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SOL (MSHA) V. PEABODY COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-223
Petitioner	:	A.C. No. 15-14074-03601
v.	:	
	:	Docket No. KENT 92-635
PEABODY COAL COMPANY,	:	A.C. No. 15-14074-03608
Respondent	:	
	:	Martwick Mine

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, Henderson, Kentucky, for Respondent.

Before: Judge Melick

These consolidated proceedings are before me upon the petitions for civil penalties 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," charging the Peabody Coal Company (Peabody), in two citations and two withdrawal orders, with four violations of mandatory standards. In these cases Peabody challenges only certain "significant and substantial" and "unwarrantable failure" findings made by the Secretary.

Docket No. KENT 92-223

In this case Peabody is charged, in Citation No. 3548378, with one violation of its ventilation plan under the standard at 30 C.F.R. Section 75.316. The citation alleges as follows:

> The old No. 4 unit return was not separated from the track and belt entry at the second cross-cut from the mouth of the unit. The return stopping was knocked out in this location.

At hearing the issuing inspector for the Mine Safety and Health Administration (MSHA), Keith Ryan, testified that he issued the citation at bar upon what he considered to be

violations of the mine operator's approved ventilation plan (Government Exhibit No. 1), and, in particular, page 1, paragraph 4, of that plan under the description of "Permanent Stoppings." Those provisions read as follows:

> Stoppings shall be erected between the intake and return aircourses in entries and shall be maintained to and including the third connecting crosscut outby the faces of the entries on the return side, and shall be maintained to the unit tailpiece on the intake side.

In addition, Inspector Ryan maintains that paragraph 8 on page 3 of the plan was violated. Those provisions read as follows:

> All ventilation controls shall be installed in workman-like manner and maintained in a condition to serve the purpose for which it was intended.

It is, of course, established law that once a ventilation plan is approved and adopted its provisions are enforceable at the mine as mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Carbon County Coal Co., 6 FMSHRC 1123 (1984); Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987).

Inasmuch as Peabody admits the violation charged in the citation, the only issues remaining are whether the admitted violation was "significant and substantial" and the appropriate penalty to be assessed. Inspector Ryan has 6-1/2 years experience as a federal mine inspector and 6 years prior experience working in the coal mining industry. He was at the Martwick Underground Mine on October 1, 1991, performing a regular inspection in the old No. 4 Unit off of the south submain. It is not disputed that at the time of this inspection the old No. 4 Unit was being sealed and equipment and materials were being reclaimed from the unit. Seals had been built across the two intake entries to the unit blocking one entry completely and the other "3/4 of the way" leaving a 2- by -3 foot opening. A stopping had also been constructed at the belt entry to the unit.

Ryan attempted to take an air reading with his anemometer in the old No. 4 Unit but there was insufficient air. He then used a smoke tube and calculated the flow at 6,100 cubic feet per minute (at the red "x" on Joint Exhibit No. 4). Ryan also noted that, while taking an air reading in the return, his "270" monitor sounded indicating the presence of low oxygen. Ryan also noted that miners were working at

this time in the track entry. The violation, according to Ryan, consisted of the removal of one of the permanent stoppings separating the track and belt entries from the return. It had been located in the first cross cut outby the line of pillars in which the seal were being constructed.

Ryan testified that the danger or threat to safety contributed to by the violation was low oxygen. In this regard he testified as follows:

> It was reasonably likely if it was continued to allow the stopping to be out, possible chances of low oxygen coming back onto these men anywhere on this area on the track entry to old No. 4, allowing them to become unconscious or even to die from it (Tr. 48).

He also believed that the absence of the stopping affected the overall ventilation of the old No. 4 Unit:

> It was short-circuiting what little bit of air was coming up the trackage into the belt area, not allowing enough ventilation being established up the track and belt which would have been short-circuited back in the return here.

He further expressed concern with explosions. In this regard the following colloquy occurred:

> When you have possible chance of low oxygen, which it was in this case, people can't come -- overcome and die from lack of oxygen, possible methane content that might be up in the air. In this case with battery motors and power center all in the track entry inby the doors, this allowed the equipment to -- it could cause a spark or even cause an explosion.
>
> * * *
>
> Q. [Government counsel] How can a spark occur --- or how can a sparking cause an explosion in this area?
>
> A. When you have low oxygen, a lot of the time it's being replaced by either methane or carbon monoxide, CO 2, [sic].

