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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 88-103 A.C. No. 15-14587-03536
v.	Docket No. KENT 88-169 A.C. No. 15-14587-03540
STERLING ENERGY, INC., RESPONDENT	Docket No. KENT 88-208 A.C. No. 15-14587-03544 Sterling No. 5 Mine

DECISION

Appearances: Mary Sue Ray, Esq., and William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Mr. Ralph Ball, President, Sterling Energy, Inc. LaFollette, Tennessee, for the Respondent.

Before: Judge Maurer

These cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", to challenge two citations, one issued under section 104(a) of the Act, the other under section 104(d)(1) of the Act, one imminent danger withdrawal order, seven section 104(d)(1) orders and a single section 104(d) (2) order. The respondent also seeks review of the civil penalties proposed by the Secretary of Labor for the related violations.

Pursuant to notice, the cases were heard in Knoxville, Tennessee on February 21, 1989.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Sterling Energy, Inc., owns and operates the No. 5 Mine, which produces coal for resale in interstate commerce and is subject to the jurisdiction of the Act.

2. The undersigned administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

3. The subject citations and orders were properly served on the respondent by a duly authorized representative of the Secretary.

4. Copies of the subject citations and orders entered into this record as petitioner's exhibits are authentic copies of the originals.

I. Docket No. KENT 88-103

Citation No. 3001604, issued on September 11, 1987, pursuant to Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.200 and charges as follows:

> The roof on 002-0 pillaring section was loose and had sloughed out around the roof bolts as much as 12" from the plates, where the employees had cleaned up and had trammed the miner part of the way to start producing coal.

The cited standard, 30 C.F.R. 75.200, provides in pertinent part as follows:

> The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

According to Inspector Osborne, an MSHA coal mine inspector, the roof in the cited area was loose and 12-14 inches of material had sloughed out around one full row of bolts on one side. At the time he observed this condition, the operator was engaged in moving equipment through this area and one man was observed directly underneath where this roof had sloughed out. It was stipulated that there were four people on the section, that there was robbing work going on, taking the pillars out, and that the operator was planning on using this as a haulage road.

The inspector assessed the gravity of the violation as highly likely to produce or result in a lost work days or restricted duty accident involving four persons because, in his words, "it's a real tender top" and they were doing robbing work at the time.

Mr. Ball, testifying on behalf of the respondent, agreed that action should have been taken in this area, but that he didn't see anything particularly serious about it. He believes that if he would have put up three or four timbers, he could have went ahead and used it as a roadway. His rationale for that position is that they were using 60-inch resin bolts in this area as opposed to 42-inch "traditional bolts".

The Secretary also presented the testimony of Mr. Roger Dingess, a roof control and ventilation specialist, employed as such by MSHA for the last seven years.

Mr. Dingess, after hearing the prior testimony of both Inspector Osborne and Mr. Ball, testified that based on the inspector's description of the affected area and the roof conditions he found there, including the fact that 60-inch resin bolts were used in this area, it was his opinion that the occurrence of a roof fall was highly likely. He went on to state that when you have sloughing out around the roof bolts, continuing bolt after bolt in a line, it weakens the roof and lets it swing on the remaining bolts on the other side. This creates an imminent danger, in his opinion, which when they are taking the pillars out, as they were here, makes it highly likely that a roof fall would occur.

To abate this condition, the area was re-supported with timbers and dangered-off and a new roadway was established.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 75.200, by a preponderance of the credible evidence adduced in this case, and also find that the violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard. I accept the testimony of Messrs. Osborne and Dingess that there was a reasonable likelihood that the cited hazard could have resulted in at least serious, if not fatal, injury to a person or persons. I therefore conclude that the violation was significant and substantial and serious. Mathies Coal Company, 6 FMSHRC 1 (1984). The citation, accordingly, will be affirmed.

Related Order of Withdrawal No. 3001603, issued pursuant to section 107(a) of the Act reads as follows:

> The roof on the 002-0 pillaring section was loose and had sloughed out around the roof bolts as much as 12" from the plates, where the employees had cleaned up and had trammed the miner part of the way to start producing coal.

