

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 13 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

ICG ILLINOIS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2013-160
A.C. No. 11-02664-305974

Mine: Viper Mine

DECISION

Appearance: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Suite 216, Denver, CO for the Secretary

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151
Beaumont Centre Circle, Suite 375, Lexington, KY for Respondent

Before: Judge Andrews

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against ICG Illinois, LLC, ("ICG" or "Respondent") at its Viper Mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act"). This case was originally assessed a civil penalty totaling \$49,140.00. Prior to hearing, the parties settled Citation Nos. 8442892 and 8420666, leaving only Citation No. 8443225, which was assessed a penalty of \$42,944.00. A hearing was held on January 14, 2014 in Springfield, Illinois at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs.

STIPULATIONS

1. ICG Illinois, LLC ("ICG") at all times relevant to these proceedings, engaged in mining activities and operations at the Viper Mine in Sangamon County, Illinois.
2. ICG's mining operations affect interstate commerce.
3. ICG is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

4. ICG is an “operator” as defined in § 3(d) of the Mine Act, § 803(d), at the mine where the contested citation in these proceedings was issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Act.
6. Dennis J. Baum was, at the time the citation was issued, an authorized representative of the United States of America’s Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citation at issue in these proceedings.
7. The citation at issue in these proceedings was properly served on ICG as required by the Mine Act.
8. The citation at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.
9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by ICG.
10. ICG demonstrated good faith in abating the violations.
11. The penalties assessed in this case will not affect the ability of ICG to remain in business.

Government Exhibit 5.¹

BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Citation in dispute and discussed below has been designated by the Secretary as significant and substantial. A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon 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 Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

¹ Hereinafter, reference to the Secretary of Labor’s exhibits will be cited as GX. Reference to Respondent’s exhibits will be cited as RX. Citations to the transcript will be cited as Tr. followed by the corresponding page number(s).

The Commission has explained that:

[i]n order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that 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 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

B. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of

the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ).

CITATION NO. 8443225

On September 18, 2012 at 8:20 a.m., MSHA Inspector Dennis Baum (“Baum”) issued Section 104(a) Citation No. 8443225 for an alleged violation of 30 C.F.R. § 75.1506(c)(1) stating,

The refuge alternative in the Main West, 006 MMU primary escapeway, is not located within 1000’ of the nearest working face. The refuge alternative is located between entries 5 and 6 at survey station 172+07 and the faces of number 5 and 6 entries are at approximately survey station 183+17, a distance of approximately 1110’.

Ex. GX-1. Baum determined that the violation was reasonably likely to result in fatal injuries to seventeen people and S&S in nature. *Id.* He further found that the violation was the result of Respondent’s high negligence. *Id.* The citation was terminated at 10:45 a.m. when a tractor was used to advance the refuge alternative to a survey station within 1,000 feet of the working face. Tr. 36; Ex. GX-1.

The cited regulation, entitled “Refuge Alternatives,” provides:

Refuge alternatives shall be provided at the following locations:

- (1) Within 1,000 feet from the nearest working face and from locations where mechanized mining equipment is being installed or removed except that for underground anthracite coal mines that have no electrical face equipment, refuge alternatives shall be provided if the nearest working face is greater than 2,000 feet from the surface.

30 C.F.R. § 75.1506(c)(1).

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent violated 30 C.F.R. § 75.1506(c)(1) when it did not move the refuge alternative to within 1,000 feet of the working face. He further argues that the violation was S&S because, when viewed in light of an emergency, the extra distance could reasonably result in fatal injuries. The Secretary states that this violation was the result of Respondent’s high negligence because it was aware of the condition for, at least, an entire shift but failed to move the refuge alternative until the inspector informed it that a citation would be issued.

Respondent concedes that it violated 30 C.F.R. § 75.1506(c)(1). However, it argues that the Secretary has not proven that the substantial evidence at hearing shows that the violation is

S&S. In essence, Respondent accepts that emergency circumstances should be presumed, but it argues that the Secretary presumed S&S because he did not consider the particular facts surrounding the violation, including the accessibility of SCSRs. Moreover, Respondent contends that high negligence is inappropriate because it was in the process of moving the refuge alternative before the citation was issued.

