CCASE:
SOL (MSHA) V. PEABODY COAL COMPANY
DDATE:
19930915
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDINGS
Petitioner	:	Docket No. KENT 93-295
v.	:	A.C. No. 15-14074-03630
	:	
	:	Docket No. KENT 93-296
PEABODY COAL COMPANY,	:	A.C. No. 15-14074-03631
	:	
Respondent	:	MARTWICK UNDERGROUND

DECISION

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

Before: Judge Amchan

These cases are before me upon petitions for the assessment of civil penalties pursuant to 105 and 110 of the Federal Mine Safety and Health Act of 1977. Docket Kent 93-295 concerns one citation, number 3417307, which alleges a violation of 30 C.F.R. 75.316 for Respondent's failure to comply with its approved ventilation plan. More specifically, the citation alleges that when the continuous miner and its scrubber were not operating, air circulation at the inby end of the line brattice near the continuous miner was significantly less than what was required by Respondent's approved ventilation plan. A $267 civil penalty was proposed. As discussed herein, I affirm the citation as a "non-significant and substantial" violation of the Act and assess a $267 penalty.

Docket Kent 93-296 concerns citation 3546915 alleging a violation of 30 C.F.R. 75.1105(Footnote 1) in that air ventilating a battery charging station was vented to the surface of the mine rather than to the return air shaft. An order, numbered 3546916, was issued pursuant to 104(b) of the Act for Respondent's alleged failure to timely abate citation 3546915. A $1,855 penalty was proposed for these alleged violations. I affirm citation number

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1The requirements of this standard have been modified by the provisions of 30 C.F.R. 75.340(a)(1) since the inspection.

3546915 as a "non-significant and substantial" violation and assess a $10 penalty. I vacate order number 3546916 on the grounds that it was unreasonable for MSHA to require abatement before the effective date of its new ventilation standards given the unique circumstances of this case.

Docket Kent 93-296

On October 22, 1992, Louis W. Stanley, an MSHA supervisory ventilation specialist inspected the Martwick mine as part of a review of Respondent's ventilation plan. During this inspection he determined that the air ventilating a battery charging station located 300 feet inby from the bottom of the slope of the mine was vented to the surface rather than to the return air shaft, as required by 30 C.F.R. 75.1105 (Tr. 11 - 18).(Footnote 2) That standard provided:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fire-proof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return...(emphasis added)

Mr. Stanley issued Respondent citation 3546915, which required that the violation be terminated by 8:00 a.m. on October 24, 1992 (Tr. 15). The danger presented by this violation in Mr. Stanley's view is that, if a fire were to break out at the battery charging station, the smoke would travel up the slope to the entry of the mine. Miners going in and out of the mine, particularly during a shift change, could be exposed to a hazard (Tr. 46, 57 - 58).

Upon receiving the citation, Respondent installed curtains and a 4-inch diameter pipe to direct the air current into the return (Tr. 65 - 71). After this proved unsuccessful, Respondent installed a four inch exhaust fan to draw the air from the battery charging station into the pipe (Tr. 73 - 79). However, when Mr. Stanley returned on October 26, 1992, he tested the air flow with smoke and it still vented up the slope towards the surface of the mine (Tr. 16 - 18). As a result of this test, Mr. Stanley issued order number 3546916 pursuant to 104(b) of the Act, alleging a failure to timely abate his original citation. Afterwards, Respondent abated the alleged violation by moving the battery charging station (Tr. 18).

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2There were 5 battery chargers at this station, which was one of approximately 15 battery charging stations in the mine. The chargers are electrically powered and are used to charge the batteries on equipment such as man trips (Tr. 25 - 26).

On November 16, 1992, less than a month after the inspection in this case, new MSHA ventilation standards for underground coal mines went into effect. Among these standards was one at 30 C.F.R. 75.340(a)(1), which provides that battery charging stations shall be "[v]entilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places . . . (emphasis added)." Petitioner concedes that Respondent would not have been in violation of the Act with regard to the instant citation and order after November 16, 1992 (Tr. 38 - 39).

The new standard was promulgated as a final rule on May 15, 1992, with an effective date of August 16, 1992. On August 6, 1992, MSHA delayed the effective date of the new ventilation standards until November 16, 1992, due primarily to difficulties some mine operators were having coming into compliance with some of the new regulations by August 16. No specific reference to 30 C.F.R. 75.340(a)(1) was made in regard to the delay. 57 FR 34683-4 (August 6, 1992).

When promulgating the final rule in May 1992, MSHA provided the following explanation for revising the requirements of 75.1105

> Unlike the existing rule, however, the final rule does not require that the intake air be coursed "directly" to the return. This existing requirement has caused much confusion under the existing rule. The final rule clarifies that the intake air installation may not also be used to ventilate active working places. Thus, the air may be coursed into other entries before being coursed into a return, if the air is never used to ventilate a working place. Since this air will not be used to ventilate face areas, the final rule provides the same level of protection as the existing rule. 57 FR 20888-9 (May 15, 1992).

