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SOL (MSHA) v. PYRO MINING
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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.	CIVIL PENALTY PROCEEDING Docket No. KENT 85-12 A.C. No. 15-13881-03539 Docket No. KENT 85-110 A.C. No. 15-13881-03557 Pyro No. 9 Slope William Station Mine
PYRO MINING COMPANY, RESPONDENT	Docket No. KENT 85-24 A.C. No. 15-11408-03533 Pride Mine Docket No. KENT 85-26 A.C. No. 15-13920-03526 Pyro No. 9 Wheatcroft Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Safety Manager, Pyro Mining Company, Sturgis, Kentucky, for Respondent

Before: Judge Melick

These consolidated cases are before me upon the 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 "Act," for alleged violations of regulatory standards. The general issues before me are whether the Pyro Mining Company (Pyro) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations and orders.

Citation No. 2337756 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.400 and charges as follows:

> Loose coal and coal dust 4 to 6 inches deep on the mine floor and from 4 inches to 24 inches deep 3 feet wide and approximately 40 feet in length in three directions at the 001-0MMV ratio feeder along the ribs in the No. 4 entry and 5 the [sic] left and right crosscuts beside the feeder had been permitted to accumulate. Coal dust sample No. 1 was taken in the left crosscut No. 2 in the No. 4 entry and No. 3 in the crosscut right all approximately 20 feet from the feeder. The feeder was energized.(FOOTNOTE.1)

The standard at issue, 30 C.F.R. 75.400, 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, or on electric equipment therein."

The testimony of MSHA health specialist Arthur Ridley is not disputed. He found the coal accumulations at the dumping point (but not at the ratio feeder) extending across the width of the entries some 40 feet in three directions. The loose coal was from 4 inches to 24 inches deep and was being further crushed by the movement of shuttle cars, thereby making it more volatile. He obtained three floor samples about 20 feet from the dumping point and the resulting lab reports on the samples showed 18%, 18% and 17% incombustible content.

According to Ridley the hazard was agravated by the existence of float coal dust for an additional 100 feet along the belt entry. He observed that this float coal dust was most volatile and could be ignited by an arc or spark and spread to the area cited in this case. Power sources such as lights and power cables were near the cited dust. He also observed an acetylene tank lying on the mine floor which he opined could explode if run over by vehicles traveling in the area. He further opined that the 12 men working on the section were, under the circumstances, reasonably likely to encounter an explosion or fire and thereby suffer serious injury or death. Within this framework of evidence the

violation and its "significant and substantial" findings has been proven as charged. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I also find the violation was the result of operator negligence. Inspector Ridley opined that based upon the large amount of accumulations they had existed from 3 to 4 shifts. Under the circumstances sufficient time had elapsed during which the section foreman or other supervisory personnel should have observed and corrected the violation. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980).

Citation No. 2506981, as amended, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.313 and charges as follows:

> The methane monitor on the Joy loader was not working at time of inspection on No. 2 unit ID002-0. Coal was being loaded at the face of No. 3 entry. 5 tenths to 9 tenths percentum of methane was detected with 2 hand held methane detectors. The section was being supervised by Jerry Smith. Responsibility of Greg Legate--maintenance foreman the record book located on the surface stated that the methane monitor was not working on 8/6/84. No corrections were noted.

The cited standard, 30 C.F.R. 75.313, requires as relevant hereto, that an operative methane monitor must be provided for the cited equipment and that "such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane." In addition, the standard provides that "an authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume percentum of methane."

MSHA Inspector Larry Cunningham found that the electrical components on the cited methane monitor were not functioning so that neither the light indicator which shows that the monitor is in the "on" position nor the test button was functioning. According to Cunningham the cited loading machine was loading loose coal where pockets of methane are commonly found. He also observed that methane can be liberated between the required 15 minute manual tests thereby causing ignitions or explosions if not detected by the

machine monitors. Ignitions could come from the motor of the loading machine or by the loading machine striking rock. There were 12 miners working in this unit who would be subject to resulting fire or explosions. The "significant and substantial" violation is accordingly proven as charged. Mathies, supra.

The violation was also the result of operator negligence. The defective monitor had been noted in the mechanic check book three days before the citation was issued and for 2 days thereafter. Although management representatives indicated that the methane monitor had been repaired on the 5th of August (2 days before the citation) they noted that it again broke down on the 6th of August. No explanation was offered as to why the monitor had not been repaired after the 6th. It is apparent therefore that the mine operator had notice of the defective monitor on August 6th but nevertheless allowed the loader to continue working at the face.