Section 107(a) of the Act provides in part as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those 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 imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The limited issue herein is whether such a condition or practice existed at the time this order was issued. According to Inspector Osborne, the imminent danger order was issued because of a "condition" in which he observed a miner proceed beneath an area of dangerous roof. Inspector Osborne maintained that this "condition" constituted an "imminent danger" because the inadequately supported roof might fall and kill or seriously injure the miner. I find that the hazard was such that the cited condition "could reasonably be expected to cause serious physical injury". Accordingly, I find that there was an imminent danger and will affirm Order No. 3001603.

II. Docket No. KENT 88-169

Citation No. 3166112, issued on April 5, 1988, pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. 75.303 and charges as follows:

> An adequate preshift examination was not being made for the above mentioned mine. The seals located on the first right panel off the main intake cannot be examined because of loose roof and water. This condition has been recorded in the preshift record book and in the mine foreman's report of hazardous conditions, February 2, 1988.

The cited standard, 30 C.F.R. 75.303, requires that operators examine seals and doors to determine whether they are functioning properly prior to each shift.

Roger Dingess issued this citation because the seals on the first right panel on the intake side had not been inspected by the operator during pre-shift examinations of this area between February 2, 1988, and the date the citation was issued, April 5, 1988. This is a period in excess of two months that these seals were not inspected allegedly due to a build-up of water and poor roof conditions extant in that area. Mr. Dingess is of the opinion that the loose roof could have been scaled down and the water could have been pumped out, which would have allowed them to examine those seals.

A request to relocate these seals was made to MSHA by the operator on February 24, 1988. But because the mine's ventilation plan expired on March 1, 1988, this request was not approved until March 28, 1988. I note here that as of April 5, 1988, when the citation was issued there was no indication that the operator was moving the seals or even preparing to move the seals. Nor was the operator examining the existent seals. Apparently, the material necessary to construct the new seals was present on the surface, but the respondent had made no effort to begin construction prior to the issuance of the citation.

The required preshift examinations of these seals were particularly important in order to detect any weakness or deterioration which might allow the seals to crush out and possibly expose the miners to black damp, which is a lack of oxygen in the air, and which very likely could have been built-up behind the old permanent ventilation seals. Furthermore, the poor roof conditions could significantly enhance the possibility of the seals crushing out in the first instance.

Mr. Dingess opined that it was "highly likely" that a fatal accident could occur involving fourteen (14) miners because of the poor roof conditions which existed in the area and the length of time for which the seals had not been examined. He also testified that in his experience there was black damp behind every seal that he has ever seen, if it had been there for awhile.

In my opinion, the record in this case concerning this citation will not support a gravity finding of "highly likely" because there is no evidence of what the actual physical condition of the seals was on the date the citation was issued.

The more appropriate finding, which I believe the record will support, is "reasonably likely".

A violation is properly designated as being of a significant and substantial nature if, based on 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. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 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 a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-74 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

I find the violation is proven as charged. When Mr. Dingess discussed this situation with Harley Wilder, the Mine Superintendent, Mr. Wilder admitted that they had not been inspecting the seals. Mr. Ball also admitted at the hearing that the mine supervision got a little relaxed on the seals once they put in for the relocation. They let the water build-up in that area after that.

The second, third and fourth prongs of the test are adequately met by the unrebutted and really unopposed testimony of Mr. Dingess to the effect that the operator's failure to inspect these seals for two months left the miners in the unenviable position of not knowing the condition of the subject ventilation seals. Given the poor roof conditions in that area as well, it was reasonably likely that one or more of these seals could fail in that amount of time and release black damp which certainly could lead to serious or even fatal injuries. Accordingly, I also find that the violation was "significant and substantial" and serious.

I further find that the violation was the result of inexcusable aggravated conduct, constituting more than ordinary negligence, on the part of the operator's superintendent, Harley Wilder, which conduct is clearly imputable to the operator. The violation was therefore caused by the operator's unwarrantable failure to comply with the cited mandatory standard. Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

Based on the foregoing, the high degree of negligence exhibited, if not reckless disregard for the consequences, and the seriousness of the violation, section 104(d)(1) Citation No. 3166112 was properly issued and will be affirmed herein.

III. Docket No. KENT 88-208

There are seven section 104(d)(1) Orders and a single section 104(d)(2) Order included in this docket. Mr. Ball, on behalf of the respondent, admits all eight of the violations that are cited in this docket, has no particular objection to those being found to be "significant and substantial" but strenuously denies the unwarrantable nature of these eight orders.

Order No. 3175428

Order No. 3175428, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.1722(b) and charges as follows:

> The No. 2 belt conveyer head drive was not guarded to prevent persons from being caught between the belt and pulley.

Section 75.1722(b) provides that: "Guards at conveyordrive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley".

Mr. Dingess issued this order on April 18, 1988, when he found that the No. 2 belt conveyor head drive was not guarded. He observed a miner greasing this belt drive unit at that time while the belt was in operation without the guard. The miner stated that the guard for this head drive had been removed for several days.

The respondent admits the violation and I further find it to be a significant and substantial violation. The head drive unit was not guarded as to prevent a miner from becoming caught

between the belt and the pulley. Furthermore, the miner stationed there must grease the belt while exposed to the moving parts, open gears and rollers. Therefore, I find it to be reasonably likely that this violation could result in a permanently disabling injury involving one miner. Mathies, supra.

I also find it to be a serious violation and caused by the unwarrantable failure of the operator to comply with the cited mandatory standard. The operator's superintendent who was in charge of performing the preshift examination in this area had actual personal knowledge the guard was missing and yet took no action to replace it. This amounts to aggravated conduct on the part of the operator because this condition was allowed to exist for several days while a miner was assigned to this duty station.

Order No. 3175428 will be affirmed.

Order No 3175429

Order No. 3175429, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.1722(b) and charges as follows:

> A guard was not provided for the No. 1 belt conveyor tail roller.

Mr. Dingess found that a guard was also not provided for the No. 1 belt conveyor tail piece, which was located in the same general area as the missing guard cited in Order No. 3175428, supra.

The respondent admits the violation and the same rationale applies to my finding that this violation was also significant and substantial and occurred as a result of the operator's unwarrantable failure to comply with the cited standard.

Accordingly, Order No. 3175429 will be affirmed herein.

Order No. 3175430

Like the previous two orders in this docket, Order No. 3175430 was issued on April 18, 1988, pursuant to section 104(d)(1) of the Act, and alleges a violation of the regulatory standard at 30 C.F.R. 75.1722(b), charging as follows:

> The 002 Section belt conveyer head drive was not guarded to prevent persons from becoming caught between the belt and the pulley.

Herein, Mr. Dingess found that a guard was not provided for the 002 section belt conveyor head drive unit. This particular head drive unit had never been guarded, even though the belt had been in place for approximately a month.

Once again, the respondent admits the violation and my rationale for finding the violation to be significant and substantial, serious, and an "unwarrantable failure" is the same as for the previous two orders in this docket.

Accordingly, Order No. 3175430 will also be affirmed.

Order No. 3175435

Order No. 3175435, issued pursuant to section 104(d)(1) of the Act, alleges a non-"S&S" violation of the regulatory standard at 30 C.F.R. 75.302 and charges that line brattice was not installed as required to provide adequate ventilation to the working faces.

Mr. Dingess issued this order on April 19, 1988, when he observed that a line brattice or other approved device was not being used to provide air to the face while active mining was going on in the Number 3 entry. There was no detectable movement of air in this entry.

The operator admits the violation.

The Secretary also charges that the violation was caused by an unwarrantable failure to comply with the standard in question. However, as stated earlier in this decision, in order to establish "unwarrantable failure," the Secretary must establish by a preponderance of the reliable and probative evidence that the operator has engaged in "aggravated conduct constituting more than ordinary negligence". Emery Mining Corp., supra. Rather than evidence of aggravated conduct, what this record reflects, at least as of April 19, 1988, is at best the educated guess of the inspector and at worst, speculation on the part of the inspector. I simply cannot find any hard evidence of aggravated conduct or gross negligence on the part of the operator with respect to this violation. The Secretary urges that the operator's failure to install this line brattice was a "practice" at this mine and for this reason the violation should be found to have occurred as a result of the operator's "high" negligence. However, there is no evidence of when this "practice" began, for how long it continued or who knew about it, ordered it or condoned it. Indeed, I don't find any evidence in the record that such a "practice" existed on or before April 19, 1988, although I concede it certainly may very well have. Therefore, I find that the instant order improperly concluded that the

admitted violation resulted from Sterling's unwarrantable failure to comply with the mandatory standard. Accordingly, Order No. 3175435 will be modified to a citation issued under section 104(a) of the Act, and affirmed as such.

