FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 16, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CLAS COAL COMPANY, INC., Respondent.	: : : : : : : : : :	CIVIL PENALTY PROCEEDING: Docket No. KENT 2013-167 A.C. No. 15-19325-302646 Mine: Mine No. 7

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, TN on behalf of the Secretary

James K. McElroy, CLR, Department of Labor, MSHA, Pikeville, KY, on behalf of the Secretary

Roy Parker, Safety Manager, on behalf of Clas Coal Company, Inc.

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against Clas Coal Company, Inc. ("Clas" or "the Company). The case is brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§815, 820, (the "Mine Act"). The Secretary petitions for the imposition of penalties that total $1,512 for two alleged violations of the nation's mandatory safety and health standards for underground bituminous coal mines. The violations are alleged in citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), at Clas's Mine No. 7, an underground bituminous coal mine located in Pike County, Kentucky.

One citation alleges a violation of 30 C.F.R. §75.1722(a), which requires that, "Gears; sprockets; chains, . . . pulleys . . . and similar exposed moving machine parts which may be

contacted by persons, and which may cause injury to person shall be guarded." The Secretary asserts that on August 23, 2012, Gary Ray, an MSHA inspector who was conducting an inspection of the mine, found that the rotating shaft of a head drive was not guarded. The shaft of the drive projected one half inch beyond its bearings. The Secretary proposes the company be assessed a civil penalty of $100 for the alleged violation.

The other citation alleges a violation of 30 C.F.R. §75. 380(d)(1), which requires that, "Each escapeway . . . be [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." The Secretary asserts that on August 23, Inspector Ray found that the mine's alternate escapeway was not so maintained in that water mixed with mud was allowed to pool in three areas. The mix ranged from 7 inches to 12 inches deep, and the pools were from 15 feet to 30 feet long. The Secretary argues that the condition endangered 12 miners who worked on the section, that the condition was reasonably likely to cause a permanently disabling injury, that the condition was a significant and substantial contribution to a mine safety hazard ("S&S") and that the company was moderately negligent in allowing the condition to exist. The Secretary proposes the Company be assessed a civil penalty of $1,412 for the alleged violation.

The Company answers that the shaft on the head drive was located in such a way there was no reason a miner would reach into the area of the drive and be caught or snagged by the shaft. It further points out that even if an errant miner for some reason reached into the area, the surface of the shaft was smooth and unlikely to catch the miner or to snag his or her clothing. According to the Company, the shaft did not protrude as much as indicated by the inspector and information displayed on MSHA's website stated that a similar shaft was "Okay." The company asks that the citation be vacated.

With regard to the allegedly unsafe alternate escapeway, the Company contends that Inspector Ray's gravity and S&S findings are excessive. It asserted that the water and muck in the alternate escapeway was not so deep as to overtop the boots of miners nor of a depth to enter the compartments of vehicles traveling the escapeway. The Company states that it was in the process of installing a dewatering system when the citation was issued. The pooled water and muck had to settle a couple of days before it could be pumped.

The company also maintains that in the unlikely event the alternative escapway had to be used, only five miners at most were likely to travel through the mix on foot. The rest would ride out of the mine on battery powered equipment. In the company's view, the citation should be modified by lowering Inspector Ray's gravity finding and by deleting his S&S finding.

After the company's answer was received the case was assigned to me, and I ordered the parties to engage in pre-hearing settlement discussions. When the parties reported they were at an impasse, I noticed the case for hearing. At the same time, I encouraged the parties to continue their efforts to find a way to resolve their differences, reminding them that a mutually agreeable settlement is in almost all instances preferable to an outcome dictated by trial. I also

asked the parties if the matter could not be settled, whether they were agreeable to a remotely conducted hearing, one that would save all involved considerable expense. However, the parties advised me they preferred an on-site hearing in view of the fact that exhibits might need to be identified and marked by the witnesses.

The hearing was called to order on August 13, 2013, in Pikeville, Kentucky. Prior to going on the record, I again discussed with the parties whether further settlement discussions might yet produce an agreement. When they advised me that they would not, the hearing commenced.

