

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 24, 2015

POCAHONTAS COAL COMPANY, LLC
Contestant

v.

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

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

v.

POCAHONTAS COAL COMPANY, LLC,
Respondent

CONTEST PROCEEDING

Docket No. WEVA 2014-395-R
Order No. 3576153; 12/19/2013

Mine: Affinity Mine
Mine ID: 46-08878

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2014-1028
A.C. No. 46-08878-350475

Docket No. WEVA 2015-854
A.C. No. 46-08878-382268

Mine: Affinity Mine

SUMMARY DECISION

Before: Judge Miller

These cases are before me on petitions for penalty filed by the Secretary of Labor and a notice of contest filed by Pocahontas Coal Company LLC pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (“the Act”). Docket No. WEVA 2014-1028 contains eighteen citations and orders, seventeen of which were issued pursuant to section 104(a) of the Act and one of which was issued pursuant to section 104(e)(2). The Secretary proposed penalties totaling \$17,251.00 for the eighteen citations and orders. The seventeen 104(a) citations were resolved in an Order Approving Partial Settlement issued by this court on May 6, 2015. The remaining Order No. 9001636 is the subject of the present order. Dockets Nos. WEVA 2015-854 and WEVA 2014-395-R both involve a single order, Order No. 3576153, which was issued pursuant to section 104(e)(1). The Secretary has proposed a penalty of \$5,600.00 for that order.

The parties have filed a Joint Motion to Consolidate these dockets, which is hereby **GRANTED**. The parties have also filed a Joint Motion for Summary Decision. The purpose of the motion is to complete these two penalty dockets so that the parties may file an appeal with regard to the order granting summary decision on the issue of the validity of the notice of pattern of violations. That order disposed of most of the issues in these cases and this order disposes of the remaining issues.

Commission rules provide that summary decision is appropriate when the entire record shows “(1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). Based upon the stipulations of the parties and a review of the entire record, I find that there is no genuine issue as to any material fact. I conclude that, for the reasons stated below, the Secretary of Labor is entitled to summary decision as a matter of law.

Procedural Background

On October 24, 2013, the Mine Safety and Health Administration (“MSHA”) notified Pocahontas Coal Company, LLC, (“Pocahontas”) that MSHA had determined that a pattern of violations existed at Pocahontas’s Affinity Mine and issued Written Notice No. 7219153 (“the NPOV”) pursuant to section 104(e)(1) of the Mine Act. That notice was upheld as validly issued in an order issued by this court on November 3, 2015. Order No. 3576153 was a section 104(e)(1) order predicated on the NPOV. It was issued on December 19, 2013, and alleged a violation of 30 C.F.R. § 75.370(a)(1). Pocahontas filed a Notice of Contest for that order on January 3, 2014, which was docketed as WEVA 2014-395-R. The Secretary filed a Petition for Assessment of Civil Penalty on August 27, 2015, for WEVA 2015-854, which included Order No. 3576153. Order No. 9001636 is a section 104(e)(2) order predicated on the NPOV. It was issued on March 26, 2014, and alleged a violation of 30 C.F.R. § 75.517. The Secretary filed a Petition for Assessment of Civil Penalty on July 15, 2014, for WEVA 2014-1028, which included Order No. 9001636. The docket, WEVA 2014-1028 and the contest WEVA 2014-395-R are the cases in which an order was entered upholding the validity of the NPOV issued to the mine. The addition of the last penalty makes the record complete.

Joint Stipulations of Fact

The parties entered into the following stipulations of fact for purposes of summary judgment:

1. Section 104(e)(1) Order No. 3576153 was issued by an authorized representative of the Secretary on December 19, 2013.
2. Order No. 3576153 alleges a violation of 30 C.F.R. Section 75.370(a)(1) as follows:

The operator failed to follow the safety precautions listed on page 1 of a revision to the ventilation plan for the slope fill construction project. When observed, the operator failed to install an adequate fall barrier on top the support structure at the Beckley Seam level and along the elevated walkways leading to the support structure. The fall barrier along the front of the structure was made of loose rebar, which did not span the full length of the opening on front of the structure, and red caution tape stretched across the area. The railing installed along elevated walkways was also not sufficient to prevent persons from falling. The railing was measured and found to be less than 28” high at its highest point. Standard 75.370(a)(1) was cited 38 times in two years at mine 4608878 (38 to the operator, 0 to a contractor).

