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SOL (MSHA), UMWA V. CONSOLIDATION COAL

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

February 21, 1984

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

Docket Nos. PENN 82-203-R
PENN 82-204-R
PENN 82-217

UNITED MINE WORKERS
OF AMERICA

v.

CONSOLIDATION COAL COMPANY

DECISION

This consolidated proceeding presents the question of whether violations of a mandatory safety standard, cited under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a)(Supp. V 1981), may be found to be of a "significant and substantial" nature. The Commission's Chief Administrative Law Judge concluded that significant and substantial findings could be made in a section 104(a) citation, and concluded that the violations in issue were significant and substantial. 4 FMSHRC 2093 (November 1982)(ALJ). We subsequently granted the petition for discretionary review filed by Consolidation Coal Company ("Consol"). 1/ For the reasons stated, we affirm the judge's decision.

During an inspection of Consol's Renton Mine, an underground coal mine located near Pittsburgh, Pennsylvania, Richard Zelka, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued two citations for alleged violations of 30 C.F.R. § 75.1100-3, a mandatory safety standard for underground coal mines. The portion of the standard alleged to have been violated states, "All fire fighting equipment shall be maintained in usable and operative condition." The citations were issued under section 104(a) of the Mine Act. 2/

1/ We also granted the motion of the United Mine Workers of America for leave to intervene on review.

2/ Section 104(a) states in part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to the Act has violated this Act,

or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.

30 U.S.C. § 814(a).

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Inspector Zelka checked a box on each citation form to indicate that the violations were significant and substantial. 3/

The citations involved two discharged fire extinguishers. The inspector observed the first inoperable extinguisher in the mine's underground car shop. The shop is an area in the mine, approximately 16 feet by 40 feet, where mine cars are repaired. The repair work includes welding and torching, which are usually carried out on a daily basis. One car was in the shop when the inspector conducted his inspection, and he believed that it was scheduled for welding that day. The inspector observed coal dust on the car. He also observed oil and grease, as well as wood, on the floor of the shop. 4/ Two miners worked in the shop, and both were present during the inspection.

In subsequently explaining his conclusion that the violation was significant and substantial, the inspector testified that "a fire is always likely in car shops like this," and that when a fire does occur, the most important thing is to extinguish it immediately.

Tr. 13. He stated that in the event of a fire, "a lot of time" would be wasted while the miners went outside the car shop to look for an operable extinguisher. Id.

Following his inspection of the car shop, Inspector Zelka proceeded along the mine's track entry. He observed another discharged fire extinguisher located on a vehicle (a trackmen's motor) that was sitting on the track. 5/ The vehicle was energized in that its trolley pole was attached to the trolley wire. The trackmen who rode in the vehicle had left it and were some distance away. Upon being questioned by the inspector, they stated that they were required to do track repair work every day and that this work normally included the cutting of rails and bolts with an acetylene torch. The inspector observed coal along the track where the men would be working. The inspector also observed grease, coal dust, and oil on the motor, particularly on the trolley pole and in the engine controller area. In addition, he noticed cutting torches on the vehicle as well as bottles containing the gas to be used in welding and torching.

3/ The box on the face of the form is followed by the legend "S AND S

(SEE REVERSE)." The reverse of the form states: Significant and substantial violations. By checking the significant and substantial block the inspector has indicated that 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. Checking the significant and substantial block also means that the violation can be considered in determining whether a pattern of violations exists.

4/ The wood was used to prop up the machines while they were being repaired.

5/ A trackmen's motor is an electrically-powered, self-propelled vehicle, used to carry the miners who repair and maintain the mine tracks and their equipment and supplies. Electric current reaches the vehicle's engine when its trolley pole is in contact with trolley wires located above the track.

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In explaining his notation that the violation was significant and substantial, the inspector testified that the motor could catch on fire if there were a fault in the electrical system and that a fire could start during the torch work. The vehicle was found by the judge to be "covered with grease, oil, and coal dust." 4 FMSHRC at 2096. The inspector concluded that the presence of those combustible materials could be a contributing factor to the occurrence or spread of a fire. He also stated that the chance of a fire was increased by what he characterized as a general history of trackmen's motors and similar vehicles catching on fire.

In concluding that significant and substantial findings may be included in a section 104(a) citation issued for violation of a mandatory safety standard, and that both violations were significant and substantial, the Commission judge relied on Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). In that case, we held that a violation of a mandatory safety or health standard significantly and substantially contributes to the cause and effect of a mine safety or health hazard when "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Although the citations contested in National Gypsum were issued under section 104(a) of the Mine Act, the operator in that case did not renew its challenge on review to the validity of making such findings in section 104(a) citations. Consequently, we did not review the conclusion of the judge below in that case that the practice was proper. We resolve the issue now.