Citation No. 2506983 alleges a violation of the standard at 30 C.F.R. 75.301 and charges as follows:

> The quantity of air reaching the last open crosscut in the set of developing entries on No. 1 unit, ID 001-0 was not enough to turn an anemometer at time of inspection. Coal was being mined under the supervision of Jerry Smith section foreman. .4 to .6 per centum of methane was detected in all of the six working places. A smoke tube was used but a velocity of air was not determined.

It is not disputed that the cited standard requires a minimum of 9 thousand cubic feet of air per minute (CFM) at the cited location. According to Inspector Cunningham, coal was being mined and 12 miners were working on the section at the time of the violation. In addition, coal was being loaded directly across the section at the intake side and the cutting machine, roof bolter and shuttle cars were operating inby the last crosscut. Cunningham opined that without the proper ventilation it was reasonably likely to expect an explosion or fire. Methane and/or dust would accumulate without proper ventilation causing ignitions or explosions triggered by friction sparks from the operating equipment. The "significant and substantial" violation is accordingly proven as charged. Mathies, supra; Secretary v. US Steel Mining Company, Inc., 7 FMSHRC 1125 (1985).

The violation was also the result of operator negligence. Cunningham observed that two or three of the ventilation curtains had been nailed up so that shuttle cars could

pass through. Other curtains were a foot too short so that the ventilating air was escaping underneath. Section Foreman Jerry Smith was working on the section and was in a position to observe these conditions.

Citation No. 2506984 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1306 and charges as follows:

> The explosives and detonator magazine being used on No. 3 unit ID 003-0 was not placed so as to be protected from falls of roof. The magazine was placed in the last open crosscut from the face area, and the crosscut had not been completely bolted. Two rolls [sic] of bolts had been left out of the center of the crosscut. Loose and broken roof was present in the crosscut and no timbers had been set around the powder magazine at time of inspection.

The cited standard, 30 C.F.R. 75.1306 reads as follows:

> "When supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction with no metal exposed on the inside, located at least 25 feet from roadways and power wires, and in a dry, well rock-dusted location protected from fall of roof . . .".

It is not disputed that the cited area had loose roof with no timbering and was not fully bolted. Accordingly Cunningham believed the powder magazine was not sufficiently protected from foof falls. The magazine was located in an area in which mining equipment with power cables was operating. These conditions constituted a violation of the cited standard and were contrary to the safe practices for handling Tovex explosive established by the manufacturer. (See Exhibit P-23). Under the circumstances it may reasonably be inferred that the violation was "significant and substantial" and serious. Mathies, supra. Assistant Mine Foreman, Don Ramsey conceded that the magazine had just been brought to the cited location. It is apparent therefore that he was aware of the violative condition and the violation was therefore the result of operator negligence.

Citation No. 2506987 alleges another "significant and substantial" violation of the standard at 30 C.F.R. 75.301 and charges as follows:

> The quantity of air reaching the last open crosscut of the developing entries of No. 2 unit ID 002-0 was not enough to turn an anemometer at time of inspections. Coal was being mined under the supervision of James Lichenar section foreman. Concentrations of CH4 were detected in all six of the working faces ranging from .4 per centum to .8 per centum.

Cunningham measured 8870 CFM on the intake side but was unable to obtain any air readings at the return side of the last open crosscut. The same hazards were present in these circumstances as described by Cunningham with respect to Citation No. 2506983. Under the circumstances I find that a "significant and substantial" and serious violation existed here as well.

The violation was also the result of operator negligence. Cunningham observed that some of the line curtains were full of holes and others had been nailed up to allow vehicles to pass beneath. Section Foreman James Lichenar was present and could have seen the condition of the curtains. Lichenar had reportedly found 11000 CFM at the beginning of the shift, three hours before Cunningham's observations. Cunningham observed that such readings were highly unlikely however because once the curtains were properly positioned and repaired there was only 12600 CFM. I find Cunningham's testimony to be credible in this regard.

Docket No. KENT 85-24

Citation No. 2338997 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.301 and charges as follows:

> The quantity of air in the last open crosscut of the No. 006 working section is 1250 CFM when measured with a calibrated anemometer. Coal was being loaded in #2 heading and cut in the No. 7 heading.

The cited standard requires 9000 CFM to ventilate the last open crosscut. According to Inspector George Newlin, deficient air could result in the build up of methane, noxious gases and dust in the working area subjecting the 7 man crew in the section to ignitions and explosions. I find that the violation did exist and was "significant and substantial" under the circumstances. It is not disputed however that the foreman had checked the air only shortly before the citation and found it to be sufficient. Accordingly I find no operator negligence.