Before calling his first witnesses, Counsel for the Secretary read the following stipulations into the record:

> 1. Clas . . . extracts and sells coal in interstate commerce, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges.
>
> 2. Clas . . . owns and operates Mine No. 7 located in Fedscreek, Pike County, Kentucky.
>
> 3. [Mine]No. 7 . . . reported a production of 53,590 tons of coal in the first two quarters of 2013. The average number of underground coal mine[rs] at this mine is 35.
>
> 4. Clas . . . took over management of this mine on July 10, 2012.
>
> 5. Clas . . . received on[e] violation at this mine prior to the violations issued on August [23,] 2012.
>
> 6. The proposed assessments will not affect the ability of Clas . . . to continue in business.
>
> 7. The violations cited were abated within the time frame given by the [i]nspector.
>
> 8. Citation No. 8276490 was issued on Thursday, August [23] for a violation of . . . [section] 75.380(d)(1), and served on an agent of Clas.

Tr. 16-17.

Counsel for the Secretary also stated that the Secretary agreed to vacate Citation No. 8276491, the citation in which a violation of section 75.1722(a) was alleged. The Secretary concurred with the Company that the cited head drive "appeared to be the same as [one that was stated to be 'Okay'] on MSHA's website." Tr. 18.

The parties then presented their respective cases, and at the close of the testimony, I entered the following bench decision:

> First, . . . it is clear that there are honestly held opinions on both sides of the issues . . . and I appreciate that fact. None of the witnesses . . . not Inspector Ray, not [MSHA] Supervisor [Brian] Dotson, not [Clas's safety manager, Roy] Parker[,] dissembled or stated things other than what they truly [believe].
>
> * * *
>
> [B]ased on the testimony . . . [of] the witnesses, and the documentary evidence, I rule as follow[s:]
>
> First, . . . the Company violate[d] [s]ection 75.380(d)(1) . . . . The standard requires each escapeway, . . . includ[ing] alternate escapeways, to be maintained to assure [the] passage of anyone, including disable persons. Clearly, an escapeway in which the passage of any miner is hindered[,] is not a safe escapeway.
>
> [Tr. 134]
>
> I accept the testimony of Inspector Ray regarding the condition of the cited alternate escapeway . . . . He was there. He traveled . . . the escapeway. He measured the depth of the liquid material[,] . . . a slurry-like mix of water and solids[.] . . . [T]he mix existed in three pools[,] 15 feet to 30 feet long and 12 inches to 7 inches deep. I accept [the inspector's] descriptions [as accurate].
>
> I further accept his testimony that the slurry-like mix obscured what it covered, and it was entirely reasonable for Inspector Ray to infer the mix covered rocks. He felt the vehicle on which he was traveling bump over the rocks. He saw rocks in the parts of the [escapeway] that were not covered with the mix. His belief that the

mix covered similar rocks was logical, and I credit it.

I also credit his belief that the slurry[-like] mix and the rocks covered by it [would have] hindered the passage of miners . . . use[ing] the . . . escapeway. While it may not have . . . [hindered them] if [they rode] through the escapeway and out of the mine on [the] rubber[-]

[Tr. 135.]

tired[,] battery powered vehicles that were available[, a]s . . . Inspector Ray's and Supervisor Dotson's testimony made clear, miners might well not have [the] luxury [of using the vehicles] and [they] might be required, because of debris in the entries and/or heavy smoke, to travel out [of the mine] on foot.

In such a situation, the slurry-like mix would slow them, and there is no [gainsaying] the fact that the hidden rocks could cause them to stumble and fall, subjecting them to injuries such as sprained ankles, or worse. Moreover, even if they were not injured, the additional delay caused by the slurry mix could lead to smoke inhalation, or . . . in the worst case scenario [if they were delayed long enough,] to death.

[Thus,] the record clearly establishes the violation. It also establishes that the violation was . . . [S&S.] My finding in this regard tracks the case law, as it must. As [Commission Administrative Law Judge Richard] Manning pointed out in a case . . . [similar] to this, a judge must determine whether there [is] a reasonable likelihood that the hazard

[Tr. 136.]

contributed to by the violation could . . . [result] in an injury in an emergency situation in which the escapeway [must] . . . be used. Judge Manning's decision is . . . *Twentymile Coal Co.*, 29 [FMSHRC 806, 811 (Sept. 2007).]

When viewed . . . this way, the issue is whether the uneven footing hidden under the slurry mix made it reasonably likely

an exiting miner . . . [would trip] . . . fall and [be] injured [during an emergency exit.] I . . . conclude the answer is, yes.

