL CO., : A.C. No. 36-07230-03752
Respondent :

DECISION

Appearances: Susan Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor;
Elizabeth S. Chamberlin, Esq., Consol Plaza, Pittsburgh, Pennsylvania for Consol Pennsylvania Coal Company.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et. seq., the "A ct", charging Consol Pennsylvania Coal Company (Consol) with five violations of mandatory standards and seeking civil penalties of \$19,241 for those violations. The general issue is whether Consol violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

At hearing, the parties agreed to a settlement of Order No. 3659993 and Citation Nos. 3659994 and 3659995 and, as supplemented post hearing, proposed a reduction in penalties from \$8,241 to \$1,870. I have considered the representations and documentation submitted in support of the proposed settlement and conclude that it is acceptable under the criteria set forth in section 110(i) of the Act. This settlement will be incorporated in the order accompanying this decision.

Order Nb. 3559982

Order Nb. 3659982, issued pursuant to section 104(d)(1) of the Act,¹ alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. ' 75400 and charges as follows:

¹ Section 104(d)(1) of the Act provides in part as follows:

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 and health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such

The cleanup program established at this mine was not being complied with in the 12B section longwall belt entry, for a distance of 3,440 feet, between the stageloader and transfer point, and this entire area was preshifted on the previous shift by a certified person who should have observed the following conditions: 1. Float dust (black in color, float coal dust up to 5 inches deep, and loose coal were observed accumulated on the mine floor, right side of stageloader and tailpiece, and on the flat surface areas on the right side over a 40 foot long area; 2. Accumulations of float dust (black in color) on top of the rock dusted surfaces of the mine floor under the entire belt, including on the right untraveled side, on all belt structures, in numerous crosscuts; 3. Belt air dump crosscut, very heavy concentrations on the 300 foot long area on the right side of the belt storage area; 4. and float coal dust up to 2 inches deep on the belt transfer area structure; 5. dry loose coal under numerous areas of the entire belt entry

finding in any citation given to the operator under this Act. 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) 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.

and excessive rib sloughage on the right untraveled side within 24 inches of belt and around four (4) bottom belt rollers at the belt storage unit.

The accumulations have existed for more than one shift and the preshift examiners on all three (3) shifts did not observe any hazardous conditions during their examinations, as no entries were made in the preshift book on the mine surface. The belt in this area was very dry except at the belt spray area.

The belt can only be used to transport coal which is being cleared up, and shall not be used until the loose coal around the four (4) bottom belt rollers is cleared up, and then only to transport the coal cleared up. During the previous quarter "6" citations for 75.400 were issued at this mine.

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleared up and not be permitted to accumulate in active workings, or on electrical equipment therein."

Inspector Joseph Reed of the Mine Safety and Health Administration (MSHA) testified that around 7:40 a.m. on October 20, 1993, before conducting a regular underground inspection of Consol's Bailey Mine, he reviewed the 12B Section preshift report for the examination conducted between 5:20 and 7:20 that morning. The report, based upon the preshift examination of Section Foreman Todd Shumaker, indicated that no "violations, dangers or hazardous conditions" were observed (Government Exhibit No. 6).

Reed thereafter continued his inspection underground accompanied by Consol Safety Inspector, Lou Sleeva. Approaching the 12B section loading point, Reed was told by midnight shift section foreman, Todd Shumaker, that no coal had been mined on the previous (midnight) shift. At the 12B belt entry under the stage loader and on the right (untravelled) side of the entry Reed found loose coal, float coal dust and coal dust accumulations. According to Reed, the accumulations under the stage loader were 40 feet long, up to 5 feet wide and 6 to 8 inches deep and were also dry to the touch.