> Not knowing what conditions were inby these seals on old No. 4 where the old work -- worked out area out -- inby, I had no idea what kind of a methane content was up in that area.
>
> Q. All right. And if injury occurred based on the things that you've noted, would it be a reasonably serious injury?
>
> A. Yes, sir. Any time it's -- you've got below 19-1/2 percent, there's reasonable likelihood if something was to happen, it'd be highly likely to happen. (Tr. 49-50)

Inspector Ryan illustrated the intended airflow through the old No. 4 Unit on Joint Exhibit No. 4 with pink arrows, using a single arrow for intake and a double arrow for return. He indicated the "short circuiting" effect on the exhibit with orange arrows. The difference between normal airflow (pink) and "short circuited" airflow (orange) is illustrated by an arrow showing airflow from the belt and track entries, through the missing stopping, into the return.

It is not disputed that airflow in the neutral entries is normally in an outby direction from intake regulators. Ryan did not take any measurements of airflow or direction in the belt or track entry. He took a smoke tube measurement in the return which showed little movement, but in an outby direction.

The inspector also obtained an oxygen level reading of 19.4 percent in the return with his hand held detector (marked on Joint Exhibit No. 4 with a green "X"). He took a bottle sample at the same location which, on analysis, showed 19.36 percent oxygen (Government Exhibit No. 3). His detector showed 0.4 percent methane and the bottle sample 0.38 percent. The explosive range of methane is from 5 to 15 percent. The bottle sample also showed 0.36 percent carbon dioxide.

Inspector Ryan testified at one point that the low oxygen in the old No. 4 Unit return was actually caused by the restriction of intake airflow by the partial seals built across the panel's intake entries. Later, Ryan opined, however, that the missing stopping exacerbated the panel's ventilation problems by short-circuiting the airflow to the panel by allowing the restricted intake air to follow another path.

MSHA Health and Safety Officer Robert Phillips testified that oxygen levels below 16.5 percent, the level at which a flame safety lamp is extinguished, represents an immediate threat to individuals. He further explained that at that level it may take a period of time for there to be an adverse effect. Phillips admitted that the subsequent ventilation plan approved for the Martwick Mine after October 1991 allowed stoppings to be taken out when seals were being constructed.

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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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.
>
> 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., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1969).

Respondent argues that the instant violation was not "significant and substantial" for three reasons. It first argues that there is no credible explanation in the record as to how the cited hazards in the return entry could have affected the safety of the miners who were working in the belt/track entries. However, even assuming arguendo, that just as Respondent claims that the miners' working in the belt/track entries, so long as they remained in the same

location, may not have been exposed to the oxygen deficiency hazards alleged by the Secretary, it fails to account for exposure to the described hazards by others, including the inspection party itself.

Respondent next claims that the issuing inspector himself acknowledged that the real cause of the low oxygen and lack of airflow in the return were the partial seals built across the intakes, which was not a violation and not the condition cited.

Inspector Ryan did in fact testify that the reason for the alleged hazard of inadequate ventilation in the old No. 4 unit was the substantial obstruction of the intake entries by the partially built seals, which completely blocked one entry and left only a 2' X 3' opening in the other. However, Ryan also testified that the missing stopping exacerbated the ventilation problems by short circuiting the air flow to the panel thereby allowing the restricted intake air to follow another path. Under the Mathies test, the Secretary need prove only that the violative condition contributed to the discrete safety hazard, not that the condition was the sole cause, or even the major cause, of the hazard. Accordingly, I reject Respondent's argument in this regard.

Finally, Respondent argues that since MSHA subsequently approved a revision to the ventilation plan for the subject mine allowing stoppings to be removed during the sealing of panels, MSHA does not in fact believe that removal of the subject stopping in fact created any health or safety hazard. While it appears to be true that a revision of this nature was subsequently made in the ventilation plan, this evidence is not sufficient in itself to permit the inference suggested by Respondent. The ventilation plan must be reviewed in its entirety and there may very well have been other corrective procedures required or implemented along with the noted revisions and mining conditions may have changed subsequent to the violation cited herein.

