

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2016

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

v.

RIVER VIEW COAL, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-782
A.C. No. 15-19374-358607

Mine: River View Mine

DECISION

Appearances: Hanah Harris-Yager, U.S. Department of Labor, Office of the Solicitor
1244 Speer Boulevard, Suite 216, Denver, Colorado 80204

Gary D. McCollum
1146 Monarch Street, 3rd Floor, Lexington, Kentucky 40513

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against River View Coal, LLC, at the River View Mine, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801. This case involves one citation, number 8506100, issued on October 23, 2013 as a 104(d)(1) violation for an assessed penalty of **\$5,961.00**. The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on May 3, 2016.

MSHA Inspector Matthew Stone testified for the Secretary. River View Mine Unit 7 Foreman Michael Duckworth and Safety Department Manager Gerome Thomas testified for River View Coal (Respondent). After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden in establishing a violation of the cited standard. All elements of the citation with the exception of the unwarrantable failure aspect are upheld. After considering the necessary criteria for penalty assessments, I find that a penalty of **\$4,500.00** is appropriate.

II. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Inspector Stone alleged that there was an inadequate on-shift examination for the 8157 roof bolting machine in violation of 30 CFR §75.362(a)(2), leading him to issue citation number

8506100. The gravity was marked as reasonably likely, permanently disabling, and significant and substantial with four miners affected. Ex A. Stone found Respondent to be highly negligent and designated the violation as an unwarrantable failure on the part of the Respondent's management. *Id.* The §75.362(a)(2) standard states "persons designated by the operator shall conduct an examination to ensure compliance with the respirable dust control parameters specified in the mine ventilation plan." Tr. 17, 39-40.

On October 23, 2013 Inspector Stone traveled to the mine to collect respirable dust samples on the Number 7 Unit. Tr. 26, 36. Section Foreman Michael Duckworth entered the mine around 6:15 that morning, while Inspector Stone waited outside for the Unit to get started. Tr. 138-139. Prior to Inspector Stone entering the mine, the scoop operator radioed Duckworth informing him that the on-shift dust parameter exam for the 8157 roof bolter was good. Tr. 154. Foreman Duckworth was given the suction rating and told everything else was good. *Id.* Three roof bolting machines were located in the unit at the time, however only two were typically used. Tr. 152-153. The 8157 roof bolter was an extra machine and did not need to be run that day. Tr. 160. Standard §75.363(g) states "The certified person directing the on-shift examination to ensure compliance in respirable dust control parameters specified in the mine ventilation plan shall certify, by initials, date and time that the examination was made." Tr. 38. A certified machine should be ready for operation even if currently idle. Tr. 120-121.

Upon entering the mine, Inspector Stone travelled underground and arrived at the power center where the DTI board was located. Tr. 37. The DTI board is where examinations are posted with the day/time and initials to signify the exam is complete. *Id.* Inspector Stone observed the date and initials on the DTI board for the 8157 on-shift examination, indicating it had been completed. Tr. 37-39, 49, 60, 64, 114-115. During his testimony at hearing, Section Foreman Duckworth did not recall certifying that the examination was completed on the DTI board. Tr. 155. However, Inspector Stone recalled that during his inspection Duckworth acknowledged he had signed the DTI board indicating the examination of the 8157 roof bolter was complete. Tr. 65. Stone also noted he was told by Duckworth and the roof bolters that they had completed an examination of the 8157 roof bolting machine. Tr. 115. Inspector Stone approached and conducted his inspection of the machine. Tr. 40. The roof bolter operator informed Stone that he had checked the vacuum and the machine had good suction. Tr. 49-50. Stone noted in his testimony that it is necessary to check both the suction and the dust filter because there may still be an issue with the dust box even with adequate vacuum pressure. Tr. 41. Inspector Stone noticed dust accumulation on the mufflers coming from the dust collection system. Tr. 45-46. After opening the collection box, Stone found a damaged filter and rock drill dust accumulation on the clean side of both filters. Tr. 45-47. It is not possible for dust to have gone backwards through the muffler because a great amount of pressure would be required for dust to enter the wrong end of the machine. Tr. 117. There were small dents to the outer ring of the filter, which could have been caused by banging the filter, creating damage and allowing dust to bypass. Tr. 195, 47-48. Inspector Stone concluded from the dust build up that the condition of the dust box existed for more than one shift. Tr. 71-72. At the time, there were four miners working down wind of the machine. Ex. A, Tr. 70.