Order Nos. 3175436, 3175438 and 2995460

These three orders, all issued pursuant to section 104(d)(1) of the Act, all allege a violation of the mandatory standard found at 30 C.F.R. 75.301 and essentially charge that the quantity of air reaching the last open crosscut for the section mentioned therein was less than the 9000 cfm required. The operator admits all three violations.

Order No. 3175436 was issued by Mr. Dingess on April 19, 1988, when he measured the quantity of air reaching the last open crosscut on the 001 section at 7,488 cfm. Because less than 9000 cfm were reaching the last open crosscut, this was a violation of the cited standard.

The respondent admits the violation, but challenges the alleged unwarrantability. I must concur with Sterling on this one. As of this date, April 19, 1988, there was no direct evidence of aggravated conduct on the part of the operator with respect to this violation. The basis for issuing this order was Dingess suspected that they were "short-circuiting" the air, manipulating it from one section to the other, depending on where an inspector was in the mine. He also saw a curtain laying down in the return and believes that he knows what the company used it for, i.e., "short-circuiting" the air and sending it to whatever section the inspector was on. The operator, however, has several potential alternative explanations for that curtain being down and flatly denies manipulating the air from section to section.

The issue of unwarrantability concerning this particular order must be settled with the evidence that was either in existence at the time the inspector issued the order or at least that relates back to the time the order issued. He testified he issued the instant order on the basis of his suspicion that the operator was improperly regulating the air from one section to another on April 19. In my opinion, a suspicion that the operator is willfully violating a standard does not equate to evidence of aggravated conduct on the part of the operator, at the particular instant of time the order is issued, even if subsequent investigation a day, a week or a month later establishes that the operator is knowingly and willfully violating the standard at that subsequent point in time. Herein, evidence of subsequent violations of the same nature and of the same standard to prove the degree of negligence that existed on

April 19 is not of sufficient weight to establish that the instant violation was an "unwarrantable failure" to comply.

Therefore, Order No. 3175436 will be modified to a citation issued under section 104(a) of the Act and affirmed.

The other two orders, issued the next day, on April 20, 1988, by Mr. Dingess and Inspector Blume present an entirely different situation. To confirm his suspicions of the previous day, on April 20, Mr. Dingess brought another inspector with him to Sterling's No. 5 mine. They synchronized their watches and he proceeded to the 001 section while Inspector Blume went to the 002 section. At exactly high noon, they both took anemometer readings of the quantity of air reaching the last open crosscut on their respective sections. Inspector Blume measured only 1,512 cfm reaching the last open crosscut on the 002 section and so issued section 104(d)(1) Order No. 2995460 for an "S&S" violation of 30 C.F.R. 75.301. Mr. Dingess meanwhile measured 7,704 cfm in the last open crosscut on the 001 section and issued Order No. 3175438 for a "non-S&S" violation of the same section.

This was an excellent investigative technique and makes an iron-clad case for an "unwarrantable" violation on both sections. On April 19th, the operator was put on actual notice that there was a ventilation problem at the very least on the 001 section and perhaps on both sections, one being related to the other, ventilation-wise. Furthermore, the operator abated the violative condition on the 001 section on the 19th by making adjustments that the operator knew would adversely effect the air on the 002 section. Therefore, the two ventilation violations found on the 20th were without a doubt the result of the operator's aggravated conduct and existed with the operator's actual knowledge and disregard for the mandatory standard involved.

Additionally, I find the extremely low air Inspector Blume found at the last open crosscut on the 002 section to be a significant and substantial violation of the standard as well, as his testimony concerning the reasonable likelihood of a significantly increased health hazard to the miners working there is unrebutted and credible, and I do credit it in making this finding.

Accordingly, Order Nos. 3175438 and 2995460 will be affirmed in their entirety.

Order No. 3172666

Order No. 3172666, issued on June 27, 1988, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. 75.303 and charges as follows:

> During a discrimination complaint investigation the investigator determined through review of the preshift examination books and statements from the operator that the miners worked from April 19th to May 3, 1988, without a preshift examination being conducted of the areas worked on the second shift (maintenance shift).

Inspector Blume issued this order because the operator had failed to have a certified person perform a preshift examination of the mine prior to the second shift between April 19 and May 3 of 1988. The second shift was a maintenance shift employing three miners and a foreman. Before April 19, one Danny Elliot was the second shift foreman and the person certified to perform the preshift examination. He was fired on April 19, 1988, and not replaced until May 3, 1988. In the meantime, no preshift examination was performed prior to the start of the second shift.