Inspector Stanley believes the revision allowing the venting of battery charging stations to the surface to be ill-advised (Tr. 40). However, MSHA has made a finding that this practice poses no threat to employee safety and health. MSHA and Inspector Stanley are bound by this determination, which was made prior to the issuance of the citations in this case.

Respondent clearly violated the requirements of the Mine Act as they existed on October 22 and 26, 1992. However, this violation was of a purely technical nature--given the agency's formal determination that the venting of battery charging stations to the surface is an acceptable practice. In assessing a civil penalty, the Commission is required to consider the operator's history of previous violations, the size of its business, its negligence, the effect on its ability to stay in

business, the gravity of the violation and the operator's good faith in achieving rapid compliance after being notified of the violation.

In view of MSHA's prior determination that the violation was of no consequence to employee safety, I find a minimal penalty of $10 is appropriate for this violation.(Footnote 3) I also find that Respondent's negligence was extremely low in view of the fact that MSHA had already determined that venting to the surface was a safe practice when this violation occurred.

Section 104 (a) of the Act provides that a citation shall fix a reasonable time for the abatement of a violation. I hereby vacate order 3546916 because I do not think it was reasonable to require abatement of citation 3546915 prior to the effective date of the new MSHA ventilation regulations. It is important to note that the new regulations were final rules, not proposed rules at the time of the inspection in this case, and MSHA had published its rationale for the change in the specific regulation under which Respondent had been cited.

Although, the effective date of the new regulations had been postponed, MSHA's rationale for the delay had nothing to do with the propriety of 75.340(a)(1). Moreover, there was no indication, as of October 22, 1992, that 75.340 was the subject of any legal challenge or that it was being reconsidered by the Agency. Given the unique circumstances of this case, the reasonable course for MSHA would have been to allow Respondent three weeks to abate the original violation in order to determine whether it still was under a legal obligation to do so.

Docket KENT 93-295

On November 19, 1992, MSHA Inspector Darold Gamblin conducted a regular quarterly inspection of the Martwick mine. During this inspection he encountered a employee working with a continuous mining machine in the number 2 entry of the number 1 working section. Inspector Gamblin sampled the air flow at a point 25 feet behind the cutting edge of the machine, at the end of the line curtain, near where the employee was working. When the continuous miner was not operating the air flow was 2,340 cubic feet per minute (cfm) (Tr. 86 - 87). Respondent's approved ventilation plan (Exh. G-4) required an air flow of 5,000 cfm, before the continuous miner was turned on, at the inby end of the line brattice.(Exh. G-4, page 4, paragraph # 2).

As a result of this air flow reading, Inspector Gamblin issued Respondent citation 3417307, alleging a significant and

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3The statute requires that a penalty be assessed for each violation. Tazco, Inc., 3 FMSHRC 1895 (August 1981).

substantial violation of 30 C.F.R. 75.316. This regulation, which requires operator compliance with approved ventilation plans(Footnote 4),was superseded by 30 C.F.R. 75.370, just three days before the inspection in this matter. Since the requirements of 75.370 are essentially the same as the former 75.316, I will sua sponte amend the pleadings to conform to the evidence. See Cyprus Empire Corporation, 12 FMSHRC 911,916 (May 1990); Rule 15(b) of the Federal Rules of Civil Procedure. Section 75.370 (a)(1) requires that "[t]he operator shall develop and follow a ventilation plan approved by the district manager..."

Respondent has conceded that it was in violation of the Act but takes issue with the characterization of the violation as "significant and substantial" (Respondent's Answer, paragraph 5, Respondent's Response to the Prehearing Order, paragraph 2). The elements of a "significant and substantial" violation have been set forth by the Commission as follows:

> (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. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

There is no question that the evidence in this case satisfies the first and fourth elements of the Mathies test. Respondent has conceded the violation and there is no question that injuries, to which the violated requirement is directed, inhalation of excessive amounts of respirable coal dust and fires and explosions due to excessive concentrations of methane, are of a serious nature (Tr. 93).

What is at issue are the second and third elements of the Mathies test. Respondent's evidence suggests that, due to the air flow capacity of the scrubber on the continuous miner, the inadequate ventilation prior to the scrubber's operation either presents no hazard, or that injury or illness is sufficiently unlikely that the violation cannot be properly considered "significant and substantial" See Cement Division , National Gypsum Co., 3 FMSHRC 822 (April 1981).

The Commission in National Gypsum has held that a "significant and substantial" violation is not established by merely showing that the chance of an injury or illness resulting

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4Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976); Secretary v. Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (1981).

from the violation is more than remote or speculative. In this case the Secretary has simply not established how likely an accident would be when the inby end of the line brattice is ventilated by 2,340 cfm of air prior to operation of the scrubber, rather than 5,000 cfm.

Assuming that the provision for 5,000 cfm is important, the Secretary's evidence leaves unanswered the question of what degree of noncompliance makes an accident or injury "reasonably likely". To rule in favor of the Secretary, I would have to infer that any amount of ventilation less than 5,000 cfm creates a substantial likelihood of injury or illness. I find no basis for such an inference. It would seem likely that a small deviation from the 5,000 cfm requirement would not create a reasonable likelihood of injury or illness. If I were to credit the Secretary's witnesses, I might infer that at some point inadequate ventilation prior to operation of the scrubber would create such a reasonable likelihood. However, there is simply no evidence in this record tying the 2,340 cfm measured by Inspector Gamblin to the likelihood of injury or illness.

