

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 09, 2015

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

v.

WOLF MOUNTAIN COAL, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-882
A.C. No. 24-00839-354603 Q131

Decker Mine

DECISION

Appearances: Daniel R. McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David Bettcher, Wolf Mountain Coal Company, Sheridan, Wyoming, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Wolf Mountain Coal, Inc. (“Wolf Mountain”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Billings, Montana, and presented oral argument following the hearing. One section 104(a) citation was adjudicated at the hearing. Wolf Mountain is an independent contractor that operates a coal processing facility near Decker, Montana.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Citation No. 8477208

On May 19, 2014, MSHA Inspector David Maynard¹ issued Citation No. 8477208 under section 104(a) of the Mine Act, alleging a violation of section 77.502 of the Secretary’s safety standards. (Ex. G-2). The citation alleges that the pull-cord switch on the Silo Gathering Conveyor immediately restarted the conveyor when returned to the reset position. The conveyor should have not restarted until someone restarted it at a different location. The malfunction of

¹ Maynard has been a coal mine inspector with MSHA for about four years. (Tr. 6). Prior to his employment with MSHA, he earned a Bachelor of Science degree in civil engineering. Upon graduation, he worked for several engineering companies doing structural design for industrial facilities, including a coal processing facility. (Tr. 6-9).

the pull-cord system leaves miners conducting weekly and monthly examinations of the system susceptible to entanglement-type injuries when returning the pull-cord switch to the reset position, which would result in lacerations, fractures, and dismemberment.

Inspector Maynard determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial (“S&S”) nature, and that any injury could reasonably be expected to be permanently disabling. He determined that Wolf Mountain’s negligence was moderate and that one person would be affected. Section 77.502 provides:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

30 C.F.R. § 77.502. The Secretary proposed a penalty of \$207.00 for this citation.

Discussion and Analysis

1. Evidence

Wolf Mountain operates a coal processing facility at the Decker Mine but the coal it processes comes from the Spring Creek Mine, which is a short distance away. (Tr. 15). During his inspection on May 19, 2014, Inspector Maynard asked the operator to pull the pull-cord on each conveyor at the facility to check to see if it functioned properly. (Tr. 14). He also asked the operator to restart each conveyor. The inspector testified that a conveyor is not supposed to automatically restart when the pull-cord switch is reset. (Tr. 34-35). Instead, for safety reasons, the operator needs to reset the pull-cord switch and then go to the control room or another location to restart the conveyor. The pull-cord switch is inside a box mounted on the frame of the conveyor. (Ex. R-1, p. 4). The pull-cord is attached to a red lever on the outside of the box. When the cord is pulled, the lever turns counter-clockwise, pops out, and locks in that position. That action opens the electrical circuit and the conveyor stops. To reset the pull-cord switch, the operator pushes in the red lever while turning it in a clockwise direction.

All the pull-cord switches at Wolf Mountain’s facility functioned properly when the pull-cords were pulled; each conveyor immediately stopped upon a pull of its cord. Except for the Silo Gathering Conveyor, none of the conveyors restarted when the pull-cord switch was reset. In the case of the Silo Gathering Conveyor, however, the belt immediately restarted when the pull-cord switch was reset. (Tr. 16). The entire length of the belt is not visible from that position. The inspector stated that the “belt should get re-energized from another location or from the main start-up switch.” *Id.* The belt should restart once the switch is flipped at the control panel. (Tr. 25, 28-29; Ex. R-1 p. 6).

As stated above, Inspector Maynard testified that when he asked the Wolf Mountain employee who was accompanying him on his inspection to pull the cord for the Silo Gathering

Conveyor, the conveyor stopped immediately. (Tr. 31). The company representative seemed surprised when the belt started as soon as he reset the pull-cord switch. (Tr. 33). Inspector Maynard testified that “[i]t was apparent that [the employee] knew that was not the way it was supposed to function.” *Id.*

Inspector Maynard cited Wolf Mountain for a violation of section 77.502 because the pull-cord switch, which is electric equipment, did not function correctly when it was reset. The operator failed to “maintain electrical equipment in safe operating condition.” (Tr. 34). The inspector testified that the violation created a discrete safety hazard. Someone could easily become entangled in the moving belt as he reset the switch because he would be “in very close proximity to the conveyor” and he would not be expecting the belt to restart. (Tr. 36). The belt would be about eight to twelve inches from where the individual would be standing. (Tr. 50). He could be crouching down beside the framework of the conveyor as he reset the switch and he might be holding onto the framework for leverage or to keep his balance. (Tr. 36-37, 53-54). Because the pull-cord switch is located at the end of the conveyor, if someone were to be caught in the moving belt, he would be pulled into a pulley. (Tr. 37, 63-64). The types of injuries the inspector would expect to see are “strains, sprains, dislocations, and small digit dismemberment.” *Id.*