SUMMARY OF THE TESTIMONY

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

On September 18, 2012, Baum² was in the Viper Mine for an E02 spot inspection. Tr. 16. This inspection was required due to the fact that the Mine liberated more than 500,000 cubic feet of methane in a 24 hour period. Tr. 16-17. However, this inspection does not limit the inspections to methane issues; rather, inspectors are still required to enforce all Mine Act statutes and regulations. Tr. 17-18.

While looking at Respondent's examination books, Baum noticed an entry from the afternoon shift on September 17, 2012 that the refuge alternative needed to be moved inby, closer to the working face. Tr. 18-19; Ex. GX-3. A refuge alternative is "a large steel-constructed device that's designed to provide miners a place of safety in the event of a mine fire, ignition of any type or disaster where they can't get out of the mine." Tr. 21. It contains all of the supplies necessary to keep up to thirty-five miners sustained for ninety-six hours. Tr. 21-22. However, the refuge alternative was not mentioned in the preshift examination report for September 18, 2012. Tr. 20; Ex. GX-4. At this point, Baum warned Safety and Compliance Foreman Kris Oglesby³ ("Oglesby") that a citation would be issued if the refuge alternative was still too far outby. Tr. 23.

² Baum started working for MSHA in March 2007 and received his AR card in February 2008. Tr. 15. Prior to this, he had about thirty years of experience in underground mines in which he ran nearly all of the equipment and conducted examinations. Tr. 15-16.

³ Oglesby has worked in coal mining for about twenty-nine years, all of which have been at the Viper Mine. Tr. 65-66. During this time, he has worked nearly every production position in the mine from roof bolting to examining. Tr. 66. In his current position, he conducts examinations and essentially works to ensure that jobs are being completed in the correct manner. Tr. 64, 66. He also fields any questions that arise from the workforce. Tr. 65.

Production Supervisor Gabriel Alderman⁴ (“Alderman”) arrived at the Mine on the morning at issue and reviewed the preshift examination reports to see what had been found and whether any corrective action was needed. Tr. 83. There was nothing in the preshift examination report that indicated that the refuge alternative needed to be moved. Tr. 83; Ex. GX-4. While Baum and Oglesby were looking at the preshift examination reports and the mine map, Alderman headed underground at 7:30 a.m. to begin his shift. Tr. 85, 103-104. When he arrived on the section, Section Foreman Jim Brown (“Brown”) told Alderman that the refuge alternative needed to be moved closer to the face. Tr. 85. At this point, Alderman testified that he asked the scoop operator to begin preparing the area and called Mine Manager Jerry Jones (“Jones”) for a tractor at roughly 7:40 a.m. Tr. 86, 98-99, 104-105. Depending on where the tractor was located on mine property, Compliance Coordinator Denny Alderman⁵ (“D. Alderman”) testified that it could take anywhere from between an hour and two and a half hours for the tractor to arrive at the necessary location. Tr. 111-112. In this instance, Alderman testified that it was there in about an hour. Tr. 93. Alderman further testified that it takes roughly two hours for the refuge alternative and new location to be “prepared” for the relocation. Tr. 103. A crosscut must be scooped, and floor dust must be laid in the new location. Tr. 103. Moreover, the signs and lifelines must also be moved. Tr. 103. To prepare the refuge alternative, the scoop must remove a beam that acts as roof support from the top. Tr. 102-103.

Baum and Oglesby traveled to the refuge alternative and confirmed that it was beyond the 1,000-foot requirement. Tr. 23-24, 69-70. It measured somewhere between 1,110-1,125 feet from the closest working face. Tr. 24. Baum testified that every foot counts during an emergency situation. Tr. 32-33. He acknowledged that miners carry Self Contained Self Rescuers (“SCSRs”), but these only provide oxygen and mostly benefit miners who can escape. Tr. 27-28. The alternative to the refuge alternative would be constructing a barricade big enough to seal the area with enough oxygen for the miners. Tr. 29-30. However, there have been instances where barricades have failed. Tr. 30.