Inspector Gamblin testified that he believed injury or illness "reasonably likely" (Tr. 93 - 98). However, this testimony is purely conclusory and I have no idea what underlies Gamblin's opinion. There is also testimony by MSHA ventilation supervisor Louis Stanley that he would not approve a ventilation plan in a deep cut mine such as Martwick unless it contained a requirement for 5,000 cfm of air before the scrubber is activated (Tr. 191). From this testimony, it appears that Mr. Stanley believes that without that quantity of air flow, injury from a fire or explosion, or inhalation of excessive respirable dust is possible. However, there is an insufficient rationale in this record for me to conclude from his testimony that there is a reasonable likelihood of injury or illness when the ventilation at the end of the line curtain is 2,340 cfm, rather than 5,000 cfm.

The Secretary, at pages 9 and 10 of its Post-Trial Brief, relies on U. S. Steel Mining Co., 7 FMSHRC 1125 (August 1985), a case in which the Commission reversed an ALJ decision that 2,400 cfm of air at a working face was not a "significant and substantial" violation. In that case the operator's ventilation plan also required 5,000 cfm. I find the U. S. Steel decision easily distinguishable from the instant case and not particularly helpful in meeting the Secretary's evidentiary burden. The requirement of U.S. Steel's ventilation plan was for 5,000 cfm once mining commenced and the Commission decision relies heavily on its conclusion that ignition of methane was reasonably likely given the ignition source provided by the arcing and sparking of the continuous miner. In the instant case where the requirement of 5,000 cfm applied before the operation of the continuous miner and the evidence indicates that ventilation of the working face

would have been much greater than 2,340 cfm when cutting operations began, I find no basis for relying on the U. S. Steel decision to conclude that an accident was reasonably likely on the record before me.

Controverting the Secretary's evidence is the testimony of Respondent's witness, Randy Wolfe. Mr. Wolfe, a supervisory safety engineer employed by Respondent, testified that the scrubber on the continuous miner will adequately eliminate any hazard from dust or methane without any other source of ventilation. He concluded that there is no reasonable likelihood of injury or illness resulting the fact that the air flow prior to operation of the scrubber was less than 5,000 cfm--assuming that conditions remained the same as they were on the November 19, 1992 (Tr. 171 - 172). Mr. Wolfe also testified that 2,340 cfm airflow to the inby end of the line brattice was adequate to eliminate any hazard of methane ignition prior to the activation of the continuous miner (Tr. 161 - 162).

The preponderance of the evidence suggests that the lack of 5,000 cfm of air prior to operation of the scrubber increased the likelihood of serious injury or illness to some extent. In this regard, I consider it significant that Mr. Wolfe's opinion with regard to the absence of a reasonable likelihood of injury and illness was qualified by the proviso that conditions remain the same. The Martwick mine is a one that is subject to spot inspections by MSHA due to its propensity for methane release. I infer from this fact, and the requirements of Respondent's plan, that maintaining 5,000 cfm prior to operation of the scrubber is necessary to insure employee safety.(Footnote 5) However, these facts alone do not warrant the conclusion that when the airflow is 2,340 cfm, prior to the operation of the scrubber, injury or illness is reasonably likely.

I assess the $267 penalty proposed by the Secretary. I note first that this penalty is very low--particularly considering the Respondent's size. Peabody has stipulated that it is a large operator and a reasonable penalty will not affect its ability to

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5I do not accord great weight to Mr. Wolfe's testimony regarding the adequacy of the 2,340 cfm. Mr. Wolfe's highest level of education is an Associates degree in Applied Science from Madisonville, Kentucky Community College. His testimony was largely based on a paper prepared by Dr. John Campbell. Little information was provided regarding Dr. Campbell's qualifications other than that he had worked for Respondent in the past. Indeed, it is not even clear in what field Dr. Campbell holds his doctorate. There is also no indication as to whether Dr. Campbell's conclusions are widely held in the scientific community or whether his paper was ever subjected to an impartial peer review.

remain in business. I believe that the gravity of the violation, particularly the seriousness of an injury if one occurred, warrants a $267 penalty. On the other hand, I find that no higher penalty is warranted given the low to moderate negligence that caused the violation and Respondent's prompt abatement of the violation by extending and tightening its line curtains to increase the air flow (Tr. 98 - 99). I see no reason to either raise or lower the penalty on the basis of Respondent's history of previous violations.

ORDER

Citation No. 3417307 (Docket Kent 93-295) is affirmed as a "non-significant and substantial" violation and a $267 civil penalty is assessed. Citation No. 3546915 is affirmed as a "non-significant and substantial" violation and a ten ($10) penalty is assessed. Order No. 3546916 is vacated. Within thirty (30) days of the date of this decision, Respondent is ordered to pay a civil penalty of $277 for the violations found herein.

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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