FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of the Administrative Law Judges
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9980
Fax: (202) 434-9949

August 16, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING: Docket No. WEVA 2008-1825 A.C. No. 46-08436-150504
v.	:	Mine: Upper Big Branch-South
PERFORMANCE COAL COMPANY, Respondent.	:	Mine ID: 46-08436

DECISION ON REMAND

Before: Judge David F. Barbour

This case is before the court on remand. On November 22, 2010, the court issued a decision assessing a penalty of $4,329 for the violation of 30 C.F.R. § 75.400 alleged in Citation No. 7279729.[1] 32 FMSHRC 1797, 1808 (Nov. 2010) (ALJ). On December 22, 2010, the Secretary filed a petition seeking review of the decision. The Secretary noted that the $4,329 penalty was lower than the $34,653 penalty proposed by the Secretary in his post-hearing brief. The Secretary argued that the court erred by failing to adequately explain the reduction. On December 28, 2010, the Commission granted the Secretary's petition. Direction for Review.

In its decision on review the Commission noted that while the court made findings with respect to each of the statutory penalty criteria set forth in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), it did not directly address the arguments in the Secretary's post-hearing brief regarding the negligence of the operator, the number of persons affected by the violation and the effect of these factors on the penalty assessed for the violation.[2] 35 FMSHRC __ (Aug. 2, 2013), slip op. 3. The Commission observed that although neither the Commission nor its administrative law judges are bound by the Secretary's proposed penalties (slip op. 2 (*citations omitted*)), the Commission requires its judges to explain in light of the statutory civil penalty criteria any substantial deviation from the Secretary's penalty proposals. *Id*. 3 (*citations omitted*). The Commission remanded the case and instructed the court to "expressly address the Secretary's argument [made in the Secretary's post-hearing brief] in favor of the increased

[1] The other three violations at issue in Docket No. WEVA 2008-1825 were settled prior to hearing, and on November 23, 2009, the court issued a decision approving the partial settlement. *Performance Coal Company,* Decision Approving Partial Settlement (November 23, 2009).

[2] The company did not reply to the Secretary's post-hearing brief.

proposed penalty."[3] *Id.* 3.

In its initial decision, the court described the circumstances giving rise to the proceeding. Mine Safety and Health Administration ("MSHA") Inspector, Keith Sigmon, conducted an inspection of Performance Coal Company's ("Performance's") Upper Big Branch-South mine on February 11, 2008. During the inspection Sigmon issued Citation No. 7279729 for a violation of 30 C.F.R. § 75.400, which prohibits the accumulation of coal dust, including float coal dust, in active workings and on electrical equipment. Sigmon observed accumulations of float coal dust inside and on top of the No. 1 North Main belt conveyor power center and on the mine floor, roof, and ribs in the cross cut where the power center was located. Gov't Ex. 3. Performance contested the citation and the matter was heard in Beckley, West Virginia.

Inspector Sigmon noted on the citation that one person was likely to be affected by the violation. Gov't Ex. 3. This person was the fire boss who had to travel to and examine the cited area and equipment. Tr. 52-53. Sigmon also testified that there was a maintenance person who worked on the belt at night and that there were six persons who were working on the belt during the day he cited the accumulation. *Id.* His testimony implied that anywhere from one to six miners could be affected at any point in time by a fire or explosion caused by the accumulated float coal dust. Inspector Sigmon believed that such an accident was reasonably likely to result in a fatal injury or injuries and that the operator's negligence was moderate. Tr. 52, 54; Gov't Ex. 3.

The court found that Inspector Sigmon reasonably exercised his judgment in citing the company for a violation of Section 75.400 and that his testimony established the violation. 32 FMSHRC at 1804-1805. The court credited Sigmon's description of the existence of black, dry, float coal dust both on and inside the power center, on the catheads at the power center, and in the crosscut. Tr. 19-21, 51, 84; 32 FMSHRC at 1805. The court also credited Sigmon's contention that the float coal dust ranged in depth from "paper thin" to one eighth inch or more and that the float coal dust easily could be put into suspension. Tr. 21-23; 32 FMSHRC at 1805.

The court held that the violation was a significant and substantial contribution to a mine safety hazard ("S&S"). The court concluded that there was a "confluence of factors" that made an injury producing fire and/or explosion reasonably likely. 32 FMSHRC at 1806. The court agreed with Sigmon that the float coal dust was dangerous and contributed to a distinct safety hazard, specifically that the accumulation served as the fuel source for a fire and/or as the propagator of an explosion. *Id.* at 1805. The court noted that both Inspector Sigmon and MSHA Supervisory Engineer Larry Cook, who in addition to Sigmon testified for the Secretary,

---

[3] As the court understands it, the purpose of a party's post-hearing brief is to present arguments, to cite points and authorities and to identify evidence supporting positions alleged by a party in its pleadings. The court does not understand a brief to be a vehicle to modify a party's pleadings. In the court's view, if the Secretary wished to amend the citation at issue to allege a higher level of negligence and/or additional persons affected, or if he wished to amend his civil penalty petition to propose a higher penalty, the Secretary should have moved to do so. In directing me to expressly address arguments raised for the first time in the Secretary's post-hearing brief the Commission appears to have treated the brief as a motion to amend and to have implicitly granted the motion. The Secretary is advised that the court views the Commission's action as *sui generis*, a view that may well be shared by the Commission, and not as a precedent the court must necessarily follow. *See* slip op. 3 n. 1.

believed arcs or sparks could serve as an ignition source. The court found Cook's testimony that arcs or sparks occurred each time the circuit breaker tripped to be particularly telling. *Id.* at 1806. The court further found that the violation was serious and that it was likely to result in grave injuries up to and including a fatality or fatalities. *Id.* at 1807. The Commission did not disturb the court's findings regarding the fact of violation and the inspector's S&S findings.