I [am] particularly impressed by the testimony of . . . Inspector Ray and Supervisor Dotson, that [had an injured miner needed evacuation on a stretcher or had evacuating miners needed to be tethered together to follow each other out of the mine,] at least one of those carrying [the] stretcher[,] . . . or [at least one of those] tethered together would have been likely to slip, stumble and fall. This is . . . common sense, because they would not be able to see where they had to step [a]nd their . . . overwhelming concern . . . would [be] to hurriedly exit. A sprained or a twisted ankle seems [to be the] most likely . . . result.

I will add that I do not think . . .

[Tr. 137.]

Inspector Ray's belief that a miner might drown is . . . likely . . . given the fact that the slurry mix was not deep, and any miner who fell from a stretcher, or who fell while being tethered, would have been . . . quickly helped by those around him or her. [However, this does not detract from the fact that] . . . the delay of miners escaping the mine in an emergency situation [and the uneven footing they would encounter] was reasonably likely to cause an injury.

That stated, while I find that this was [both an S&S] and a serious violation, it was not as serious as Inspector Ray believed. [Although] all 12 of [the section's] miners . . . were put in danger by the violation, I find [that those] . . . most likely to . . . [be] injured were those carrying a stretcher with an injured miner. In other words, I find that five miners were most immediately affected. Tethered miners also . . . [were affected, but they would] . . . be . . . likely to quickly help one another if one of their [fellow miners] slipped or [tripped.]

I also agree with Inspector Ray's assessment that the Company was moderately negligent. As Mr. Parker

[testified], he had been

[Tr. 138.]

in the area prior to the violation being cited, and he knew that the mine and the [escapeway were] wet. The Company [should have] had the equipment on hand to remove the water [and mud], [s]omething it clearly recognized, since Mr. Parker [stated that] . . . the Company was in the process of installing the equipment.

Still, the company gets credit for [identifying] what was needed, and for moving forward with its installation. In addition, I find it telling that the [Secretary] agrees . . . [MSHA inspectors] traveled through the area prior to August [23,] and when the condition existed, . . . but [that they] did not cite . . . a violation.

I [therefore] find that the Company's negligence was on the low side of moderate. I [also] think it important to recognize that Clas . . . is not a recalcitrant operator. Mr. Parker's testimony that the Company tries very hard. . . to comply with all of the [Secretary's] regulations . . . is born out by [S]tipulation [5], to wit that in the month and almost two weeks it . . . controlled the mine, and in three weeks it

[Tr. 139.]

had been actively mining, the Company . . . received but one [citation].

* * *

[T]he record [also] affirms [the conclusion] that [S]tipulation [7] is accurate. The Company did, indeed, work diligently to abate the violation[.]

Therefore, [and for the reasons stated above,] I conclude that the violation existed, and that the relevant case requires that I affirm the [inspector's S&S] finding[,and] I . . . note here that this case is very similar to [Commission Administrative Law] Judge [Margaret]

> Miller's case, *Independence Coal Company,* [*Inc.*], [32 FMHRC 654 (June, 2010),] . . . in which she found the hazards caused by water that . . . collected in an . . . escapeway were reasonably likely to contribute to an injury in the event of an emergency evacuation . . . .
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> [Tr. 140.]
>
> I [further] find that although 12 miners . . . could have been affected, the most likely number was five[,] that the Company's negligence was on the low side of moderate, and [that] the Company's overall attitude toward compliance[,] as exhibited by Mr. Parker's testimony and by the single [citation] issued at the mine between the time the Company took control of the mine and the [subject] violation[,] warrant a lower penalty than that proposed.
>
> Were I to assess the [Secretary's] proposed [penalty] of $1,412, it would be more than twice what the Company has previously paid for an [S&S] violation, I therefore assess a . . . penalty of $912[,] . . . which is . . . more than a third of what the Company has . . . [paid] for a violation of [section 75.380], and indeed [a third] more than the Company has . . . ever paid for any violation.
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> [Tr. 141.][1]

[1] Editorial changes correcting syntax, grammar, spelling, and typographical errors have been made in reproducing the bench decision.

ORDER

Within 30 days of the date of this decision, Clas **IS ORDERED** to pay a penalty of $912 for the violation of section 75. 380(d)(1) set forth in Citation No. 8276490.[2] Within the same 30 day, if he has not already done so, the Secretary **IS ORDERED** to vacate Citation No. 8276491. Upon payment of the penalty and vacation of the citation, this proceeding **IS DISMISSED**.

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

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/db

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