It is clear that section 104(a) does not specifically require

or prohibit the practice of making significant and substantial allegations on a citation issued for an alleged violation of a mandatory health or safety standard. An inspector's significant and substantial findings are, however, specifically mentioned as a prerequisite to citing violations and issuing orders under section 104(d) of the Mine Act, 30 U.S.C. § 814(d)(Supp. V 1981). 6/ Consol argues that because the phrase

6/ Section 104(d) provides as follows:

(1) 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 an 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 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

(footnote continued)

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"significant and substantial" is not contained in section 104(a), Congress did not intend to authorize a significant and substantial finding in conjunction with a section 104(a) citation issued for a violation of a mandatory safety or health standard. A careful reading of sections 104(a) and 104(d) convinces us, however, that this is not the case.

Section 104(a) requires that the citation be in writing and that it "describe with particularity the nature of the violation." (Emphasis added.) The "nature" of a violation refers to its characteristics and properties. Thus, when an inspector describes the nature of a violation he may articulate in writing not only the objective conditions that result in the violation, but he may also indicate, where appropriate, his subjective judgment as to its other distinguishing characteristics. That one of those characteristics may be whether the violation is significant and substantial is made clear by section 104(d)(1), which requires the inspector to determine, among other things, whether the violation "is of such nature as could

significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." (Emphasis added.) Thus, construing sections 104(a) and (d) together, we conclude that the required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding by the inspector that the violation is significant and substantial.

This leaves the question of whether the violations in this case were in fact significant and substantial. The judge noted the presence of combustible materials in the vicinity of both discharged extinguishers.

footnote 6 continued

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 [section 104(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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(emphasis added).

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He also noted the presence of potential ignition sources at both locations, in that welding and torching were routinely done at both locations and power was going into the trackmen's motor. 4 FMSHRC at 2096. The judge found the danger of fire to be "inherent and ever present" when welding and torching are routinely carried out. 4 FMSHRC at 2097. He concluded that "injury of a reasonably serious nature becomes a reasonable likelihood when firefighting equipment such as extinguishers are not in working condition in such an environment." Id.

During the hearing, Consol sought to establish the presence of other fire extinguishers and of rock dust, which may also be used to suppress a fire, in the vicinity of both violations. The judge

made no finding with respect to the existence of this firefighting equipment and material, but concluded that, even assuming their presence, a significant and substantial finding would still be appropriate. He accepted the testimony of a MSHA accident investigator Gerald Davis, that in the event of a fire, panic often was likely and that it therefore could not be assumed that a miner would attempt to obtain a second extinguisher, if the nearest one were not operable, or rock dust to fight a fire. 4 FMSHRC at 2097. 7/ As noted above, we have held that a violation is significant and substantial "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 Act does not define "hazard," we construed the term to "denote a measure of danger to safety or health." 3 FMSHRC at 827. We stated 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).

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; 8/ (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC , FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984). The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not.

7/ Investigator Davis was also an electrical inspector. He had worked for MSHA in both capacities for eleven and one-half years. He was a member of MSHA's mine rescue team for fighting mine fires and explosions, and was accepted by Consol as an expert in the field of mine electricity.

8/ We note that this case involves the violation of a mandatory safety standard. We have pending before us a case raising a challenge to 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 intimate no views at this time as to the merits of that case.

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In this case, there is no dispute as to the existence of the

violations. Rather, Consol argues that the inoperable fire extinguishers could not cause the feared hazard to safety--a mine fire--and thus could not pose "a significant and substantial contribution to the cause and effect of a ... mine safety ... hazard." Consol also argues that even if the cause and effect of a hazard were contributed to, there was not a reasonable likelihood the hazard would result in a reasonably serious injury. We do not agree.

With regard to Consol's argument concerning cause and effect, the causative chain of a danger in a mine may have many links. Hazards may result from the interactions of various conditions. We believe it is beyond dispute that the inoperable fire extinguishers created a major threat that a mine fire, once started, would spread or intensify without control. As the inspector testified, the most important step to take when a mine fire starts is to extinguish it immediately. If the fire fighting equipment is inoperable, such suppression may be impossible. Thus, the violations in this case presented a discrete safety hazard, i.e., propagation or intensification of a fire.

The next question is whether there was a reasonable likelihood that the hazard contributed to would result in injury. To prove this aspect of his case, the Secretary of Labor first had to establish that a fire was reasonably likely to occur, for without a fire there could be no reasonable likelihood of injury resulting from the hazard of propagation or intensification due to inoperable extinguishers. Consol argues that the evidence does not establish a reasonable likelihood of a fire. We disagree.