When Baum wrote Citation No. 8443225 as S&S, he assumed, and was trained to assume, the occurrence of a disaster because the refuge alternative would only be used under conditions in which escape was impossible.⁶ Tr. 26, 45-46. He testified that 110 feet is a long distance to travel during an emergency where when visibility could be poor, miners may have to crawl and injured miners may have to be assisted. Tr. 31. This is compounded by the fact that

⁴ Alderman has worked in coal mining for sixteen years, all of which have been at the Viper Mine. Tr. 79. He began working outby and then began working on production. Tr. 80. He eventually became a foreman and has since served as the Production Supervisor for the past five years. Tr. 80. This position is similar to a section foreman or face boss. Tr. 80-81. He oversees the production process, including ensuring that miners are working safely. Tr. 81. He also plans the present and future cutting sequence. Tr. 81.

⁵ D. Alderman has worked in the mining industry for nearly forty years. Tr. 106. He has been at the Viper Mine for thirty-one years. Tr. 106. He began outby before becoming the Construction Coordinator. Tr. 106-107. He has held managerial positions within the Mine since this time. Tr. 107. In his current position, he acts as a liaison between the Mine and MSHA inspectors. Tr. 107. He either escorts the inspectors or assigns other miners to do, but he is responsible for following up on any citations issued or suggestions made. Tr. 107.

⁶ Baum specified that some of these scenarios could involve roof falls, fire, bad air or an ignition at the face that caused an explosion on the section. Tr. 26.

this distance is above and beyond the 1,000 feet that would have already been traveled from the face. Tr. 32. Baum believed that fatal injuries were likely if the seventeen miners on the section could not reach the refuge alternative. Tr. 54. Because he believed the miners either would not be able to reach SCSRs during an emergency or they would be destroyed, he did not consider them as a mitigating factor. Tr. 35-36, 49. While Baum testified that he would not necessarily consider every violation of an emergency standard S&S, he would find any violation of this standard at this Mine S&S because of the its particular history of methane, ignitions and 107(a) withdrawal orders. Tr. 46-47.

Baum testified that he further designated Respondent's negligence as high because no mitigating circumstances or excuses were offered. Tr. 33, 57. It was obvious to Baum that no equipment had been to the area because a thin layer of dust was undisturbed on top of the rock dust, and there were no equipment tracks. Tr. 33. Oglesby and Alderman insisted that a scoop was not capable of moving the refuge alternative; however, they also admitted that they had not tried.⁷ Tr. 34. They informed Baum that a tractor was on its way, but Baum did not consider this to be mitigating because it was only called after Respondent knew that it would likely be receiving a citation. Tr. 35, 41-42, 57. Further, the condition was reported after the afternoon shift. The midnight shift had worked, and, at 8:20 a.m. the next morning, roughly twelve hours later, nothing had been done. Tr. 35, 52, 58.

Oglesby and Alderman testified that a scoop is incapable of moving the refuge alternative because it is too heavy. Tr. 71, 86. However, both admitted that they had never attempted or personally seen anyone else attempt to move one with a scoop. Tr. 71, 87. Baum continued his inspection within the Mine. Respondent ultimately moved the refuge alternative with a tractor, and the Citation was terminated at 10:45 a.m. Tr. 56; Ex. GX-1.

ANALYSIS AND CONCLUSIONS

I find that the Secretary has proved that Citation No. 8443225 meets all four factors in the *Mathies* test and, therefore, is S&S and reasonably likely to cause fatal injuries to seventeen miners. Respondent admits that Citation No. 8443225 was validly issued. Tr. 9, 69-70. This violation contributes to the possibility that miners will be incapable of reaching the refuge alternative in the event of an emergency, such as an explosion, an ignition or a roof fall. It is the extra distance miners must traverse from the face that would result in additional and possibly critical delays accessing the chamber. These possibilities constitute a measure of danger contributed to by the violation. The Viper Mine is subject to ten-day spot checks because it liberates more than 500,000 cubic feet of methane in a 24-hour period. Further, Baum testified that the Mine has a history of ignitions and methane issues. Because this is a working face, equipment would be running for most of the shift and could serve as an ignition source. All of this contributes to the reasonable likelihood that an explosion or ignition could occur. If this were to happen, visibility could be poor and the conditions could be disorienting, creating the likelihood that all seventeen miners on the working section would suffer from serious injuries or fatalities.

⁷ Baum admitted at hearing that he had never personally seen a refuge alternative moved, so he was unsure whether a scoop could actually move it. Tr. 38-39. He was mostly concerned that Respondent had not even tried. Tr. 39.

