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SOL (MSHA) V. HARLAND CUMBERLAND COAL
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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 88-191 A.C. No. 15-11964-03541
v.	H-2 Mine
HARLAN CUMBERLAND COAL COMPANY, RESPONDENT	Docket No. KENT 88-192 A.C. No. 15-07201-03559 C-2 Mine

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Secretary; Mr. Wallace Harris, Safety Director, and Mr. Clyde V. Bennett, President, Harlan Cumberland Coal Company, Grays Knob, KY, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alledged safety violations under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

Citation No. 3163046

1. On May 11, 1988, MSHA Inspector Jimmy A. Tankersley issued Citation No. 3163046 because he found that the Jeffrey 1028 continuous miner in the 001 working section was not maintained in a permissible condition. Specifically, there was

an opening in excess of. 005 inch in the main breaker box cover on the continuous miner.

2. The inspector considered Harlan Cumberland's H-2 Mine, an underground coal mine, to be a gassy mine, i.e., a mine which released methane. Because the mine is below the water table, he was particularly attentive to its gassy nature. He took a number of methane readings during his inspection, and found methane in all five entries Respondent was driving.

3. To substantiate his methane-detector readings, the inspector also took bottle samples of air, including one in the area of the cited continuous miner. Although the area was well ventilated, analysis of an air sample showed. 4% methane. The inspector believed that this level of methane in a well-ventilated area indicated a risk of a substantial increase in the methane level. He also considered the fact that the continuous miner was being used to advance, i.e., it was cutting coal and proceeding into virgin territory and that there was no way to predict how much methane would be in the virgin territory. He considered the possibility that, when removing a cut of coal, the miner could hit a methane gas pocket. The inspector was aware of a mine, like H-2 Mine, in which there generally was a low methane content most of the time but a continuous miner had cut into a pocket of methane. The inspector testified that, "there's no way to determine that there's not an air pocket of methane . . somewhere in the coal bed" (Tr. 27).

4. The inspector expected that, if the air quantity were reduced, e.g., through a failure of the ventilation system components, the methane level would probably increase.

5. The inspector determined that there had been a recent, significant rise in methane accumulation at the H-2 Mine and he recognized this as an indication that change was ocurring someplace in the coal bed of the mine. On February 18, 1988, air samples showed a reading of 8,700 cubic feet of methane found in 24 hours when the air quantity was 60,000 cubic feet per minute. Just three months later, in May, 1988, the methane reading was 22,000 cubic feet of methane in 24 hours when the air quantity was even greater, i.e., 76,000 cubic feet per minute.

6. The inspector's experience was that methane usually accumulates between one and twelve inches from the roof of the mine. It is most violently explosive at 10%, but its explosive range is 5% - 15%. He testified that methane tends to accumulate where air movement is reduced, such as in the face area when coal is not being cut and when ventilation is not so strong as it is when coal is being cut.

7. An electrical arc is a normal part of the operation of a continuous miner.

8. Morris Lewis, an electrical specialist with MSHA, also testified at the hearing. Mr. Lewis distinguished a methane ignition from an explosion. An ignition, he said, occurs when methane alone catches fire; ignitions are confined to the particular area where methane has accumulated. An explosion, on the other hand, would occur when a methane accumulation ignited and propagated an explosion of float coal dust, coal dust, or other combustible material. The explosion could involve an entire mine. It was the electrical specialist's opinion that, in a wet, relatively dust-free mine such as H-2, with the level of methane present in this mine, and with the. 005 inch gap in the breaker box lid, if a pocket of methane were hit in the course of mining there would be a reasonable likelihood of an ignition with serious injuries to several miners.

Citation No. 3162239

9. On March 23, 1988, miners at the Harlan Cumberland C-2 mine were advance mining in the 002 section. The continuous miner had broken down after operating for about one hour that day. About 1:45 p.m., MSHA Inspector Lawrence L. Rigney found. 1% to. 2% methane in the face area. Methane is usually found in areas below the water table; Inspector Rigney thought it unusual to find methane at the higher elevation at which the 002 Section was located. It was not only unusual to find a methane concentration at that elevation, but Inspector Rigney was surprised to be able to detect the methane with his spotter. Usually the concentration of methane in higher-altitude areas is discernible only through the more exacting laboratory analysis of air bottle samples. In at least 15 previous visits to this mine, Inspector Rigney had not found enough methane in the mine to detect it with his spotter.