Under the circumstances I find that the cited violation was indeed "significant and substantial" and of high gravity. Considering all of the available evidence in reference to the criteria set forth in Section 110(i) of the Act, including the Inspector's undisputed negligence findings in his citation, I conclude that the proposed civil penalty of $227 is appropriate for the instant violation.

Docket No. KENT 92-635

This case involves one citation (No. 3417070) and two withdrawal orders (Nos. 3417071 and 3417072) issued pursuant to Section 104(d)(1) of the Act.1 The citation and orders were initially issued as citations under 104(a) of the Act on October 2, 1991. They were modified on November 20, 1991, based upon subsequent findings by the Secretary of unwarrantable failure. Peabody does not dispute the violations nor that those violations were "significant and substantial" and challenges in these proceedings only the Secretary's findings that the violations were the result of its "unwarrantable failure."

Citation No. 3417070 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. Section 75.301 and charges as follows:

> Obvious violations were observed and present in the 4 east sub main entries, in that the ventilating current of air was not sufficient to dilute, render harmless, and carry away harmful gases and the air quality was less than the required oxygen content 19.5 volume per centum of oxygen required, air samples collected in the No. 2 entry (intake) and the

1 Section 104(d)(1) of the Act provides as follows:

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 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 persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

> No. 5 entry (return) of the east sub main entries, citations issued in conjunction with 107(a) Order No. 3417069 therefore no time was set.

The cited standard, 30 C.F.R. Section 75.301, provides, in relevant part, as follows:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes.

Order No. 3417071 alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.305, for failure to conduct adequate weekly examinations for hazardous conditions, and charges, as follows:

> The weekly examinations for hazardous conditions were not adequate in the 4 east sub main entries and seals in that obvious violations were present. 6 man doors were open in the permanent stopping line between the Nos. 4 and 5 entries return side that was a short circuit to the ventilating air current to the seals and permanent stoppings between Nos. 2 and 3 entries. Intake side to the seals had been removed and replaced with curtains in 6 crosscuts short circuit in air current that ventilated the seals, the air quality and quantity were not sufficient to dilute harmful gases as to properly ventilate the area where persons were required to work. Citation issued in conjunction with 107(a) Order No. 3417069.

Finally, Order No. 3417072 alleges a "significant and substantial" violation of the mine operator's ventilation plan under the standard at 30 C.F.R. Section 75.316 and charges as follows:

> The approved ventilation plan dated February 14, 1991 was not being followed in the 4 east sub main entries off the south west sub mains, in that 6 man doors

> were open to short circuit the air current, this being ventilation controls not maintained in a condition to serve the purpose for which they were intended (ventilating the 4 east sub main seals) creating a hazardous condition low oxygen at the seals page (3) Statement (8) of the approved plan citation issued in conjunction with 107a Order No. 3417069.

More particularly, the Secretary maintains that in the above order Peabody violated page 3, paragraph 8, of its ventilation plan (Government Exhibit No. 1) which provides that "all ventilation controls shall be installed in a work-manlike manner and maintained in a condition to serve the purpose for which it was intended."

The evidence is essentially undisputed that during the course of an inspection by MSHA Inspector Darold Gamblin at the old No. 4 Unit of the subject Martwick Mine on October 2, 1991, a hand held detector carried by Peabody Safety Supervisor Paul Cotton sounded a low oxygen alarm, indicating oxygen levels below 19.5 percent. Gamblin marked the location (on Joint Exhibit No. 4 with a pink "X") at approximately the same location Inspector Ryan had found low oxygen the previous day. Gamblin took two bottle samples at that same location and the test results showed 19.12 and 19.06 percent oxygen. Gamblin then proceeded up the track entry and found 6 man doors open in the return stopping line. He considered this to be a violation of paragraph 8, page 3, of the approved ventilation plan noted above and the condition was accordingly cited in Order No. 3417072. Inspector Gamblin also considered that the weekly examination of the area (which was performed shortly after midnight on the morning of October 2, 1991) was inadequate because those hazards were not reported. (See Joint Exhibit No. 2).

As previously noted, Peabody challenges only the "unwarrantable failure" findings made by the Secretary. Unwarrantable failure has been defined by the Commission as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997 (1987); Youghiogheny and Ohio Coal Co., 8 FMSHRC 2007 (1987). In the latter decision the Commission further stated that whereas negligence is conduct that is "inadvertent, thoughtless, or inattentive, unwarrantable conduct is conduct that is described as not justifiable or inexcusable."