- The Parties agree that inspector saw the condition as outlined in Order No. 3576153.
3. The authorized representative determined that in Order No. 3576153 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one (1) person. The parties agree that the inspector properly marked Order No. 3576153 as reasonably likely, permanently disabling, and affecting one person.
 4. The authorized representative determined that Order No. 3576153 was significant and substantial. The parties agree that Order No. 3576153 was properly cited as significant and substantial.
 5. The authorized representative determined that the negligence in Order No. 3576153 was moderate. The parties agree that Order No. 3576153 was properly cited with moderate negligence.
 6. The Office of Assessments assessed a civil penalty in the amount of \$5,600.00 for Order No. 3576153. The Parties agree that the assessed civil penalty of \$5,600.00 is proper given the following factors:
 - a. The proposed penalty is appropriate given the operator's history of previous violations;
 - b. The proposed penalty is appropriate to the size and business of the operator charged;
 - c. The proposed penalty is appropriate based on the level of negligence alleged;
 - d. The proposed penalty will not affect the operator's ability to continue in business;
 - e. The proposed penalty is appropriate based on the gravity of the violation; and
 - f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.
 7. Section 104(e)(2) Order No. 9001636 was issued by an authorized representative of the Secretary on March 26, 2014.
 8. Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517 as follows:

The power wire for the AL LEE Forklift Co. #3 S/N E11858, is not being maintained fully insulated and adequately protected. The Forklift is being used outby the No. 2 section and has damage at the Anderson plug exposing an uninsulated energized power conductor. Standard 75.517 was cited 14 times in two years at mine 4608878 (14 to the operator, 0 to a contractor).

- The parties agree that the inspector saw the condition as outlined in Order No. 9001636.
9. The authorized representative determined that in Order No. 9001636 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one person. The parties agree that the inspector properly marked Order No. 9001636 as reasonably likely, permanently disabling, and affecting one person.
 10. The authorized representative determined that Order No. 9001636 was significant and substantial. The parties agree that Order No. 9001636 was properly cited as significant and substantial.
 11. The authorized representative determined that the negligence in Order No. 9001636 was moderate. The parties agree that the order was properly cited with moderate negligence.

12. The Office of Assessments assessed a civil penalty in the amount of \$764.00 for Order No. 9001636. The Parties agree that the assessed civil penalty of \$764.00 was proper given the following factors:
- a. The proposed penalty is appropriate given the operator's history of previous violations;
 - b. The proposed penalty is appropriate to the size and business of the operator charged;
 - c. The proposed penalty is appropriate based on the level of negligence alleged;
 - d. The proposed penalty will not affect the operator's ability to continue in business;
 - e. The proposed penalty is appropriate based on the gravity of the violation; and
 - f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Order No. 3576153 alleges a violation of 30 C.F.R. § 75.370(a)(1). That standard requires that operators "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1). The parties have stipulated that fall barriers installed on top of a support structure and elevated walkways at the mine did not comply with requirements included in a revision of the mine's ventilation plan. Jt. Stips. ¶ 2. The parties have further stipulated that the violation was reasonably likely to cause a permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 3-5. They agree that the proposed penalty of \$5,600.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 6.

Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517. That standard requires that "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." 30 C.F.R. § 75.517. The parties have stipulated that at the time of the inspection, the power wire for the cited forklift had damage at the Anderson plug exposing an uninsulated energized power conductor. Jt. Stips. ¶ 8. Thus, the power cord was not "insulated adequately and fully protected" as required by the standard. *Id.* The parties have further stipulated that the violation was reasonably likely to cause permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 9-11. They agree that the proposed penalty of \$764.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 12.

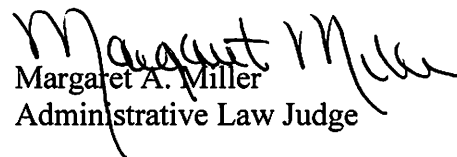
The two orders at issue here were both issued pursuant to section 104(e) of the Mine Act. Order No. 3576153 was issued pursuant to section 104(e)(1) and Order No. 9001636 was issued pursuant to section 104(e)(2). Sections 104(e)(1) and 104(e)(2) grant the Secretary the authority to issue withdrawal orders for significant and substantial (S&S) violations when a mine has received notice that a pattern of S&S violations exists at the mine. 30 U.S.C. § 814(e). Thus, for

an order to be properly issued under either of those sections, the operator must have received a notice of pattern of violations (NPOV) as described in section 104(e)(1). *Id.* The NPOV underlying the two orders here was Written Notice No. 7219153, which was issued to Pocahontas on October 24, 2013. Pocahontas does not concede that the NPOV was validly issued or that a pattern of violations existed at the mine, and thus argues that these two citations should have been issued as 104(a) citations rather than 104(e) orders. Jt. Memo. at 7. However, the issue of the validity of the NPOV was already decided by order granting partial summary decision to the Secretary on November 3, 2015. Therefore, Orders No. 9001636 and 3576153 were properly issued as 104(e) orders.

In view of the entire record, I find that there is no genuine issue remaining as to any material fact. Based on the stipulations of the parties, I find that both violations occurred and that the proposed penalties are appropriate under the criteria set forth in section 110(i) of the Act. I therefore find that the Secretary is entitled to summary decision as a matter of law.

II. ORDER

For the reasons set forth above, the motion for summary decision is **GRANTED**, the notice of contest is **DISMISSED**, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$6,364.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

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