Substantial evidence supports the judge's findings as to the existence of combustible materials in the car shop and combustible materials on and near the trackmen's motor. Indeed, their presence was not seriously disputed. Inspector Zelka stated his opinion that a fire in the car shop was "always likely" and "could easily happen." Tr. 13, 17. He also testified that a fire was reasonably likely to occur with respect to the trackmen's motor. Investigator Davis stated his opinion that any time there is a combination of oil and grease and proximate welding and torching in a mine, the likelihood of a fire is increased. With respect to the trackmen's motor, Inspector Zelka testified that welding and torching could ignite the accumulated materials along the track and that a fault in the machine's electrical system could ignite the accumulations on the motor. Davis further testified, without dispute, that acetylene hoses could develop pin holes and that an arc or spark from the welding could ignite the acetylene coming out of the hoses. The investigator reviewed reports of previous mine fires involving similar vehicles. He stated that he found 28 such fires during 1959-1973. 9/ The informed opinions of the inspector and the investigator

9/ The mine is located in MSHA District 2. The accidents which were reported and reviewed all occurred in that district. A summary of the reports was introduced into evidence by the Secretary. This exhibit indicates that of the 28 fires listed, eight involved ignition of accumulations of combustible materials and three involved ignition of acetylene.

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are an important component in determining whether there is a reasonable likelihood that the hazard contributed to will occur. See, for example, Mathies Coal Co., supra, slip op. at 5. Based upon the reasoned opinions of the inspector and the investigator, as well as the evidence of previous fires on similar equipment, we agree with the judge's findings that a danger of fire was reasonably likely at both locations.

The next question is whether there was a reasonable likelihood that such a fire, in conjunction with the inoperable fire extinguishers, would result in an injury. Both MSHA witnesses testified that in the event of a fire in the car shop, the two miners who worked in the shop would be in danger of being burned or being overcome by toxic smoke. Investigator Davis additionally testified that in such a situation, the miners might panic. 10/ Consol offered no evidence to rebut this testimony.

With regard to the trackmen's motor, Inspector Zelka testified that there was a high velocity of air in the track entry, and that if a fire occurred it would spread rapidly. He stated that the smoke would spread through the entry and that the eight miners working in by the trackmen's motor could be overcome. He also testified that the two miners repairing track might be burned. Consol's project engineer testified that the trackmen could telephone those in by and warn them of the approaching smoke and that the eight miners could then enter an escapeway and the inspector conceded the presence of telephones and escapeways between the trackmen's motor and the area where the eight men were working. However, Investigator Davis stated that in one fire he knew of, miners tried to come up the entry through the smoke rather than take the escapeway. In light of the un rebutted testimony that the extinguishers did not work, that miners were present in the car shop, on the track and in by the trackmen's motor, that mine fires may produce highly toxic fumes, and that miners in the face of fire may panic, we conclude that substantial evidence

10/ The investigator stated:

[T]he shop [has] ... two metal doors [and] ... the guy uses a fire extinguisher that does not work. The second he runs out of that door and closes the door behind him to seal the fire off... [t]here is no guarantee the other fire extinguisher

that he grabs is going to work; ... [a]fter he grabs the door, after whatever length of time, the fire has already kindled to the point to a great degree of smoke, especially if there's grease and oil which gives off a ... large amount of smoke which is very toxic. The second he opened that door, the smoke would come out and hit him in the face and there's no guarantee at that point that he is even going to be able to go in there to fight the fire after you open that door. [I]t's been our experience through other accidents that a guy never does the logical.

Tr. 84.

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supports the judge's conclusion that there was a reasonable likelihood the hazard contributed to would result in injury. 11/

The judge also concluded that any injuries would be reasonably serious. 4 FMSHRC at 2097. Because the evidence indicates that any injuries would be caused by smoke and/or fire, substantial evidence also supports this conclusion.

For the foregoing reasons, we affirm the judge's holdings that significant and substantial findings may be made in connection with a citation issued under section 104(a) of the Mine Act for violation of a mandatory safety or health standard and that the violations in this case were significant and substantial.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab,

Commissioner

L. Clair Nelson,

Commissioner

11/ Like the judge, we are persuaded that the presence of other fire extinguishers 50 to 100 feet from the discharged fire extinguishers is irrelevant to the question of whether there was a reasonable likelihood that a fire would result in an injury. The judge stated, "Even if other fire extinguishers and rock dust were where the operator alleged they were ... there would be no guarantee that in the event of a fire a miner would go [to them]. ... [A] miner might run in the other direction and the first couple of minutes in any fire is critical with smoke the major problem." 4 FMSHRC at 2097. We note, however, that any question involving the presence of other firefighting equipment is hypothetical. Consol introduced a map into evidence which indicated the locations where other extinguishers and bags of rock dust were said to exist. The record contains testimony concerning their possible presence. However, there was no proof that any of the fire extinguishers were actually present at the locations

indicated on the map, that they were operable, or that rock dust was present in usable amounts.

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Commissioner Lawson concurring:

I agree with the majority as to the disposition of this case and their holding that significant and substantial findings may be made for a citation issued under section 104(a) of the Mine Act. 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 case.

A. E. Lawson, Commissioner

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