While Respondent accepts that an emergency situation should be assumed, it argues that the Secretary has presumed the S&S designation without taking into account the particular facts surrounding the violation. However, I disagree. Baum credibly testified that he would not necessarily consider every violation of this standard S&S; however, he would find every violation of *this standard at this mine* S&S. In explaining his determination, he explained that the Viper Mine has a history of ignitions, methane problems and Section 107(a) imminent danger withdrawal orders. Moreover, the refuge alternative serves to protect miners at the working face, where there would certainly be equipment moving in the area and providing ignition sources. Based on this evidence, I find that the Secretary has proven all four *Mathies* factors, and the violation is properly designated S&S.

Second, Respondent argues that it is unreasonable for Baum to have assumed that all of the available caches of SCSRs would have been destroyed. Moreover, it states that these SCSRs would reduce or negate any likelihood that injury would occur. Like Respondent, I do not assume that every SCSR would be destroyed. However, I do not agree that the SCSRs would greatly reduce or negate the likelihood of injury. While the SCSRs would increase the amount of time that the miners had access to breathable air, they could not ensure that disoriented miners would be able to reach a refuge alternative located more than 100 feet beyond the distance they are trained to travel in emergencies. Further, SCSRs are still limited in time and could not protect the miners from burns associated with fire or from falling rock during a roof fall. In these situations, the refuge alternative would still be the most important means of survival. While I find that the SCSRs are an important resource in the Mine, their availability does not change the S&S nature of this violation.

Although I affirm the Secretary's determination of S&S, I find that the violation was the result of moderate, rather than high, negligence. Baum agreed with Respondent's witnesses at hearing that there was no reason to believe that any one underground had been warned of his presence in the mine. Tr. 42-45, 68, 114. Alderman did not speak to Baum prior to going underground, and he had no reason to believe that there was a problem with the refuge alternative because nothing was included in the preshift examination report. Tr. 84-85; GX-4. While word may travel quickly in a mine, there is no evidence to suggest that Brown knew that Baum was in the area or that Alderman informed him upon arrival. Rather, the uncontroverted evidence at hearing suggests that Alderman only realized that the refuge alternative needed to be moved during his preshift conference with Brown. At roughly 7:40 a.m., Alderman called outside and told Jones that a tractor was needed to move the refuge alternative closer to the face, and the tractor arrived approximately one hour later. Further, he instructed the scoop operator to begin preparing both the refuge alternative and the new location. The fact that the entire process was completed approximately three hours later supports the idea that Alderman independently began the process of moving the refuge alternative. In light of this, I find that mitigating circumstances exist and Respondent's negligence should be reduced from high to moderate.

The Secretary argues that Respondent's negligence is high because it could provide no mitigating evidence for its failure to move the refuge alternative. Baum credibly testified that at 8:20 a.m., when he issued the Citation, the thin layer of dust in the area around the refuge alternative was undisturbed and there were no tire tracks in the area. However, this does not account for the fact that the scoop may have been in transit to or already preparing the new

location. Moreover, there would be no signs of a tractor in transit to the location of the refuge alternative. While I find it disturbing that Respondent seemingly assumes that a scoop is incapable of moving the refuge alternative, Baum had no experience or information to suggest that it was a certainty. Further, while Respondent's communication may not have been enlightening during the inspection, the testimony and evidence at hearing suggest that it was taking action to bring the refuge alternative into compliance. As such, I reduce Respondent's negligence from high to moderate.

PENALTY

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:


[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties stipulated to Respondent's violation history, good faith compliance, and ability to continue in business. Further, there is no argument that the penalty is disproportionate to the size of Respondent's business. As stated above, the Secretary's gravity determination has been affirmed. However, I have determined that Respondent's negligence should be reduced due to the testimony and evidence presented at hearing. In light of this reduction, I find that \$25,000.00 is a more appropriate penalty.

ORDER

It is **ORDERED** that Citation No. 8443225 is **MODIFIED** to reduce the negligence attributable to the operator from "High" to "Moderate." It is further **ORDERED** that ICG Illinois, LLC, **PAY** the Secretary of Labor the sum of \$25,000.00 within 30 days of the date of this Decision.⁸ Upon receipt of payment, this case is hereby **DISMISSED**.


Kenneth R. Andrews
Administrative Law Judge

⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

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