At hearing, the parties proposed a settlement of Citation No. 2338998 and a reduction of the penalty from $85 to $40. A minimal violation was found in connection with the spacing and number of support posts. The government conceded that it had no evidence that management knew of the condition and, once cited, it was corrected immediately. I find the settlement appropriate and it is accepted.

Docket No. KENT 85-26

At hearing a motion for settlement was also proferred by the parties as to each citation in this docket. The motion was approved at hearing and that determination is now affirmed.

Docket No. 85-110

Citation No. 2506350 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1725(a) and charges as follows:

> The No. 1 Goodman 10 ton locomotive was being operated in an unsafe condition in that due to the low level of charge of the batteries on board the locomotive and the excessive degree of elevation the locomotive was being operated in, the motor could not safely negotiate such elevation.

The cited standard, 30 C.F.R. 75.1725(a), provides that "mobile and stationary machinary and equipment shall be maintained in safe operating condition and machinary or equipment in unsafe condition shall be removed from service."

In determining whether there was a violation of the cited standard it is immaterial whether the mine operator knew that the cited equipment was not in a safe operating condition. Mine operators are liable under the Act for violations of mandatory safety standards regardless of fault. A form of strict liability is imposed to insure worker safety. See Allied Products Company v. Federal Mine Safety and Health Review Commission, 666 F.2d 890, 893 (5th Cir.1982); and (9th Cir.1983); Secretary v. El Paso Rock Quarries Inc., 3 FMSHRC 35 (1981). Thus, if the Secretary sustains his burden of proving in this case that the cited equipment was not in a safe operating condition the violation is established. It is immaterial in this regard whether or not the operator knew that the equipment was not in a safe operating condition.

Bart Noffsinger was acting as motorman on a 10 ton battery powered "Goodman" locomotive on October 30, 1984,

when a fatal accident occurred. He had been driving that locomotive for about 2 to 3 months and had additional experience operating other locomotives at other mines. The deceased, Larry Sutton, was motorman on a similar locomative and he and Noffsinger were working together as a team. Both locomotives were "on charge" when they arrived for work that day. Noffsinger filled his sanders with sand before resumption of work but did not check the water level of the batteries. He understood this was the mechanics job.

After operating his locomotive for awhile Noffsinger saw that his battery indicator or "fuel gauge" had moved about halfway into the "yellow" caution area. He called the supply cordinator, Lynn Shanks, to advise him of that condition. Shanks requested a replacement locomotive but the replacement was apparently diverted to another task and was not available. Shanks then asked Noffsinger and Sutton about the condition of their batteries and, according to Noffsinger, "we told him we didn't think we would have any trouble".

The men were then told by Shanks to pick up some empty cars. Three of the empty cars were later attached behind Sutton's locomotive and three behind Noffsinger's. Noffsinger went first. As Noffsinger noted, visibility was limited over a portion of an upgrade to be encountered in that the bottom of the grade could be seen but not the other side. On his first effort up the grade the wheels on his locomotive "spun out" and he was forced to back down to the bottom of the grade. He yelled to Sutton that he "didn't make it that time but [would] try again". Sutton apparently signaled to go ahead and nodded "yes". Noffsinger then made another effort to surmount the hill. This time he did not hear the wheels spinning but the motor apparently lost power and the locomotive went back down the grade. As he was backing down the grade Noffsinger was "flagging" his lamp to warn Sutton. Suddenly he felt a jolt and found that one of his trailing cars had jumped over Sutton's locomotive killing him.

Noffsinger testified that the charge indicator never left the "yellow" area on the "fuel gauge" and that until his second effort to surmount the grade there had been no decline in power. When the needle on the "fuel gauge" moves into the red area a red alarm signal is triggered. This signal light was never activated on the day of the accident.

When MSHA electrical inspector Kurtis W. Haile examined Noffsinger's locomotive several hours after the accident the battery gauge was still in the "yellow" area. Haile was unable however to take a hydrometer reading because

the level of liquid in the batteries was below the plates and inaccessible. Several battery cells were tested with a cell condition tester approximately 2 to 3 hours after the accident. On the particular cells tested a "fully discharged" reading was obtained on the testing gauge.

Within this framework of evidence it is apparent that the cited locomotive was unable in its second effort to overcome the steep grade on the tracks because of insufficent power. It may reasonably be inferred from the undisputed evidence that this deficiency was caused by inadequate charge in its battery. Under the circumstances this constituted an unsafe condition and the violation is accordingly proven as charged. This was also a serious and "significant and substantial" violation in that it was reasonably likely under the circumstances for the violative condition to lead to serious or fatal injuries.