Reed left the stage loader and walked the belt entry toward the belt drive and transfer point to take an air reading and methane measurement. He walked down the belt entry about 75 to 100 feet where he took the air readings. According to Reid, a short distance beyond this point, he observed that the travelway had less than 24 inches of clearance. A fire hose outlet was projecting waist high into the 33 inch wide travelway about 18 inches making it necessary to turn sideways to get around it. The fire hose outlet was a pipe perpendicular to the belt and extending from the main sprinkler pipe. Normally these outlets are in a vertical position aimed down toward the floor.

According to Reed, between the stage loader and this fire hose outlet, there was additional float dust, black in color, along the belt structure and beneath the belt. Reed

maintains that he then observed extraneous material in several locations in the travelway along the belt. There were discarded supplies, including pipes, pieces of belt structure and roof materials lying in the travelway. Reed had to step over the materials as he walked along the belt. According to Reed, there were additional accumulations of float dust on the mine floor and on the belt structure as he proceeded down the belt entry. He maintains that he also observed coal dust accumulations on the floor in several crosscuts.

At the drive area, he purportedly found heavy float dust accumulations, dark black in color, on the mine floor and on the right side of the belt structure. According to Reed, there was no rock dust on the float dust and the float dust covered the entire drive area. Reed also observed that a guard was missing at the belt drive on the right side. The guard had purportedly been removed to perform maintenance and was propped against the rib. Moving parts were thereby exposed on the right side of the belt drive.

Inspector Reed walked the entire 3,400 foot length of the belt to the transfer point where the 12B belt dumped onto the main belt. At the belt transfer, he observed additional accumulations of float coal dust. They were two inches deep and covered the top surfaces of the belt structure. Reed testified that on his return he observed several areas where coal from the right rib had sloughed and fallen into the tight side along the belt. In several locations this sloughage was several feet deep and had fallen into the walkway on the left side of the belt reducing the clearance to less than 24 inches.

I find the disinterested testimony of Reed to be credible and, therefore, conclude that, indeed, on October 20, 1993, there were accumulations of coal and float coal dust as alleged, that these accumulations were combustible and that the violation is proven as charged. Moreover, in essential respects, that testimony is corroborated by that of Mine Foreman Kostelnick. Kostelnick acknowledged, for example, that Reed showed him some float coal dust on the tight side of the stage loader but claimed only that it "wasn't an excessive amount". He further acknowledged the accumulations cited by Reed in and around the stageloader area which he characterized as "a problem or if you want to call it, [but] it's just a part of mining with a longwall mine". Kostelnick also recognized "drippings" under the beltline as including coal but maintained this was not hazardous because it was damp and not yet in contact with any belt rollers. In addition, he admitted there was rib sloughage along the belt including coal and, approaching the storage unit, there was some float dust 24 inches wide and 180 feet long which was "more than I was happy to see at that area."

Reed also concluded that the violation was "significant and substantial". 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 FM SHRC 822, 825 (1981). In Mathies Coal Co., 6 FM SHRC 13-4 (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 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'd 9 FM SHRC 2015, 2021 (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 FM SHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FM SHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FM SHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FM SHRC 912, 916-17 (1991).

The Secretary maintains that the safety hazard contributed to in this case was a mine fire or explosion and that loose coal in an active working where possible ignition sources exist presents a "measure of danger" to the safety of miners. The Secretary further argues there was a reasonable likelihood that fire or smoke would result from the accumulations had the conditions been left to exist, noting that the accumulations were extensive and affected the entire belt. He notes that although the belt was not then in operation, the section was scheduled to produce that day and the crew was on the section.

Finally, the Secretary points to several potential ignition sources and related concerns. The Bailey Mine is a gaseous mine producing over one million cubic feet of methane per 24 hours. MSHA records show that for 1993 the average daily methane liberation was 3.9 to 4.7 million cubic feet of methane per 24 hour period. The belt itself also presented ignition sources. Four rollers under the belt drive appeared to have been turning in coal. According to the credible testimony of Inspector Reed, there was an "indentation where the coal was piled around the rollers and the rollers had been running in it". Reed further noted the belt was rubbing on the metal support legs and this was also an ignition source. I agree with the Secretary on this issue. The credible evidence, indeed, supports the significant and substantial findings.

