

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

June 25, 2015

BLACK BEAUTY COAL COMPANY,
Contestant,

v.

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

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

v.

BLACK BEAUTY COAL COMPANY,
Respondent.

CONTEST PROCEEDINGS

Docket No. LAKE 2008-378-R
Order No. 6672656; 04/05/2008

Docket No. LAKE 2008-379-R
Citation No. 6672658; 04/08/2008

Docket No. LAKE 2008-380-R
Citation No. 6672659; 04/08/2008

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2008-643
A.C. No. 12-02010-160151

Docket No. LAKE 2009-72
A.C. No. 12-02010-165822

Mine: Air Quality No. 1

DECISION ON REMAND APPROVING SETTLEMENT¹
AND
ORDER TO PAY

Before: Judge Feldman

Section 50.2 of the Secretary of Labor’s (“Secretary”) regulations defines, in pertinent part, an “accident” as “[a]n injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2. Section 50.10 of the regulations requires a mine operator to notify the Mine Safety and Health Administration (“MSHA”) within 15 minutes of the occurrence of an “accident” that can potentially result in death. 30 C.F.R. § 50.10. Following such notification, MSHA routinely verbally issues a section 103(k) order prohibiting a mine operator from resuming operations at an accident site before MSHA can determine that mining operations can be safely resumed. 30 U.S.C. § 813(k). Additionally, section 50.12 of the regulations, the cited mandatory safety standard in issue in this Remand Decision, requires the preservation of evidence at an accident site. Specifically, section 50.12 provides:

¹ This Remand Decision concerns only Citation No. 6672658 in Docket No. LAKE 2008-643.

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

30 C.F.R. § 50.12.

This remand matter concerns an alleged violation by Black Beauty Coal Company (“Black Beauty”) of section 50.12, which was cited in Citation No. 6672658. The Secretary attributed the violation to a high degree of negligence and initially sought to impose a penalty of \$2,678.00.

The undisputed evidence presented at the hearing reflects that at approximately 8:05 p.m. on April 5, 2008, a roof bolter was struck in the head and torso by a fallen slab of roof material. The victim remained ambulatory after the accident, walked to a mantrip, and was taken to the surface where he was transported to a hospital via ambulance. Shortly thereafter, at approximately 8:23 p.m., Black Beauty reported the event to MSHA pursuant to the requirements of section 50.10, which resulted in MSHA’s issuance of a verbal 103(k) order communicated via telephone at approximately 9:41 p.m. *See, e.g., Black Beauty Coal Co., 37 FMSHRC ___, slip op. at 2-3 (Apr. 7, 2015).*

An MSHA inspector arrived at the accident site at approximately 10:50 p.m. At that time, normal mining operations at the site of the roof fall had resumed after Black Beauty’s management reportedly received information from the hospital emergency room that the roof bolter was not seriously injured. This information is consistent with, and supported by, the roof bolter’s emergency room medical records, which were proffered by the Secretary at the hearing, reflecting that the victim sustained contusions and abrasions to the shoulder and rib cage. *See Gov. Exs. 45, 46.* Although the roof bolter was initially cleared to return to work two days after the accident without significant physical restrictions, the record also reflects that three weeks later, on April 28, 2008, the roof bolter’s physician advised that he refrain from roof bolting for two weeks due to significant right shoulder pain and inflammation that was treated with anti-inflammatory medication. *37 FMSHRC ___, slip op. at 2-3.*

The Secretary moved for summary decision with respect to Citation No. 6672658 at the conclusion of his direct case. *Tr. 278-79.* The Secretary does not contend that the injuries sustained by roof bolter were life threatening. However, the Secretary asserts:

The Secretary believes that this is a straightforward application of the 50.12 regulation to the operative facts in this case. And that is, again, as Your Honor has stated, 50.12 states that unless granted permission by an MSHA district manager, no operator may alter an accident cite, et cetera, the rest of what the regulation says. The facts are undisputed that the mine never received permission by an MSHA district manager to continue operations. And thus, there is no dispute that the accident site was modified.

Tr. 283.

Based on the above undisputed medical evidence presented at the hearing, following the Secretary's request for a summary decision, I issued a bench decision, which was formalized in a written decision, holding that the April 5, 2008, incident did not constitute an "accident" because the *injuries sustained* did not present "a reasonable potential to cause death." *Black Beauty Coal Co.*, 34 FMSHRC 436, 439 (Feb. 2012) (ALJ). Nevertheless, having reported the incident as an "accident," albeit erroneously, I concluded that Black Beauty was precluded from resuming normal mining operations without MSHA's approval. *Id.* Consequently, I affirmed the violation of section 50.12 in Citation No. 6672658, reduced the negligence attributable to the violation from "high" to "low," and reduced the civil penalty from \$2,678.00 to \$500.00. *Id.*