In determining whether the mine operator was negligent it is appropriate to consider what knowledge it had or should have had of the insufficient battery charge. In this regard I believe primary reliance could properly have been placed by the mine operator and its employees upon the so called "fuel gauge" indicating the battery charge status on the cited locomotive. MSHA has not shown that this gauge was deficient in any way. In addition it is not disputed that the cited locomotive was being operated just before the accident within the "yellow" or cautionary area of the gauge and the gauge had never reached the "red" level of discharge status.

According to Jack Stuart the maintenance mechanic at the Slope William Station Mine, the maintenance records show that the cited locomotive had its batteries filled to the proper level on October 25, 1984, 5 days before the fatal accident. In addition, Thomas Chirel, director of maintenance, testified that the batteries hold 100 gallons of water and that following the accident he found it necessary to add only 8 gallons to fill up the cells.

Within this framework it is apparent that the operator's battery maintenance program was not deficient, that the locomotive "fuel gauge" was not malfunctioning and that the locomotive showed no decrease in power until the second and fatal attempt to surmount the grade. Indeed, shortly before the accident Pyro's supply coordinator confirmed with the locomotive operators that their batteries had adequate power to continue working. Under these circumstances I cannot find that the mine operator was negligent.

In finding this violation of the standard at 30 C.F.R. 75.1725(a) I have not considered the Secretary's allegations made at hearing and in its post-hearing brief

concerning purportedly defective sanding devices on the locomotive at issue. These conditions were not alleged in the citation at bar and no amendment to incorporate those allegations has been made.(FOOTNOTE.2) The allegations are accordingly not properly before me. See section 104(a) of the Act, 29 C.F.R. 2700.53, and 5 U.S.C. 554(b).

Citation No. 2506354 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1404-1. That standard provides in relevant part that "a trailing locomotive or equivalent devices should be used on trains that are operated on ascending grades." The citation charges that "a trailing locomotive or equivalent devices were not being used on the supply train that was on ascending grades in the 3rd main north entries on 10-30-84 and was a contributing factor in a fatal injury."

Pyro argues that the use of the word "should" in the cited standard indicates an intent to make the standard advisory rather than mandatory and that under the circumstances a specific safegaurd notice would be a condition precedent to finding a violation.

30 C.F.R. Part 75, which incorporates the relevant regulatory provisions, is entitled "Mandatory Safety Standards--Underground Coal Mines". The word "should" as used in the cited standard must therefore be construed as mandatory and not permissive and the failure to comply with its provisions will subject the operator to the appropriate enforcement mechanisms and penalties under the Act. See Secretary v. Kennecott Minerals Company, 7 FMSHRC 1328 (1985).

Since Respondent did not use a trailing locomotive or "equivalent device" during relevant times it was not in compliance with the cited standard. Under the circumstances the violation is proven as charged. It may reasonably be inferred from the credible evidence that the fatal accident in this case could have been prevented by use of a connected trailing locomotive. The violation was accordingly "significant and substantial" and serious. Again, however, I do not ascribe negligence to the mine operator. The use of the word "should" in the cited standard before any authoritative interpretation by the Commission or the Courts could in my opinion

have reasonably led the mine operator to have believed, as it alleges, that the regulation was indeed advisory and not mandatory.

The remaining citation in this docket, Citation No. 2339146, was the subject of a motion for settlement filed at hearing in this case. That motion was approved at hearing and that determination is now affirmed.

ORDER

Pyro Mining Company is hereby directed to pay the following civil penalties within 30 days of the date of this decision:

	Citation No.	Amount
Docket No. KENT 85-12		
	2337756	$ 250
	2506981	150
	2506983	150
	2506984	150
	2506987	150
Docket No. KENT 85-24		
	2338997	50
	2338998	40
Docket No. KENT 85-26		
	2505204	157
	2505205	85
	2505208	85
	2505209	85
	2505211	85
	2505212	85
	2505217	136
	2505762	276
Docket No. KENT 85-110		
	2506350	150
	2506354	50
	2339146	50
Total		$2,184

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 At hearing, the inspector who issued this citation, Arthur Ridley, conceded that the ratio feeder was in fact not located in the area of the alleged violation.

~Footnote_two

2 The Secretary in his post-hearing brief suggested that the pleadings "could be amended to conform to the proof at hearing pursuant to 20 C.F.R. 2700.1 and Rule 15(b) F.R.C.P." Even assuming, arguendo, that such an amendment could have been made, the fact is that it was not.