Inspector Stone then issued the 8506100 citation. Tr. 56-57. He concluded that the Respondent had violated the standard because they did not adequately examine the entire system

as specified in the ventilation plan. Tr. 63. The inspection of the collection box only included the vacuum suction test, not a visual check inside the box and filter. Tr. 59-60. On the day of the inspection no replacement dust filters were located at Unit 7, however additional filters were available from other units at the mine. Tr. 182-183. If an additional filter were requested, Foreman Duckworth would have been informed. Tr. 182-183. Duckworth acknowledged that all steps for the on-shift examination need to be conducted prior to the examination being certified. Tr. 171. Inspector Stone noted that if a full examination had been conducted, the issue would have been found and resolved. Tr. 124.

Inspector Stone testified that on-shift examinations are important because they eliminate hazards and exposure to respirable dust for miners. Tr. 64. Drill dust can cause silica to enter the surrounding air and lead to a permanently disabling disease, silicosis. Tr. 69, 72. Silicosis is caused when silica particles, similar to glass or sand, enter the lungs and cut the tissue. Tr. 72-73, 207. Persons affected by silicosis will never get better, even if the individual is removed from the environment. Tr. 72-73, 207.

Section Foreman Duckworth testified that since the 8157 roof bolter was the extra machine at the unit, it was not in operation at the time of the inspection. Tr. 79. The 8157 roof bolter was located in an area that would not have allowed for dumping of the dust box because the air for that day flowed through the section and could have exposed workers on the left side to harmful dust. Tr. 177, 206-207. However, according to Inspector Stone the box could have been opened with minimal dust release to check the filter without dumping the dust inside. Tr. 60-62, 116. Additionally, there were acceptable areas the machine could have been moved to conduct the full inspection. Tr. 61-63.

The roof bolter standard in the Respondent's mine standard book number 8 states "dust boxes should be cleaned at the beginning of each shift and at mid-shift. Boxes should only be emptied as close to the face as possible so they can be loaded out in the loading cycle wall, wearing a dust mask." Tr. 146. Foreman Duckworth further testified that it was standard procedure at the River View Mine for the roof bolter operators to wait until they reached the face to open the box because each time the box is opened there is a chance for dust to enter the air. Tr. 175. The roof bolters operating the 8157 roof bolter were proficient in MSHA training and the River View Mine's expectations training. Tr. 148-150. The Respondent requires the filters in the box to be changed on Mondays, Wednesdays and Fridays or as needed. Tr. 163. When roof bolters are in use, boxes will typically be dumped three or four times per shift, and the roof bolter operators conduct a visual inspection of the filter during each dump. Tr. 175-176, 214. There were no restrictions preventing the roof bolter operators from conducting another exam once they pulled up to the face. Tr. 166, 174, 210.

Prior to the inspection in question, Respondent had not been cited under this particular standard in the 15 months prior to the citation at issue. Ex A, Tr. 158. Between April 23, 2013 and October 23, 2013 MSHA and mine operator respirable dust samples were taken from the River View Mine. Tr. 159-160. Of the total 525 dust samples, two exceeded the 2-milligram standard for respirable dust. Tr. 159-160. All of the samples taken on the working sections of the mine were compliant with the standard. Tr. 195-196.

Respondent contested the citation, claiming their inspection of the dust box was not inadequate.

III. PARTY ARGUMENTS

The Secretary argues that in order for the Respondent to comply with Standard 30 C.F.R. Section 75.362(a)(2), an on-shift examination must be conducted to determine whether the dust collection system is in operational condition. Sec’y Br., 14. Foreman Duckworth certified the on-shift exam for the roof bolter was complete. Sec’y Br. 18, Tr. 37-39, 49, 60, 64, 114-115. However, since dust was found on the clean side of the filter, the Respondent did not check the interior of the box, and therefore did not complete the on-shift examination. Sec’y Br., 16. The Secretary states the Respondent accepted the dust collection system was not maintained in operative condition and the condition was a significant and substantial violation of the standard. Tr. 16. The Secretary argues the violation should remain designated as high negligence since there were no mitigating factors. Sec’y Br., 25. Although the machine was located in an area not adequate for dumping, the box could have been opened to check the filter with minimal dust release. Sec’y Br., 28-29, Tr. 177, 60-62. In addition, there were other acceptable areas the machine could have been moved to conduct a full examination. Sec’y Br. 28-29, Tr. 61-63. The Secretary argues the violation was an unwarrantable failure as the condition was visibly obvious and the Respondent was aware of the hazard, it was common practice at the mine, and posed a high degree of danger. Sec’y Br., 25-26, Tr. 15-16. The Secretary contends that since Foreman Duckworth was aware that the roof bolter operators usually wait to reach the face before dumping the drill dust box, he also knew or should have known the dust filter had not been examined as part of the on-shift examination when he certified it complete. Sec’y Br., 26, Tr. 15-16.

