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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

v.

YOUGHIOGHENY & OHIO COAL CO.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 85-90
A.C. No. 33-00968-03605

Nelms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner;
Robert C. Kota, Esq., St. Clairsville, Ohio,
for Respondent.

Before: Judge Melick

This case is before me upon the petition 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 "Act" for three violations of regulatory standards. The general issues before me are whether the Youghiogeny & Ohio Coal Company (Y & O) violated the cited regulatory standards and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violations were "significant and substantial." If violations are found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.(FOOTNOTE.1)

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Citation No. 2494894 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.302(a) and charges as follows:

A line brattice or other approved device was not installed in a room drive [sic] off the the entry at 48 á 49 where the No. E0965 roof bolting machine was being operated at the face. The room was drive [sic] 64 feet inby the neck of E entry. Accumulations of methane measuring 2.5% to 3.5% were found in the face area. Measurements were taken with an approved methane detector and a bottle sample to substantiate this condition.

The cited standard requires that "properly installed and adequately maintained line brattice or the other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust and explosive fumes."

Respondent concedes that the violation existed as alleged and that if the cited conditions were allowed to continue there could have been "serious" consequences. According to MSHA Inspector James Jeffers the mine operator's failure to have properly installed line curtains presented an "imminent danger" of death or great bodily harm to the miners working in this section. Methane accumulations of 2.5% to 3.5% were found in the face area of the room not properly ventilated. A roof bolter operating at the face area provided an ignition source from an electrical defect or sparks from the drill bit striking rock. While Respondent claims there was no "imminent danger" it concedes that the conditions presented a "bad situation" and, if allowed to continue, could have led to "serious" injury. The violation was accordingly of high gravity and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

The violation was also the result of operator negligence. It is not disputed that the section foreman was working in close proximity to the violative conditions and was in a position to see that the line curtain had not been hung. Indeed, at the conclusion of its own investigation of the incident, Respondent discharged the foreman in charge of that section because of this negligence. It is not disputed that the cited conditions were corrected immediately.

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In assessing a penalty for this violation I have considered Respondent's acknowledgment of the seriousness of the violation and its swift disciplinary action against the responsible section foreman. Such prompt and severe disciplinary action sends a strong and clear message to all mine personnel that such negligence will not be tolerated. Considering the size of the operator and its history of violations in light of the above factors I find that a penalty of \$400 is warranted.

Order No. 2330533 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges as follows:

Accumulations of float coal dust was [sic] permitted to accumulate in the A return entry as follows: (1) from the section return regulator at approx 0 á 15 inby to 2 á 96, heavy black in color/deposits of float coal dust was [sic] deposited on the rock dusted surface areas of the mine floor and all connecting cross cuts (2) from 2 á 96 inby to 6 á 50 heavy black in color deposits of float coal dust was [sic] deposited on the rock dusted surface areas of the mine roof, rib, and floor and all connecting cross-cuts. This return air course is to be examined once each week. The condition should have been observed and corrected.

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

Respondent again concedes the existence of the violation but maintains that the violation was not as serious as alleged and that it was not the result of operator negligence.

According to Inspector Jeffers the float coal dust was first found in the 1 East Main North No. 2 Section over a distance of 250 feet inby the regulator. The color of the coal dust was gray at first but became darker as the inspection party moved closer to the section. Over the next 400 feet the coal dust was "very black" and covered all surface areas. According to Jeffers the cited area was part of the active working section in which electrical equipment such as ventilation fans, a battery charger and a rock dusting machine would be working. Jeffers opined that the accumulations found would propagate fire or explosion exposing the seven miners working inby to serious injuries. He also

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observed that there had been a prior ignition at this mine of hydrogen gas emitted from that battery charger.

Don Statler, Assistant Safety Director for the Nelms No. 2 mine, testified that the first 400 feet of the cited section had been adequately rock dusted but conceded that from that point to the face there was indeed a deposit of coal dust on the surface area. He felt that the violation was not serious however because he was not aware of any ignition sources. Statler did not, however, contravene the testimony of Inspector Jeffers as to the presence of a battery charger and the fact that electrical equipment such as a rock duster and ventilation fan would be used in the cited area. Indeed, Statler conceded that float coal dust is highly combustible and not safe to have on top of rock dust. He further conceded that the air course was not in a safe condition and that he was "surprised" to find the coal dust so "black" in the last 500 feet to 600 feet to the face. Under the circumstances I find that the violation was indeed quite serious and "significant and substantial". Mathies Coal Co., supra.

Statler also conceded that a fire boss or section foreman should have discovered the existence of the float coal dust and he was again "surprised" that it had not been found. According to Inspector Jeffers a certified mine examiner is required by regulation to go into the cited area once every 4 hours to perform methane tests, and, during the course of such examinations, should have seen the plainly visible violation. Within this framework it is apparent that the violation was also the result of operator negligence.(FOOTNOTE.2)

Considering that the operator abated the condition in a timely manner I find that a civil penalty of \$750 is appropriate for the violation.

Order No. 2330535 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.305 and charges as follows:

The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in

the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Respondent does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged but maintains that proper examinations were being made. It concedes that the examinations had not been recorded as required but suggests that this was a mere "technicality". The credible evidence does not however support the purported defense. It is not disputed that during Jeffers' inspection of the right and left air courses neither he nor the company representative, Don Statler, were able to locate any dates or initials of mine examiners in the entire 1,300 feet. Returning to the surface, the examination party along with the company safety director looked at the corresponding record books and were unable to find any evidence of entries corresponding to an examination of the cited air courses. The examination book covered a 3 month period preceding the date of inspection. In addition, as recently as the filing of the Respondent's Answer in these proceedings on September 12, 1985, Respondent conceded that the examinations had not been properly recorded.

At hearing however, Statler testified that book entries did exist corresponding to examinations of the right and left air courses through March 13, 1985, but that there were no entries between that date and the date of the inspection at issue, April 9, 1985. Statler conceded that he did not know whether the designated mine examiner had been examining the returns as required. The examiner had since been laid off and Statler had been unable to contact him.

Statler conceded however that for this 4 week period there was in fact no record of examination of the air courses in the appropriate examination books and that he did not know whether the examinations had actually been performed. He further conceded that he was "surprised" that no markings from the mine examiners were found in the cited air courses and that it was indeed hazardous to fail to conduct such examinations.

According to Inspector Jeffers, the failure to have conducted the examinations of the air courses as required was particularly hazardous in light of the float coal dust cited in the previous order. These accumulations should have been discovered in the course of such examinations and eliminated before leading to the more serious fire and explosive hazards described in connection with the previous order. Within this framework I conclude that the violation was indeed serious

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3 For the same reasons the violation was also the result of "unwarrantable failure".