10. Mine foreman David Mitchell accompanied Inspector Rigney as he tested for methane throughout the 002 Section. Mr. Mitchell made a methane check each time Inspector Rigney made one.

11. Inspector Rigney made his first methane check (finding. 1% to. 2% methane) where the continuous miner was located, in the right break, number three entry.

12. As he continued through the section, Inspector Rigney found that there was an abandoned area adjacent to the main intake air course. Curtains were hanging across all but one part of the entry to the abandoned area.

13. Inspector Rigney walked back up the cross entry to the timber line (roof posts) adjacent to the abandoned area and made a second methane check with his spotter. There, when the auxiliary fan was not running, he found. 3% to. 6% methane. There was so little air movement that his anemometer blades would not turn. Inspector Rigney took another reading with his spotter at this place with the auxiliary fan running; the reading rose to. 9% to 1.6% methane. An air bottle sample taken at this location showed. 81% methane.

14. Inspector Rigney took his second air bottle sample at the point marked 4169 on Joint Exhibit 1. His spotter showed. 1% methane. The laboratory analysis of the air bottle sample taken there showed. 14% methane.

15. Inspector Rigney's third air bottle sample was taken at another point marked on Joint Exhibit 1. His spotter indicated. 2% methane at that location; the laboratory analysis of the air bottle sample he took there also showed. 2% methane.

16. The Inspector's fourth air bottle sample was taken at another point marked 3797 on Joint Exhibit 1. With the fan was turned off, his spotter showed. 2% methane. The laboratory analysis of the air bottle sample taken there was. 22% methane.

17. Finally, Inspector Rigney went back to the timber line area and took another reading. With the fan was turned on, his spotter indicated. 9% to 1.6% methane. Mine Foreman David Mitchell's spotter showed 2% methane at a point to the left of the inspector's position and a little closer to the edge of the abandoned area. The laboratory analysis of the air bottle sample, taken at the position marked 3798 on Joint Exhibit 1, showed 1.5% to 2% methane.

18. The abandoned area was separated from the active part of the mine by double rows of timbers to block access. Danger signs and caution boards were posted as well. The abandoned area was not accessible for air testing because of the hazard of roof falls. The pillars had been pulled out so the roof support was gone. Even when the pillars had been in place, roof conditions were adverse. The area had a history of roof failure.

19. A six-inch bore hole had been drilled from the abandoned area to the surface of the mountain. Respondent expected that any methane that accumulated in the abandoned area would be ventilated to the surface through that bore hole bleeder system. The abandoned area had not been sealed before the bore hole was drilled; the bleeder system was not operating effectively. The fan blowing into the mine in the number one entry was supposed to maintain positive air pressure against the

curtains across the entry to the abandoned area, in order to prevent methane from seeping into the air course and across the face where miners were working. There was nothing in the bore hole to pull the air from the abandoned area to the surface. Methane is lighter than air. This fact, coupled with the positive pressure to be maintained by the fan in the number one entry, was expected by Respondent to cause the methane to rise to the mountain surface and dissipate into the atmosphere.

20. However, Respondent operated an auxiliary fan while coal was being produced on this section. With the auxiliary fan operating, the methane was being pulled out of the abandoned area into the active section.

21. Inspector Rigney considered the situation very dangerous. There was an abandoned area where the pillars had been pulled, and the roof conditions were so adverse that there were roof falls even when the pillars were in place. There was an accumulation of methane. There was the potential of another roof fall which could have pushed air from the abandoned area in one big rush of wind out into the intake air course and to the face. The incombustible content of the roadway was less than the allowable 65% in the intake aircourse. There was an accumulation of loose coal, coal dust, and some float coal dust. There was float coal dust in the electrical boxes for the belt conveyors. If there had been a methane ignition, there was enough dust that could have been thrown into suspension and it could have resulted in a coal dust explosion. The inspector thought it reasonably likely that this combination of factors would contribute to a major mine hazard involving fatal injuries. He therefore issued an imminent danger order.

22. Power to the auxiliary fan was disconnected. It took less than a minute for the methane level to go below 1% once the auxiliary fan was turned off. When the methane level dropped below 1%, the equipment was backed out from the face area. Miners proceeded to build cinder block walls that would effectively seal the abandoned area from the active mining area.

23. At the same time that he issued the imminent danger order, the inspector issued Citation No. 3162239, charging a violation of 30 C.F.R. 75.312.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3163046

In its answer, Respondent acknowledges the violation charged in this citation (an impermissible continuous miner), but

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contends that the inspector erred in designating it as "significant and substantial."

Gravity of a Violation

The term a "significant and substantial violation" derives from 104(d)(1) and (2) of the Act,1 and not its civil penalty provision (110(i)). The civil penalty provision simply uses the term "gravity of the violation," as one of six statutory criteria to consider in assessing a penalty.

Sections 104(d)(1) and (2) grant an administrative injunctive power to the Secretary of Labor quite different from the civil penalty authority in 110(i). Sections 104(d)(1) and (2) authorize the Secretary to withdraw miners from a mine if a certain chain of violations occurs. The chain must begin with a finding of a violation which, though not an imminent danger,2 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 is also "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . . . " If a mine inspector finds such a violation, 104(d)(1) requires that the inspector "include such finding in any citation given to the operator . . . . " It is this finding that begins a 104(d)(1) chain that may lead to a 104(d)(2) order withdrawing miners from the mine or a part of it.

This administrative injunctive power is strictly construed by the Commission, which has ruled that, to prove a "significant and substantial" violation, the Secretary must prove "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 (1981)).

The Commission has not stated how its definition of a "significant and substantial" violation differs from the Act's definition of an "imminent danger" (see n. 2, infra). However, inasmuch as 104(d)(1) excludes an "imminent danger" from its application, the Commission's definition of an S & S violation must mean a level of gravity below an imminent danger.

"Gravity of the violation," as used in 110(i), i.e. for civil penalty purposes, is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of 104(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the importance of the operator's conduct, in relation to the Act's purpose of deterring violations and encouraging compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing injury or illness, or even fit into a

probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight.3 Other mine safety and health violations are serious because they may combine with other violations or conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

With this background, I turn to the question of whether the evidence sustains the inspector's finding that the violation was of a "significant and substantial" nature within the meaning of 104(d)(1).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission stated:

> In order to establish that a violation of a mandatory safety 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 Commission has explained further that the third element of the Mathies formulation "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 FMSHRC 1834, 1836 (1984) (emphasis deleted). It has also

stated that, in accordance with 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). Applying these principles to the instant case, I conclude the reliable evidence sustains the inspector's finding that the violation was of a significant and substantial nature.

In United States Steel Mining Co., 8 FMSHRC 1125 (1985), the Commission reversed a judge's holding that a ventilation violation was not significant and substantial. The Commission observed that, although "methane measured in the section revealed a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made "in terms of continued normal mining operations' [citing U.S. Steel Mining Co., Inc., 6 FMSHRC at 1574]," and if "normal mining operations were to continue, a rapid buildup of methane could reasonably be expected." 8 FMSHRC at 1130. These considerations also apply in the instant case.

In Texasgulf, Inc., 10 FMSHRC 498 (1988), three continuous mining machines were used in a mine containing methane. They were not maintained in a permissible condition in that their flange joints had gaps exceeding. 004 inch. The inspector detected no methane on his hand-held detector. Bottle samples indicated only. 005% to. 009% methane in the mine atmosphere. Just as in the case at hand, the inspector determined that the violations could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Texasgulf, as Respondent does here, conceded the violations but disputed the inspector's finding that the violations were significant and substantial. The Commission, in affirming the judge's decision that the violations were not significant and substantial, stated:

> We recognize that permissibility violations have the potential for serious danger. Nonetheless, whether a permissibility violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. [Emphasis added.]

The non-coal mine in Texasgulf (a trona mine) was very different from the Harlan Cumberland H-2 Mine. Texasgulf's mine showed methane levels of. 005% and. 009%. The methane levels in

the Harlan Cumberland Coal H-2 Mine were between 45 and 80 times greater. The highest level of methane ever detected in Texasgulf's mine was. 2%, far below the level detected in Harlan Cumberland's mine. The Texasgulf mine's geological features were not conducive to methane liberation. Thus, the Commission noted that the geological structure of the unmined portion of the Texasgulf mine bed was essentially the same as that which had been mined, showing no presence of methane-producing geological factors. Further, the Commission noted that the record established a substantial factual basis for explaining the Texasgulf mine's prior history of low methane liberation and for reasonably expecting low methane in the future. However, in the instant case the inspector found an approximately three-fold increase in the amount of methane detected in the mine during the three months before the citation. This degree of buildup was a warning that something was changing in the coal seam.

The Commission in Texasgulf stated that, "[I]n determining whether a violation is of a significant and substantial nature the appropriate question is whether there is a reasonable likelihood of . . . a sudden liberation of methane." Texasgulf at 503. Given the evidence of Texasgulf mine's history of low methane emissions as well as the evidence establishing a reasonable expectation of low methane emissions, the Commission concluded that there was substantial evidence to support the judge's holding that the violations were not significant and substantial. However, here it is evident that, given the sudden increase in methane liberation over the three months prior to the citation, changes were occurring in the coal bed at Harlan Cumberland's mine. Those changes showed a reasonable likelihood of a sudden liberation of methane if the continuous miner hit a methane pocket as mining advanced.

No witness testified on behalf of Respondent about the circumstances leading to the issuance of Citation No. 3163046. The inspector was the only witness at the hearing with first-hand knowledge. He found the impermissible condition of the continuous miner to be a discrete safety hazard reasonably likely to cause serious injuries. The inspector's independent judgment is an important element in making significant and substantial findings, which should not be lightly set aside. National Gypsum, supra.

I find that the reliable evidence sustains the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a civil penalty of $200 is appropriate for this violation.

Citation No. 3162239

This citation, as amended, alleges a violation of 30 C.F.R. 75.312, which provides

> 75.312 -- Air passing through abandoned, inaccessible, or robbed area.
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> Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine. No air which has been used to ventilate an area from which the pillars have been removed shall be used to ventilate any working place in a mine, except that such air, if it does not contain 0.25 volume percentum or more of methane, may be used to ventilate enough advancing working places immediately adjacent to the line of retreat to maintain an orderly sequence of pillar recovery on a set of entries.

In its answer, Respondent acknowledges the violation alledged in Citation No. 3162239, but contends that the inspector erred in designating it as a "significant and substantial" violation.

The regulation requires that air from an abandoned area not be allowed to ventilate any working place in a mine.

Miners at the Harlan Cumberland C-2 mine were in advance mining in the 002 Section. There was an abandoned area adjacent to the area where miners were working. Curtains had been put up but did not cover the entire span of the entry to the abandoned area.

Pillars had been removed from the abandoned area. Roof conditions in the abandoned area were adverse; even when the pillars were in place, there had been several significant roof falls. The abandoned area was separated from the active part of the mine with double rows of road timbers to block entry. The abandoned area was not accessible for inspection or air testing because of the hazard of roof falls.

An auxiliary fan was operated when the continuous miner was operating in order to provide sufficient air movement to the face of the coal. However, the auxiliary fan was powerful enough to override the positive pressure created by the fan in the number one entry, allowing air from the abandoned are to move into the working area of the 002 section and across the face.

Respondent did not prevent the abandoned area air from going into the working area of the 002 Section. As a result, there was a buildup of methane in the working area, creating a dangerous situation. The evidence amply sustains the inspector's finding that the violation was of a "significant and substantial nature."

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of $275 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Respondent violated the safety standards as alleged in Citations Nos. 3163046 and 3162239.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3163046 and Citation No. 3162239 are AFFIRMED.

2. Respondent shall pay the above civil penalties of $525 within 30 days of this Decision.

William Fauver
Adminstrative Law Judge

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FOOTNOTES START HERE

1. Sections 104(d)(1) and (2) provide:

"(d)(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 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 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 person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such are 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 (i), 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 violation. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

2. Section 3(j) of the Mine 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." 30 U.S.C. 802(j).

3. For example, a stop-look-and-listen safety law for public service vehicles at railroad crossings may be considered an important safety standard even though a particular instance of violation may not show a "reasonable likelihood" of collision with a train.