The Respondent argues the citation should be vacated because it was premature and speculative. Resp. Br., 15, 20. The Respondent asserts the No. 8157 roof bolting machine was not engaged in production at the time of the inspection and according to the plain language of 30 C.F.R. Section 75.362(a)(2) “...The examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes.” Resp. Br., 16, 19. The Respondent argues they still had time to conduct the examination and therefore no violation occurred. Resp. Br., 19. In the alternative, the Respondent argues the negligence level should be reduced from high negligence to a lower level given the presence of mitigating factors. Resp. Br., 26, Tr. 24. The Respondent contends that the Secretary failed to demonstrate an unwarrantable failure on the part of the River View Mine. Resp. Br., 20-21. The Respondent argues that the situation did not result from aggravated conduct but rather demonstrated poor communication and a difference in opinion on rock drill dust safety practices. Resp. Br., 21.

IV. ANALYSIS

A. Citation No. 8506100

Inspector Stone alleged in part with Citation No. 8506100 that:

An inadequate examination was conducted on the CO#8157 roof bolter operating on the #7 unit (MMU 011-0/012-0) to assure the compliance of the respirable dust control parameters specified in the approved mine ventilation plan. The operator had conducted the examination prior to the MSHA inspection and no deficiencies were found by the operator. An MSHA inspection was conducted on the CO#8157 roof bolter and the following deficiencies were found. The opposite operator side dust filter was damaged from being beat out, accumulations of rock drill dust were found on the clean side of both the operator side and opposite operator side dust filters and dust has accumulated on the machine frame from dust blowing from the exhaust mufflers. These deficiencies were obvious to the most casual observer and should have been found by a person who is trained to conduct these exams.

Inspector Stone went on to state that:

The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Stone found that the condition of the filter violated 30 C.F.R. §75.362(a)(2) which requires:

A mine operator to conduct an examination of the mine's respirable dust control parameters specified in the mine ventilation plan and correct any deficiencies in the dust controls before production begins or resumes.

The Secretary may demonstrate a violation of §75.362(a)(2) by proving the operator either did not examine a dust suppression measure required in the ventilation plan or did not correct a problem with a dust suppression measure. *GMS Mine Repair*, 37 FMSHRC 2841 (Dec. 2015) (ALJ).

Inspector Stone determined that the violation was reasonably likely to result in injury, that injury was likely to be serious, and the violation was significant and substantial (S&S) and affected four people. Ex. A. Inspector Stone alleged the violation was the result of high negligence with no mitigating factors and an unwarrantable failure on the part of the respondent's management. *Id.*

There is no dispute among the parties that there was dust located on the clean side of the filter. Tr. 45-47, 157. While examining the machine, the roof bolter operator informed Inspector Stone that he had checked the vacuum and the machine had good suction. Tr. 49-50. Inspector Stone observed the date and initials on the DTI board indicating the exam was completed. Tr. 37-39, 49, 60, 64, 114-115. Section Foreman Duckworth acknowledged in his testimony that all steps for the on-shift examination need to be conducted prior to the examination being certified. Tr. 171. Finally, Inspector Stone testified that if a full examination had been conducted the issue would have been found and resolved. Tr. 124-125.

Based on the testimony and entered exhibits, I find that the Secretary presented sufficient evidence to show that a violation of 30 CFR §75.362(a)(2) occurred at Unit 7 of the River View Mine. I affirm Citation No. 8506100 but, as explained below, do not find the violation to be an unwarrantable failure on the part of Respondent.

B. Significant and Substantial

A violation is significant and substantial (S&S), “if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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).

The Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

I have already held that a violation of 30 CFR §75.362(a)(2) occurred at Unit 7 of the River View Mine. Secondly, since dents were found in the filter and rock drill dust on the clean side of the filter, the violation contributed to the discrete safety hazard of silica particles in the air. Tr. 45-48. If the machine was in use it is reasonably likely that silica particles would have entered the air contributing to an injury. Tr. 69, 72. Silica particles in the air can cause silicosis, a permanently disabling condition. Tr. 69, 72.

Because the examination of the roof bolting machine was certified as complete, it was available and ready to be placed into production with the defective filter. And at no time prior to his decision to issue a citation was Inspector Stone notified by the roof bolt operators or Foreman Duckworth that further inspection was necessary or going to take place prior to the machine going into production. To the contrary he was also told by Duckworth and the roof bolters that they had completed an examination of the 8157 roof bolting machine. Tr. 115. This led Stone to reasonably conclude that the machine was in fact ready and available to be placed into production in the condition he found it during his inspection. It is undisputed that the condition of the filter was likely to contribute to a permanently disabling injury, and in the event a violation is found that the condition of the dust filter was a significant and substantial violation of the standards. Tr. 16. It is also undisputed that four people would have been affected had silica particles entered the air since there were four miners working in close proximity to the roof bolting machine at the time of the violation. Ex. A, Tr. 70. Therefore, based on the evidence presented by the Secretary, I find that the Secretary has satisfied all four elements of the Mathies S&S test and affirm citation No. 8506100 as S&S.

C. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

Inspector Stone, without equivocation, credibly testified that the DTI board reflected that the examination certification was complete. Tr. 37-39, 49, 60, 64, 114-115. Even though the 8157 roof bolter was not in operation at the time of inspection, a certified machine should be ready for operation even if currently idle. Tr. 79, 120-121. Foreman Duckworth testified he knew all steps for the on-shift examination needed to be conducted prior to the examination being certified. Tr. 171. He was aware that the 8157 roof bolter was not at the face when his roof bolters communicated the suction rating and relayed to him through the scoop operator that everything else was good. Tr. 169. Duckworth also testified the standard procedure is for the roof bolters to wait until the machine is at the face to inspect the dust boxes and dump them if needed. Tr. 168-169, 175. Even though the box could have been opened to check the filter, the machine was not located in an area suitable for dumping. Tr. 177, 60-62. Duckworth also clarified that the boxes do need to be checked wherever the machine is located. Tr. 180. Further, Inspector Stone noted the roof bolter operators had the option to move the machine to a different area or to the face before certifying a complete exam. Tr. 61-63.

Foreman Duckworth testified that the roof bolters operating the machine were proficient in MSHA training as well as the River View Mine's expectations training. Tr. 148-150. It was standard procedure at River View for the roof bolter operators to wait until they reached the face to open the dust boxes because there is a chance for dust to enter the air each time a box is opened. Tr. 175. When roof bolters are in use, boxes will typically be dumped three or four times per shift, and the roof bolter operators conduct a visual inspection of the filter during each dump. Tr. 175-176, 214. There were no restrictions preventing the roof bolter operators from conducting another exam once they pulled up to the face. Tr. 166, 174, 210. However, the operators should have reported their intent to Foreman Duckworth rather than communicate that everything with the machine was good. It was this report that led Duckworth to certify on the DTI board that the inspection was complete. I find Foreman Duckworth certified the examination as complete knowing that the dust boxes were not examined by the roof bolters. The examination should never have been certified until such time as the dust boxes were examined. While it is true Respondent, under the standard, had until the time the machine went into production to conduct further examinations and correct the deficiencies in the dust filter there is no indication that was going to happen. In fact Inspector Stone was told by both Duckworth and the roof bolters that the inspection of the machine was complete. Under these circumstances I find the high negligence level designated by Inspector Stone to be appropriate.

D. Unwarrantable Failure

Section 104(d)(1) of the Mine Act states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,...and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “willful intent,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d)(2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator’s efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator’s knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

For Citation No. 8506100, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Therefore citation 8506100 shall be **MODIFIED** from a 104(d)(1) to a 104(a) violation.

1. Extent and Duration of the Violation

Inspector Stone observed the dust accumulation on the mufflers was noticeable to a casual observer. Ex. A. Inspector Stone concluded from the dust build up that the condition of the dust box existed for more than one shift. Tr. 71-72. However, Foreman Duckworth testified that he observed rock dust on the machine in question and that due to its location at the last open crosscut it would have been rock dusted over calling into question the length of time the condition of the dust box Inspector Stone observed existed. Tr. 156. While it is undisputed there was dust on the clean side of the filter and that the filter had been damaged there is insufficient evidence to conclude the length of time that the filter had been damaged and operated in that condition.

2. Notice to the Operator

The “notice” factor of unwarrantable failure pertains to MSHA citations, directives, and communications prior to the violation at issue that notify the operator of hazardous conditions or practices. *Consolidation Coal*, 22 FMSHRC 2353; *IO Coal. Co.*, 31 FMSHRC 1353-55.

The River View Mine has not been cited for a violation of 30 C.F.R. § 75.362(a)(2) in two years as of 2015. Ex 1. Furthermore, previous MSHA and mine operator respirable dust samples taken from the mine showed only 2 samples exceeding the standard for respirable dust. Tr. 159-160. Neither of the samples were taken from working sections of the mine. Tr. 195-196.

3. Abatement Efforts

Citation 8506100 notes that Inspector Stone allowed Respondent “time to meet with all roof bolter operators and section foreman to train these persons to conduct the examination to assure compliance with respirable dust control parameters and to provide proof by signature that these individuals received this training.” Ex A. No evidence was presented at hearing to dispute that Respondent abated this citation in anything other than an effective and timely fashion.

4. Obviousness of the Hazard and Degree of Danger

Inspector Stone noticed dust accumulation on the mufflers coming from the dust collection system and rock drill dust on the clean side of both filters. Tr. 45-47. Inspector Stone alleged the deficiencies were obvious to a casual observer and should have been found by a person who is trained to conduct these exams. Ex. A. However, as noted above, Section Foreman Duckworth testified that he observed rock dust on the machine in question and that due to its location at the last open crosscut it would have been rock dusted over calling into question whether what Inspector Stone observed on the outside of the machine was rock dust or hazardous drill dust. Tr. 156.

At the time of the citation there were four miners working downwind from the machine. Ex. A, Tr. 70. Rock drill dust is dangerous because it contains silica, which can lead to a permanently disabling disease called silicosis. Tr. 69, 72. Silicosis is caused when airborne silica particles, similar to glass or sand, enter the lungs and cut the tissue. Tr. 72-73, 207. Persons affected by silicosis will never get better, even if the individual is removed from the environment. Tr. 72-73, 207.

5. Operator’s Knowledge of the Violation

During Foreman Duckworth’s testimony he acknowledged that all steps of the on-shift examination needed to be completed prior to the examination being certified. Tr. 171. Duckworth did not complete the examination himself, rather a scoop operator radioed him informing him of the suction rating and that everything else was good. Tr. 154. It was standard procedure at the River View Mine for the roof bolter operators to wait until they reached the face to open the dust collection boxes. Tr. 175. In failing to ensure that the filter was checked prior

to certifying the examination of the 8157 roof bolter complete I found Foreman Duckworth acted with high negligence as noted above.

However, I am not convinced Duckworth acted with reckless disregard or willful aggravated intent to justify an unwarrantable failure designation. He knew the roof bolter operators were certified in MSHA training and the River View Mine's expectations training. Tr. 148-150. He also knew that the dust boxes would be checked and dumped once the roof bolter was trammed to the face. His mistake here was knowingly certifying that the examination was complete before it was actually complete. A highly negligent failure on his part but not one indicative of aggravated conduct. I find that had Foreman Duckworth been aware of the condition of the dust box and filter he would have promptly corrected the problem or instructed the operators to do so. Factoring in that no prior violations of this standard had occurred and Respondent's timely abatement I conclude that the faulty certification of an inadequate examination of the dust collection box was not an unwarrantable failure on the part of the Respondent.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) 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).

Respondent had no history of violations for this particular standard in two years as of 2015. Ex 1. In 2013, 525 MSHA and mine operator respirable dust samples were taken from the River View Mine. Tr. 159-160. Two of the samples exceeded the respirable dust standard, however all samples from working sections of the mine were satisfactory. Tr. 159-160, 195-196. The Respondent had not been placed on notice that greater efforts were needed in complying with the standard. Resp. Br., 23. The Respondent is a large mine, employing approximately 600 miners during the time of the violation. Resp. Br., 2. The payment of a reasonable civil penalty will not affect the Respondents ability to continue business. Resp. Prehearing Report, 4. As I have stated above the Respondent was highly negligent because the examination of the 8157 roof bolter was not complete at the time Section Foreman Duckworth certified the examination as complete. It is undisputed that the condition of the dust box filter was likely to contribute to a permanently disabling injury, and that the condition of the dust filter was a significant and substantial violation of the standards. It is also undisputed that four people would have been affected had silica particles entered the air since there were four miners working in close

proximity to the roof bolting machine at the time of the violation. Silicosis is caused from silica particles entering the air and is a permanently disabling disease. Tr. 69, 72. The Respondent quickly worked to abate the violative condition by immediately informing inspector Stone they would get someone to clean out the box and get the filter taken care of. Tr. 209, Resp. Br., 24.

The Secretary proposed a regularly assessed penalty of \$5,961.00. I find that the Respondent was highly negligent but that the failure to conduct a complete respirable dust examination prior to the examination being certified as complete was not an unwarrantable failure. Thus, after considering the statutory criteria, I find that a penalty of \$4,500.00 is appropriate.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$4,500.00** within 30 days of this order.¹



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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Gary D. McCollum, 1146 Monarch Street, 3rd Floor, Lexington, KY 40513

¹ 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