As the Secretary's motion for summary decision with respect to Citation No. 6672658 was summarily granted in a bench decision based on the undisputed medical reports, after presentation of the Secretary's direct case, the Commission, in essence, concluded that I prematurely terminated the hearing without providing Black Beauty with the opportunity to further clarify the "nature and extent of the injuries suffered."² 37 FMSHRC ___, slip op. at 4-5. Consequently, the Commission vacated my affirmance of the cited violation in Citation No. 6672658 with remand instructions to reopen the record for the purpose of receiving additional evidence. *Id.* at 5. In this regard, the Commission concluded that if the roof bolter's injuries did not have a reasonable potential to cause death, Black Beauty was permitted to resume operations without MSHA's approval because the site of the roof fall could not be deemed an "accident site." *Id.* at 4. Specifically, the Commission held that "it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one." *Id.*

The Commission's remand was followed by a telephone conference with the parties on May 12, 2015, during which I sought to determine if the parties could agree on whether the injuries sustained by the roof bolter presented "a reasonable potential to cause death." The parties have now filed a joint motion to approve settlement of Citation No. 6672658. The parties have agreed on a reduction of the proposed civil penalty for Citation No. 6672658 from \$2,678.00 to \$500.00. The parties' settlement terms include lowering the degree of negligence attributable to Black Beauty's alleged violation of section 50.12 from "high" to "low."

² At the hearing, counsel for Black Beauty represented that the roof bolter victim was prepared to testify that he did not sustain serious injuries. Tr. 296.

Given Black Beauty's acquiescence to the fact of the violation, I believe the reduction in penalty based on a substantial reduction in the degree of Black Beauty's negligence is amply supported by the record, which reflects rather insignificant injuries sustained by the roof bolter. Thus, Black Beauty's resumption of mining operations at the roof fall site, a questionable "accident" site at best, without MSHA's prior approval, supports the parties' agreement that the violation was attributable to low negligence. In the absence of any aggravating circumstances, the penalty reduction is consistent with the penalty criteria in section 110(i) of the Act. 30 U.S.C. § 820(i). Consequently, the parties' motion to approve settlement **IS GRANTED**.

ORDER

In view of the above, **IT IS ORDERED** that the parties' settlement of Citation No. 6672658 **IS AFFIRMED**. **IT IS FURTHER ORDERED** that the degree of negligence attributable to Black Beauty for the violative condition is modified from "high" to "low."

Finally, **IT IS FURTHER ORDERED** that Black Beauty Coal Company shall pay the \$500.00 civil penalty in satisfaction of Citation No. 6672658 in Docket No. LAKE 2008-643.

IT IS FURTHER ORDERED that consistent with the parties' settlement terms, Black Beauty Coal Company shall pay the \$143,493.00 civil penalty in satisfaction of 19 other citations and orders at issue in Docket No. LAKE 2008-643.³

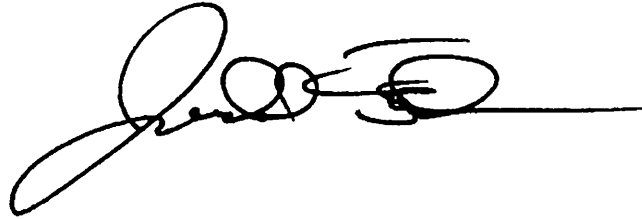
Consequently, **IT IS ORDERED** that Black Beauty Coal Company shall pay a total civil penalty of \$143,993.00 in satisfaction of 20 citations and orders at issue in Docket No. LAKE 2008-643.

IT IS FURTHER ORDERED that consistent with the parties' settlement terms, Black Beauty Coal Company shall pay the \$80,862.00 civil penalty in satisfaction of 14 citations and orders at issue in Docket No. LAKE 2009-72.⁴

³ Prior to the hearing, the parties settled 18 of the 20 citations and orders at issue in Docket No. LAKE 2008-643. During the hearing, prior to the close of the record, the Secretary agreed to vacate Citation No. 6672659. While I approved of the settlement of the 18 citations settled prior to the hearing in my February 10, 2012, initial decision, the settlement terms were officially memorialized in the Commission's April 7, 2015, remand. 37 FMSHRC ___, slip op. at 9-11. Black Beauty has agreed to pay \$143,493.00 in satisfaction of these 19 settled citations and orders.

⁴ Prior to the hearing, the parties settled 11 of the 14 citations and orders at issue in Docket No. LAKE 2009-72. During the hearing, prior to the close of the record, the Secretary agreed to settle two additional citations (Citation Nos. 6672674 and 6676919). While I approved of the settlement of the 11 citations settled prior to the hearing in my February 10, 2012, initial decision, the settlement terms were officially memorialized in the Commission's April 7, 2015, remand. 37 FMSHRC ___, slip op. at 9-11. Black Beauty has agreed to pay \$80,862.00 in satisfaction of these 13 settled citations and orders.

Upon receipt of timely payment of the total \$224,855.00 civil penalty within 45 days of this Remand Decision, the captioned civil penalty and contest proceedings **ARE DISMISSED.**⁵

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal line extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd, Suite 216, Denver, CO 80204

Arthur Wolfson, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

/acp

⁵ 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.