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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 PROCEEDING

Docket No. WEST 88-165
A.C. No. 42-01211-03541

v.

Trail Mt. No. 9 Mine

BEAVER CREEK COAL COMPANY,
RESPONDENT

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado
for the Petitioner;
David M. Arnolds, Esq., Thomas F. Linn, Esq.,
Beaver Creek Coal Company, Denver, Colorado,
for the Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act," charging Beaver Creek Coal Company (Beaver Creek) with a violation of three mandatory safety standards found in Title 30 of the Code of Federal Regulations.

Beaver Creek filed a timely answer to the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs filed, and the matter was submitted for decision.

Citation No. 3227060

Citation No. 3227060 alleges a Section 104(a) S&S violation of 30 C.F.R. 75.316. The cited safety standard provides as follows:

75.316 Ventilation system and methane
and dust control plan.

[Statutory Provisions]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Beaver Creek's ventilation plan does include requirements for stoppings. The plan provides:

"All ventilating controls such as stoppings . . . shall be of substantial and incombustible construction, installed in a workman-like manner and maintained in the condition to serve the purpose for which they were intended. The intent being to direct the air to the sections and working faces, and to separate entries for escapeway purposes." (Joint Exhibit 24)

The citation under the heading "Condition or Practice" charges a violation of 30 C.F.R. 75.316 as follows:

The #13, 14, 15, 20, 21, 33, 39, 41, 43 and 44 stoppings on the South mains belt entry were not maintained. The back of the stoppings have crushed and a half of the hollow blocks have fallen off. The stoppings are used to separate the belt entry from the intake entry. The intake entry is used as a designated intake escapeway. The above conditions do not comply with the approved ventilation system and methane and dust control plan.

Inspector Huggins testified that he inspected the stoppings which were used to separate the belt entry from the intake entry and to direct airflow. The stoppings were constructed with hollow cement cinder blocks that were 6 to 8 inches wide by 8 inches high by 15 1/2 to 16 inches long. Huggins observed that the back-half of some of the cinder blocks had broken off. On cross-examination, however, Inspector Huggins testified that there were no holes or breakthroughs in any of the stoppings.

Beaver Creek at the hearing conceded a non-S&S violation of the cited regulation. It vigorously maintained, however, that the violation was not significant and substantial pointing out that none of the stoppings at issue had been broken through and the purpose for the stoppings was in no way compromised.

The primary issue before me is whether the alleged violation of 30 C.F.R. 75.316 is "significant and substantial" within the meaning of the Act.

Beaver Creek's ventilation plan, quoted above, provides that stoppings "shall be . . . maintained in the condition to serve the purpose for which they were intended" and that this intent was "to direct air to the sections and working faces, and to separate entries for escapeway purposes" (Joint Exhibit 24, p. 19). Since the undisputed evidence established that none of the stoppings were broken through, the stoppings at the time of inspection were serving their intended purpose which was "to direct the air to the sections and working faces, and to separate entries for escapeway purposes." It is clear from Inspector Huggins' undisputed testimony that no hazards were presented by the stoppings unless they were in fact broken through in some sort of explosion (Tr. 474).

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it 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." 30 U.S.C. 814(d)(1). A violation is properly designated significant and substantial "if, based on the particular facts surrounding that 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, 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 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 (August 1984) (emphasis deleted). In accordance with the language of Section 104(d)(1), 30 U.S.C. 814(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 (July 1984).

Applying these principles to the present case I find that the evidence presented at the hearing is insufficient to find that the cited violation was of a significant and substantial nature.

It is recognized that a violation of 30 C.F.R. 75.316 has the potential for serious danger. Nevertheless, whether such a violation is significant and substantial "must be based on the evidence in the record of the particular facts surrounding the violation, including the nature of the mine involved." Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 20, 1988).

The discrete safety hazard contributed to by the violation at issue is that an explosion or major fire could blow out a stopping and this would contaminate the intake escape (Tr. 474). The key question is whether there was a reasonable likelihood of a major fire or explosion that would break through the stopping or stoppings in question had normal mining operations continued.

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Such an occurrence would require a confluence of factors. Although there is a chance such a fire or explosion could occur there is insufficient evidence to conclude that there was a reasonable likelihood of such occurring had normal mining operations continued.

Citation No. 3227060 is therefore modified from a 104(a) S&S violation to a 104(a) non-S&S violation.

Citation No. 3227081

This Section 104(a) citation alleges a significant and substantial violation of 30 C.F.R. 77.502. At the hearing Beaver Creek agreed to withdraw its contest and pay the Secretary's initial proposed penalty of \$91.00. This disposition and penalty is consistent with the Act.

Citation No. 3227084

This citation alleges a Section 104(a) significant and substantial violation of 30 C.F.R. 75.400. At the hearing the Secretary moved to modify the citation by redesignating it a 104(a) non-S&S violation. Beaver Creek agreed to withdraw its contest to the newly redesignated non-S&S violation and pay the Secretary's amended proposed penalty of \$20.00.

Upon review and evaluation I find the agreed settlement disposition of Citation No. 3227084 is consistent with the criteria set forth in Section 110(i) of the Act. The settlement disposition of this citation is approved.

Penalty Assessment for Citation 3227060

In assessing a civil penalty under Section 110(i) of the Act the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. A print-out of Beaver Creek's assessed violation history (Ex. H, J - 1) shows violations within the two-year period prior to the inspection leading to the issuance of Citation No. 3227060. The mine inspector evaluated the degree of Beaver Creek's negligence in violating 30 C.F.R. 75.316 as "moderate". Upon evaluation of the evidence I too find that the violation resulted from the operator's

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ordinary negligence which is moderate. Beaver Creek demonstrated good faith in abating the violation. The Secretary's proposed penalty will have no affect on Beaver Creek's ability to continue in business. Beaver Creek produces 1,358,520 tons of coal annually. This includes 300,000 tons of coal produced at the Trail Mountain No. 9 Mine. Considering the size of Beaver Creek's business and the other statutory criteria set forth in Section 110(i) of the Act, the appropriate penalty for this violation is \$100.00

ORDER

1. Citation No. 3227060 is modified to a 104(a) non-S&S violation and as modified is affirmed. A civil penalty of \$100.00 is assessed.

2. Citation No. 3227081 is affirmed and a civil penalty of \$91.00 is assessed.

3. Citation No. 3227084 as modified to a Section 104(a) non-S&S violation is affirmed and a civil penalty of \$20.00 is assessed.

Beaver Creek is directed to pay the Secretary of Labor a civil penalty in the sum of \$211.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge