FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2009-412 A.C. No. 11-03060-179547-02 Riola Mine Complex-Vermillion Grove
v.	Docket No. LAKE 2009-413 A.C. No. 12-02010-179550-01
BLACK BEAUTY COAL COMPANY, Respondent	Docket No. LAKE 2009-414 A.C. No. 12-02010-179550-02 Air Quality #1 Mine

DECISION APPROVING SETTLEMENT UPON REMAND

Before: Judge Manning

On March 10, 2014, I issued a decision after hearing in the above dockets.[1] *Black Beauty Coal Co.*, 36 FMSHRC 1821 (Mar. 2014 published July 2014) (ALJ). The Commission granted cross- petitions for discretionary review and issued its decision on June 16, 2016. 38 FMSHRC 1307 (June 2016). In its decision, the Commission remanded several issues to me in light of its decision. These issues are: (1) whether the violations set forth in Citation Nos. 8414910 & 6680994 and Order Nos. 8414938 & 8414939 significantly and substantially contributed to the cause and effect of a coal mine safety or health hazard (S&S); and (2) whether the violations set forth in Order Nos. 8414938 & 8414939 were the result of Black Beauty's unwarrantable failure to comply with section 75.400.

The Commission held that "the Judge's determination that the violations in these [citations and] orders were not S&S may have been flawed due to consideration of redundant safety measures." 38 FMSHRC at 1315. It further concluded that "the Judge's non-S&S findings might have influenced his view of the degree of danger, and consequently his unwarrantable failure determinations for these orders." *Id.* (footnote omitted). The Commission then remanded "the Judge's S&S and unwarrantable failure findings at issue for reconsideration in light of [its] decision." 38 FMSHRC at 1316.

I encouraged the parties to settle the S&S and unwarrantable failure issues in a manner that was consistent with the Commission's decision. The parties reached a settlement and filed a motion to approve settlement on October 20, 2016. The terms of the settlement are as follows:

[1] My decision also included dockets LAKE 2009-410 and LAKE 2009-415 which are not at issue on remand.

1. **Citation No. 8414910, LAKE 2009-414.**

This citation, issued under section 104(a) of the Mine Act, states that the approved ventilation plan was not being complied with in the No. 1 active section in violation of section 75.370(a)(1). Specifically, the citation states that a Joy continuous mining machine being operated in the No. 7 entry was not being supplied with adequate ventilation to dilute, render harmless, and carry away flammable and explosive gasses, dust, and fumes while mining. The plan required 7,000 CFM of air and the velocity at the inby end of the wing curtain was about 4,982 CFM. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that permanently disabling injuries could reasonably be expected. He determined that the violation was S&S, that four people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a penalty of $3,996. In my decision I affirmed the violation but reduced the gravity, vacated the S&S determination, and assessed a penalty of $2,000. 36 FMSHRC at 1850-51.

Black Beauty has agreed to accept this citation as originally written by the MSHA inspector and will accept the Secretary's proposed penalty of $3,996.

2. Citation No. 6680994, LAKE 2009-412.

This citation, issued under section 104(a) of the Mine Act, states that oil, oil saturated coal fines, and brake fluid were present on a mantrip on Unit #1 in violation of section 75.400. The citation states that the accumulations were in the transmission compartment, brake caliper compartment, and the muffler compartment. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty could reasonably be expected. He determined that the violation was S&S, that 14 people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a penalty of $23,229. In my decision, I affirmed the violation but vacated the S&S determination and assessed a penalty of $12,000. 36 FMSHRC at 1826-28.

The parties propose to modify the citation to delete the inspector's S&S determination. The proposed settlement is based, in part, upon the representation that the temperature of the engine and transmission housing does not exceed 215 degrees Fahrenheit but the flash point for oil and coal dust was significantly higher than 300 degrees Fahrenheit. As a consequence, the violation was unlikely to contribute to an injury or illness. The parties agree that I should assess a penalty of $12,000 for this violation.

3. Order No. 8414938, LAKE 2009-413.

This order, issued under section 104(d)(2) of the Mine Act, states that combustible material was allowed to accumulate in the last three crosscuts of the south slope belt in violation of section 75.400. The order further states that the accumulations consisted of float coal dust deposited on rock dusted surfaces from rib to rib. The accumulations were distinctively black in color and ranged from a thin coating to approximately one quarter inch in depth. This dust was also found on timbers and belt structure. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty

could reasonably be expected. He determined that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a penalty of $10,705. In my decision, I affirmed the violation but vacated the S&S and unwarrantable failure determinations and assessed a penalty of $8,000. 36 FMSHRC at 1832-35.

The parties propose to modify this order to a section 104(a) citation, thereby removing the unwarrantable failure determination made by the MSHA inspector. The MSHA inspector's S&S and high negligence determinations remain. The proposed settlement is based, in part, upon the representation that significant accumulations were not present during the previous examination conducted by the operator. As a consequence, the violation was not caused by an unwarrantable failure of the operator to comply with the safety standard. The parties agree that I should assess a penalty of $8,000 for this violation.

4. Order No. 8414939, LAKE 2009-413.

This order, issued under section 104(d)(2) of the Mine Act, states that combustible material was allowed to accumulate upon the energized main south belt from head to tail in violation of section 75.400. The order further states that the accumulations consisted of a thin coating of float coal dust on rock dusted surfaces that was distinctively black in color. The accumulations also extended into two crosscuts. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty could reasonably be expected. He determined that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a penalty of $10,705. In my decision, I affirmed the violation but vacated the S&S and unwarrantable failure determinations and assessed a penalty of $8,000. 36 FMSHRC at 1836-38.

The parties propose to modify this order to a section 104(a) non-S&S citation. Thus, they are proposing to remove both the unwarrantable failure and S&S determinations made by the MSHA inspector. The MSHA inspector's high negligence determination remains unchanged but the likelihood that the violation would contribute to an injury or illness is reduced to "unlikely." The proposed settlement is based, in part, upon a representation that the accumulations were not as extensive as set forth in the inspector's order and the rollers for the belt were not hot. As a consequence, the violation was unlikely to contribute to an injury or illness and it was not caused by an unwarrantable failure of the operator to comply with the safety standard. The parties agree that I should assess a penalty of $8,000 for this violation.

ORDER

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve the settlement of the remanded citations and orders is **GRANTED** and

Black Beauty Coal Company or its successor is **ORDERED TO PAY** the Secretary of Labor the sum of $1,996 within 30 days of the date of this decision.[2]

Richard W. Manning
Administrative Law Judge

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RWM

[2] Following my March 10, 2014, decision on the merits, Black Beauty paid the $30,000 penalty I assessed for the four violations. (Motion to Approve Settlement at 2). The $1,996 due now reflects the difference between the total owed by Black Beauty in this Decision Approving Settlement on Remand and the amount previously paid. 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.