In its post-hearing brief, the Secretary, in support of her finding that these violations were the result of "unwarrantable failure" stated only as follows:

> It is clear from the testimony of Inspector Ryan, Mike Abney, Health and Safety Conference Officer Bob Philips, Inspector Gamblin, and Kenneth Baggarly that the operator was fully aware of the fact that there was a problem with low oxygen on the old No. 4 Unit on October 1, 1991. Nevertheless, when the area was inspected 24 hours after the operator was made aware of low oxygen on the section, the problem of low oxygen still existed. Not only did the problem still exist, but the area had been examined for weekly hazardous conditions and the presence of low oxygen was not noted on the examination book. Additionally, the operator continued to send miners into the area to work, knowing that there was a problem with low oxygen that had not yet been corrected.

While the evidence is undisputed that indeed there was an oxygen deficiency in the old No. 4 Unit on October 1, 1991, as the Secretary alleges, the fact that low oxygen also existed 24 hours later in the same general area which was the result of new violative conditions (the fact that 6 man doors had been left open in the return stopping line) not cited on October 1, does not, however, necessarily lead to the inference the Secretary suggests. The citation and orders now at issue admittedly arose out of an interrelated set of facts, commencing with the fact that 6 man doors had been left open in the return stopping line, admittedly a violation of the ventilation plan and as charged in Order No. 3417072. It is alleged by the Secretary that this violation in turn caused the low oxygen in the return in violation of 30 C.F.R. Section 75.301 and as charged in Citation No.3417070. It is further alleged that since the weekly examination conducted on the morning of October 2, 1991, failed to disclose these open man doors, the examination was therefore also purportedly inadequate. The latter violation was charged in Order No. 3417071.

The Secretary has failed, however, to sustain her burden of proving that these violations were the result of Peabody's "unwarrantable failure." There is no evidence as to when the man doors were opened or by whom. More specifically, there is no direct nor adequate circumstantial evidence that the doors were open in the early morning of October 2, 1991, at the time the weekly examination was conducted. Accordingly, there is no evidence to support a

conclusion that Respondent knew or even should have known that the 6 man doors had been opened in the return stopping line of the old No. 4 Unit.

While the Secretary also apparently claims that the examination was inadequate in that the examiner failed to note low oxygen on the weekly examination performed on the morning of October 2, 1992, there is again no direct or adequate circumstantial evidence as to what the oxygen level actually was during that examination. The oxygen levels measured on October 1 and 2, 1992 were only slightly below the required 19.5 percent and it may just as reasonably be inferred that the oxygen levels were at or above 19.5 percent during the examination. It cannot reasonably be inferred therefore that the examiner had knowledge of an any oxygen deficiency during his examination on October 2, 1991.

In addition, while MSHA Supervisor Charges Dukes concluded that the violations were the result of "unwar-rantable failure," his testimony cannot be credited because it was based upon erroneous assumptions of fact. Nothing in the two citations issued by Inspector Ryan on October 1, 1991, could be deemed to have given notice of the specific violations charged on October 2, 1991, regarding the open man doors inby the panel mouth.

Under the circumstances, I conclude that the Secretary has failed to sustain her burden of proving such a level of aggravated conduct or omissions that constitutes more than ordinary negligence. The "unwarrantable findings" in Citation No. 3417070 and Order Nos. 3417071 and 3417072 are therefore unsupported, and, accordingly, they are modified to citations under Section 104(a) of the Act. Considering the lower level of negligence therefore associated with these violations, but also considering the admitted "significant and substantial" nature of these violations and the remaining criteria under Section 110(i) of the Act, I find that civil penalties of $500 for each of the above three violations are appropriate.

ORDER

Docket No. KENT 92-223

Citation No. 3548378 is affirmed with its "significant and substantial" findings and Peabody Coal Company is directed to pay a civil penalty of $227 for the violation charged therein within 30 days of the date of this decision.

Citation No. 3417070 and Order Nos. 3417071 and 3417072 are hereby modified to citations under Section 104(a) of the Act and Peabody Coal Company is directed to pay civil penalties of $500 for each violation for a total of $1500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

David R. Joest, Esq., Peabody Coal Company, 1951 Barrett Court, P.O. Box 1990, Henderson, KY 42420-1990 (Certified Mail)
/lh