With regard to the company's negligence, the court concluded that Performance did not meet the standard of care required by the circumstances. 32 FMSHRC at 1808. The court found that the evidence established the company was aware there was a problem with float coal dust at and around the power center, but that the steps it took to alleviate the problem – rock dusting the area on a regular basis and placing curtains across the holes in a stopping near the power center to inhibit the passage of dust – were inadequate. *Id.* at 1807-08. The court concluded the company "should have taken more aggressive steps to make sure that [the cited area] was kept clean." *Id.* at 1808. Like the court's findings as to the existence of the violation and its S&S nature, the court's negligence findings were not disturbed by the Commission on review.

In his post-hearing brief to the court the Secretary recognized that if a violation was found, the court had to assess a penalty *de novo* based upon the six penalty criteria set forth in Section 110(i) of the Mine Act and on the record of the proceeding. Sec. Br. 20. Nonetheless, the Secretary stated that the original proposed penalty of $4,329 was predicated in part upon the inspector's finding that the violation was the result of Performance's moderate negligence and his finding that one person was affected. Sec's Br. 20-21. (Based on these findings and the criteria in 30 C.F.R. § 100.3, MSHA calculated 107 penalty points and proposed a penalty of $4,329.00. *Id.* at 21.) The Secretary contended that the evidence at hearing demonstrated that the Respondent's negligence was more properly characterized as high and that seven persons rather than one were potentially affected by the violation. *Id.* at 21. As a result, the Secretary recalculated the penalty points at 133 and asserted that the court should assess a penalty of $34,653, over eight times the initial proposed penalty. *Id.*

The court declined to assess the much higher penalty. Rather, given the serious nature of the violation, the moderate negligence of the company and the other civil penalty criteria, it found the Secretary's original (and only [4]) penalty "proposal [to be] appropriate." 32 FMSHRC at 1808. The court still believes this to be true. First, the court found, and it continues to find, that the company's negligence was properly characterized as "moderate." 32 FMSHRC at 1807-1808. No part of the record highlighted by the Secretary in his brief persuades the court to reconsider. While the court concluded the company knew there was a problem with float coal dust in the area and while Performance should have taken more aggressive steps to keep the cited area clean (32 FMSHRC at 1808), the court found that mitigating factors existed. Specifically, the company placed curtains across the holes in the stoppings near the power center to reduce the amount of coal dust entering the power center and the company rock dusted the area on a regular, albeit too infrequent, basis. In short, although its efforts were inadequate, the company attempted to address the problem.

Second, the court noted, and it continues to note, that the parties agreed that the primary location of the float coal dust and its possible ignition source, the power center, was in an area where miners only occasionally worked and traveled. 32 FMSHRC at 1807 (*citing* Stip 8).

---

[4] As noted, the Secretary never moved to amend her pleadings to propose a different penalty.

Sigmon's testimony established that the miner most subjected to danger and therefore his primary concern was the fire boss who would "be examining that area." Tr. 53. This was the person he had in mind when he issued the citation and indicated one person was reasonably likely to be affected. *Id.* As previously noted, Sigmon also spoke of a "maintenance person" who might be present on the midnight shift and six miners whom he observed working on the one south main belt the day he issued the citation. Tr. 52-53. Sigmon was focused on the hazard the violation posed to the fire boss, but his testimony also implied that at any point in time up to six miners might be affected. The Secretary failed to show that more than six miners might be affected by a fire and/or explosion in the cited entry in that the Secretary failed to provide evidence that the fire boss or maintenance person would be in the area at the same time as the six miners. Thus, the record establishes that depending on when the feared fire or explosion occurred it was reasonably likely to affect one person or up to six persons.[5] This stated, there is no gainsaying the fact that, as the court found, the violation was serious. 32 FMSHRC at 1807. It appeared to the court at the time, and it continues to appear to the court, that a serious violation with the potential to affect the one to six miners as identified by Sigmon (32 FMSHRC at 1802, 1803), that was caused by the company's moderate negligence (32 FMSHRC at 1808) and that was cited under section 104(a) of the Act warranted and continues to warrant a penalty of $4,329.[6]

ORDER

Within 40 days of the date of this decision, Performance **IS ORDERED** to pay a civil penalty of $4,329 for the violation of Section 75.400 set forth in Citation No. 7279729.[7] Upon payment of the penalty, this proceeding **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

---

[5] In concluding a civil penalty of $4,329 was appropriate the court, like Sigmon, focused on the danger to the fire boss, while recognizing that up to any point in time up to six miners could be in the area. The court used the adjective "numerous" to describe the miners. 32 FMSHRC at 1802. The court weighed negligence and the associated mitigating factors more heavily than it weighed the number of persons affected.

[6] Interestingly, the Secretary did not choose to offer as an exhibit a certified copy of Performance's prior history of violations. Rather, he relied on the parties' stipulation regarding the total number of violations assessed in the 15 months immediately preceding February 11, 2008. Stip. 7; Sec. Br. 20. The court observes that a copy of the history might have afforded the court and the Commission with helpful comparative assessments.

[7] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution: (Certified Mail)

Carol Marunich, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Boulevard, Suite 310, Morgantown, WV 26501

Melanie Garris, U.S. Department of Labor, Office of Civil Penalty Compliance, MSHA, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209-2296

/ca