The operator contends the preshift examinations were being done, but just not recorded. I specifically reject that contention as incredible. As far as I am concerned, the preshift examination book for the mine for the period between April 19, 1988 and May 3, 1988, establishes by a preponderance of the credible evidence available that preshift examinations were not being performed for the second shift during that entire time period.

There is additional evidence to that effect. Mr. Ronnie Brock, a special investigator for MSHA, had occasion to investigate this allegation concerning preshift examinations as part of a discrimination complaint investigation involving two discharged miners at Sterling's No. 5 Mine. It was reported to him by the other two miners who continued to work the second shift that from April 19, 1988, until May 3rd there was no preshift examination performed prior to the second shift. Furthermore, they told him that complaints were made to Harley Wilder, the Mine Superintendent about the lack of a foreman and the lack of a preshift examination on the 19th of April. The next night, the 20th of April, the same complaints were voiced to Mr. Ralph Ball, the President of Sterling. Reportedly, Mr. Ball indicated that he would try to have them a foreman by the following week, which would have been around the first part of May. I recognize the hearsay nature of this testimony, but it is corroborated by the documentary evidence of the preshift

examination book itself and I do give it weight, particularly on the issue of "unwarrantability".

I also recognize that the Commission recently rejected the notion that any violation of section 75.303 is per se significant and substantial in nature. Birchfield Mining Co., 11 FMSHRC 31, 35 (January 1989). The Mathies test is still the proper test to apply in making the "S&S" finding and applying it here, I find that the respondent's failure to preshift this mine on the second shift for some two weeks running is a significant and substantial violation of the mandatory standard. There is a violation of the mandatory standard established, if not admitted. There is also a discrete safety hazard presented in my opinion in that two miners worked the second shift for some two weeks without a foreman present and without a preshift examination being conducted approximately a mile underground while a myriad of other violations and hazards existed, as demonstrated earlier in this decision. At least some of the other violations that existed at that time were themselves significant and substantial and some violations, particularly ventilation-related ones were repetitive in nature as well. I believe the mining conditions and lack of supervision were such during this period of time that the failure to inspect and report any violative or hazardous conditions prior to these two men going into the mine constituted an "S&S" violation of the preshift standard because in my opinion there was a reasonable liklihood that the hazard contributed to would have resulted in an event in which there very well could have been a serious injury.

Order No. 3172666 will be affirmed in its entirety.

Civil Penalty Assessments

A computer printout entered into evidence as Petitioner's Exhibit No. 16, indicates to me that this operator has a relatively lengthy history of roof control and ventilation violations in the two year period prior to April 17, 1989. This is not a good sign, to say the least.

There is some question raised as to the operator's financial ability to pay these assessments and remain in business. At the hearing the respondent put into evidence a document that purports to be a financial statement. However, this statement is unaudited and the CPA firm that submitted it attached a very big disclaimer to it that renders it all but worthless for its intended use, i.e., to prove the respondent's inability to pay. Mr. Ball also testified that the No. 5 Mine is now closed, but the No. 8 Mine was opened in latter 1988. The record really does not contain any substantial evidence in a usable form concerning the operator's financial condition. Therefore, I find that the

civil penalties ordered herein, infra, are appropriate considering the size of the operator and such penalties will not cause the company to discontinue in business.

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of civil penalties is warranted as follows:

Citation/Order No.	Date	Standard	Penalty
3001604	9/11/87	75.200	$ 1100
3166112	4/5/88	75.303	1200
3175428	4/18/88	75.1722(b)	500
3175429	4/18/88	75.1722(b)	500
3175430	4/18/88	75.1722(b)	500
3175435	4/19/88	75.302	200
3175436	4/19/88	75.301	200
3175438	4/20/88	75.301	400
2995460	4/20/88	75.301	500
3172666	6/27/88	75.303	750

ORDER

1. Citation Nos. 3001604 and 3166112 ARE AFFIRMED.

2. Order Nos. 3001603, 3175428, 3175429, 3175430, 3175438, 2995460, and 3172666 ARE AFFIRMED.

3. Order Nos. 3175435 and 3175436 ARE HEREBY MODIFIED to citations issued under section 104(a) of the Act, AND AFFIRMED.

4. Respondent, Sterling Energy, Inc., IS ORDERED TO PAY civil penalties totaling $5850 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge