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MSHA V. PEABODY COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-1231 A.C. No. 15-14074-03587
v.	:	
	:	Martwick Underground Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., the "Act," to challenge four citations issued by the Secretary of Labor against the Peabody Coal Company (Peabody) for alleged violations of regulatory standards. The general issue before me is whether Peabody violated the cited regulatory standards as alleged, and, if so, what is the appropriate civil penalty. Three of these four citations were the subject of a posthearing settlement motion in which a reduction in penalties from $472 to $394 was proposed. Considering the representations and documentation submitted, I find that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and an order directing payment will be incorporated in this decision.

The one citation remaining at issue, Citation No. 3419837, as amended at hearing, alleges a violation of the mandatory standard at 30 C.F.R. 75.301 and charges that "[o]nly 6,750 cubic feet a minute of air was reaching the last open crosscut between Nos. 1 and 2 Rooms (intake to return) in rooms left off northeast entries off four east panel off southwestern submain entries (ID 004)." The cited standard provides in relevant part that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute . . . ."

The essential facts are not in dispute. Federal Mine Safety and Health Administration (MSHA) ventilation specialist Lewis Stanley obtained an air reading during the course of an inspection of the subject mine in the area he determined to be the last open crosscut between the No. 1 and the No. 2 rooms. It is undisputed that the quantity of air at that location was then only 6,750 cubic feet per minute (CFM). It is further undisputed that if Inspector Stanley measured the air at the correct location then Respondent failed to provide the prescribed minimum of 9,000 CFM and there was a violation of 30 C.F.R. 75.301 as charged. Respondent maintains however, that Inspector Stanley did not measure the air at the correct location in that he did not take his reading at the "last open crosscut."

In Secretary of Labor v. Peabody Coal Company, 11 FMSHRC 4, (1989), the Commission stated in regard to the term "last open crosscut" that:

> Although "last open crosscut" is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term. [Footnote reference omitted.] As noted, a "crosscut" is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. [Footnote reference omitted.] The last open crosscut "is an area rather than a point or line . . . ." Henry Clay Mining Co., 3 IBMA 360, 361 (1974).

At hearing, Inspector Stanley provided expert testimony that the crosscut labeled "location of bolter" on Joint Exhibit No. 1 (Appendix A) was the "last open crosscut." Peabody argues however, that since this crosscut was then being roof-bolted and the roof-bolting machine was situated in and partially obstructing that crosscut it was not "open" and therefore could not have been the "last open crosscut." Clearly, however, within the scope of the above definition the concept of "open" in the phrase "open crosscut" refers to the point at which the crosscut is cut through in its total width to complete a passageway between entries. In this regard, I accept the definition provided by the MSHA expert testimony. A definition such as proffered by Peabody depending upon whether mining equipment such as a roof bolter may be within the crosscut at a particular moment would completely void the purpose of the ventilation requirements here cited and indeed is without any legal or rational foundation. Peabody's contention is accordingly rejected.

I also reject Peabody's contention that the violation was not proven because the inspector failed to take his air reading

within the area he defined as the "last open crosscut." It is not disputed that the specific point at which the inspector obtained his reading provided the same reading as if it was actually taken within the last open crosscut. He was apparently unable to take a reading within the crosscut because of the position of the roof bolter. The evidence is clearly sufficient therefore from which it may reasonably be inferred that the quantity of air in the last open crosscut was deficient as charged.

A violation is properly designated as 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 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'd 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria)). 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" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)."

Inspector Stanley testified without contradiction that the subject mine liberates methane and that adequate ventilation is accordingly necessary to remove and/or dilute such methane. He cited a number of ignition sources in the cited set of rooms including the roof bolter within the last open crosscut. It was his expert opinion that a resulting explosion or ignition could result in burn injuries or fatalities. It may reasonably be inferred from this evidence that the violation was "significant and substantial" and serious. I further find the operator chargeable with but little negligence in light of the dearth of

evidence in this regard. Under the circumstances and considering the criteria under section 110(i) I find that a civil penalty of $200 is appropriate.

ORDER

Peabody Coal Company is hereby directed to pay civil penalties of $594 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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