The Secretary further argues that the violation was the result of unwarrantable failure and high negligence on the basis that the violative conditions were "extensive and obvious". According to the Secretary the conditions had existed for more than one shift, no effort had been made to clean up the conditions and the Respondent had been previously cited for similar violations. Unwarrantable failure is conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. See, Emery Mining Corp., 9 FM SHRC 1997, 2203-2204 (1987); Rochester & Pittsburgh Coal Co. 13 FM SHRC 189, 193-194 (1991).

In support of his position, the Secretary argues that the violative conditions were extensive and obvious, involving nearly the entire length of the 3,400 foot belt and with most of the accumulations visible from the travelway. The Secretary further argues that the conditions had existed for at least one and one-half shifts. He notes that this belt entry was required to be examined during preshift and onshift examinations by a certified mine examiner, that the preshift examination book showed that no coal had been run during the previous shift (the midnight shift on October 20th), that coal had last been run during the afternoon shift of October 19th, and that, accordingly, the accumulations had "existed for at least one and a half or more shifts". The Secretary maintains that the violative conditions should have been observed during any one of the examinations of the area.

As another independent basis for unwarrantability, the Secretary maintains that accumulations of combustible materials were a continuing problem on belt lines at this mine. He notes that Inspector Reed had personally issued several citations for violations of 30 C.F.R. ' 75.400 on belt lines at this mine -- two in this same longwall belt entry within the last 8 months and one on another beltline in October 1993. In this regard, the Secretary further notes that the Bailey Mine was cited 42 times for violations of this standard in the two year period preceding the issuance of the subject order and maintains that such a significant history of problems with accumulations places an operator on notice that greater cleanup efforts are necessary, citing Mid-Continent Resources, 16 FM SHRC 126 (1994).

Consol suggests in an unauthorized "supplemental" brief, but without factual record support, that these 42 citations for accumulations may have been for such things as "trash in a dinner hole" and that it was "inherently unfair" for the Secretary to rely on such evidence because it was provided only two days before hearing. Consol overlooks that it not only failed to object at hearing to the admissibility of this evidence but that it stipulated to its admissibility. It is also reasonable to infer that Consol was aware of the 42 citations it had received. Moreover, if they were for violations of "trash in a dinner hole", such evidence must be presented at hearing on the record and not by off-the-record suggestion in an unauthorized post-hearing "supplemental" brief. In any event, regardless of the specific nature of the 42 prior violations of the standard at issue this evidence shows a serious problem of disregard for cleanup of combustible accumulations. The Secretary notes, finally, that Inspector Reed did not see anyone working or preparing to work along the belt in any cleanup efforts and, after the conditions were cited, Respondent used the remainder of the shift and part of the next to clean up the cited accumulations, using a total of 19 miners.

I agree with the Secretary that this violation resulted from aggravated conduct and omissions constituting more than ordinary negligence and, accordingly was the result of "unwarrantable failure". This conclusion is clearly supported by the credible and disinterested testimony of Inspector Reed corroborated, in part, by the testimony of Mine Foreman Kostelnick. I can give but little weight to the self-serving testimony of a "good faith belief" that violations of the cited standard did not exist as charged.

Citation No. 3659981

Citation No. 3659981 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(a) and charges as follows:

An improper preshift examination was being made in 12B longwell section belt entry, from the stageloader to the transfer point, by a certified person on all (3) shifts, as the following conditions which constitute serious hazards along the 3,440 foot long area were not recognized by such persons: 1) Float dust (black in color), on top of the rock dusted surfaces of the mine floor under the belt, on belt structures, tailpiece area, on untravelled right side, heavy accumulations near storage area for 300 feet on right side, loose material, or excessive coal rib sloughage obstructing the walkway; and 3.) Inadequate guarding at the belt storage roller area due to guards previously installed being down and not re-installed to prevent persons from accidentally contacting moving large roller.

Due to this citation covering all three shifts, (24 hours) will be given so that the preshift examiners on all three shifts can be made aware of the requirements of 75.360.

No coal was mined on the previous shift and these conditions have apparently existed for several shifts, and the preshift book on the mine surface did not indicate any hazards were observed by the examiners.

During the previous quarter, "I" citation for 75.360 was issued at this mine.

The cited standard provides in essential part that "[w]ithin 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination."

The Secretary argues that several hazardous conditions existed on the morning of October 20th that had not been reported in the examination record books, namely the conditions cited by Inspector Reid in Order No. 3659982, Citation No. 3659983 and Citation No. 3659984. (Government Exhibits 2, 3 and 4, respectively). As charged therein, there were hazardous accumulations of coal, coal dust and float dust, there was less than the required 24 inches of clearance in the travelway along the belt due to the protruding sprinkler pipe and extraneous roof materials and rib sloughage, and there was a missing guard for the drive roller at the belt drive. As found previously in this decision, the coal and coal dust accumulations cited in Order No. 3659982 existed as charged and, based on the credible testimony of Inspector Reid, were of an obvious nature.

The latter two conditions cited herein were the subject of citations that have become final and their existence is not therefore subject to dispute (nor the related "significant and substantial" findings). I again accept the disinterested credible testimony of Inspector Reed that these conditions were also obvious. I agree with Consol, however, that the Secretary has not sustained her burden of proving that the guard for the drive roller had been removed prior to the required pre-shift examination. It may reasonably be inferred that the other cited conditions existed during the time of the pre-shift examination and accordingly should have been detected and reported in the pre-shift examination of the belt entry.

It is undisputed that the entry is required to be examined during pre-shift and on-shift examinations by a certified mine examiner. It is further undisputed that the pre-shift examination book showed entries for pre-shift examinations for the midnight shift on October 20th and the afternoon shift on October 19th when checked by the MSHA inspector and that no hazards were reported on either examination. The violation is accordingly proven as charged. Again, Mine Foreman Kostelnick corroborates Inspector Reed in essential respects. In addition to his admissions regarding the presence of accumulations, Kostelnick acknowledged that the 24 inch clearance was not maintained along the belt in that rib sloughage had, indeed, restricted passage at four or five locations, a fire hydrant obstructed the walkway and several belt rollers were in the walkway.

I further find that the violation was "significant and substantial". A violation of 30 C.F.R. ' 75.360(a) has been established with a number of related safety hazards. The safety hazard related to the coal accumulations is that of mine fires and explosions previously discussed in this decision and the likelihood of a fire and injury was reasonable. The hazard associated with the inadequate clearance would be tripping. The record shows that persons do travel along this belt entry performing maintenance and clean-up work and conducting examinations. I find that persons traveling along the belt therefore reasonably likely to slip or trip over the cited materials and would have fallen in close proximity to a moving belt. They could twist or sprain an ankle or come into contact with moving parts of the belt. These events, I conclude, were reasonably likely to result in an injury of a reasonably serious nature.

The violation was also the result of "unwarrantable failure". Again, the credible testimony of Reed shows that these conditions were obvious and had existed at least since the afternoon shift of October 19th without corrective action. The failure to have reported any of these violative conditions, therefore, constitutes aggravated negligence.

Under all the circumstances and considering the criteria under Section 110(i) of the Act, I find that the proposed civil penalties of \$7,500 for Order No. 3659982 and \$3,500 for Citation No. 3659981 are appropriate.

ORDER

Order Nos. 3659982 and 3659993 and Citation Nos. 3659981, 3659994 and 3659995 are affirmed. Consol Pennsylvania Coal Company is hereby directed to pay civil penalties of \$12,870 for the violations therein within 30 days of this decision.

Gary Melick
Administrative Law Judge

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