Someone might use the pull-cord to stop a conveyor in a number of situations, such as when cleaning up under the belt or in an emergency situation. A rake with a long handle for cleaning up accumulations was leaning against the frame of the conveyor system. (Tr. 46; Ex. G-4). If someone’s clothing, such as a coat, becomes entangled between the belt and the rollers, the pull-cord could be used to shut down the belt. It is also possible that coal fines could start to smolder if frictional heat is being generated and someone would use the pull-cord to shut down the belt. Finally, an electrician is required to test the pull-cord switch on a monthly basis. At this facility, the system is checked on a weekly basis. (Tr. 58-59). The pull-cord switch would need to be reset to put the belt back into production every time the cord is pulled. The inspector believed that an injury was reasonably likely to occur assuming continued mining operations. (Tr. 46-48).²

2. Violation

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). “Even a skilled

² Wolf Mountain did not present any testimony at the hearing except in response to questions posed by the judge. (Tr. 62-65) The Secretary introduced two of Wolf Mountain’s exhibits, which were admitted into evidence. (Ex. R-1 pgs. 1-6; Video Exhibit).

employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

I find that the Secretary established a violation of section 77.502. Although the pull-cord switch was frequently tested by a qualified person, it was not functioning properly at the time of MSHA’s inspection. The belt shut down immediately when the cord was pulled. As a consequence, the greatest hazard presented by a faulty pull-cord switch was not present. Nevertheless, the belt immediately started when the pull-cord switch was reset. This fact creates a hazard because the person resetting the switch would not expect the belt to start. He might be positioned close to belt as he resets the switch and, because he would not be expecting the belt to start, he could become entangled and injured by the moving belt.

Wolf Mountain argues that a miner would more likely reset the pull-cord switch from a standing position away from the belt as illustrated in its photograph. (Ex. R-1, p. 1). The miner accompanying Inspector Maynard reset the switch from a crouched position near the belt, however. Given that a miner would not be expecting the belt to start, it is entirely foreseeable that a miner would not think it would be necessary to be a safe distance from belt when resetting the switch.

3. Significant and Substantial

I find that the Secretary established that the violation was S&S.³ There was a violation of a safety standard that created a discrete safety hazard. The hazard included the risk that someone would get caught in the moving belt when resetting the pull-cord switch. He would not expect the belt to move so he would not feel it necessary to be in a safe position.

Whether it was reasonably likely that the hazard contributed to by the violation will result in an injury is a close issue in this case. The “reasonably likely” requirement does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011). For the reasons discussed above, I find that the hazard contributed by the violation would reasonably be expected to result in an injury. I credit Inspector Maynard’s testimony on this issue. An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan*

³ An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Cumberland Coal Co., 20 FMSHRC 1275, 1278-79 (Dec. 1998). Any injury would be of a reasonably serious nature. I credit Inspector Maynard's testimony that expected injuries would include strains, sprains, dislocations, and small digit dismemberment.

4. Negligence

Wolf Mountain was represented at the hearing by David Bettcher, who is a plant foreman. He argued that the violation was not S&S. In closing arguments he stated:

I just feel that this shouldn't have been an S&S, it should have been written up as a non-S&S. I mean, we could have tested it the day before, and it worked great. We could have, which we did several days prior to that, and everything worked fine.

(Tr. 73). I conclude that this argument relates to the negligence of Wolf Mountain rather than to the issues of S&S and gravity. Given that Wolf Mountain was not represented by counsel and that I must enter negligence findings based on the evidence introduced at the hearing, I have considered all the evidence presented when applying the negligence criterion to the facts of this case. The Secretary does not dispute that Wolf Mountain checked its pull-cord switches weekly and that the most recent test was performed on May 12, 2014. (Tr. 58-59; Ex. G-2). There is no evidence that the switch malfunctioned when tested on that date. The fact that all the other pull-cord switches worked properly when tested during MSHA's inspection, and that Wolf Mountain's employee acted surprised because the belt restarted when he reset the pull-cord switch during the inspection, supports a finding that the malfunction occurred sometime since the previous test.

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

I find that Wolf Mountain was not negligent with respect to this violation. It fully met its duty of care. It frequently examined and tested the cited pull-cord switch. It performed these examinations weekly rather than monthly as required by safety standard. 30 C.F.R. § 77.502-2. There is no evidence that it did not properly maintain its electric pull-cord switches; indeed the evidence clearly shows that it did all that it could to maintain its pull-cord system. A potentially dangerous condition had not been discovered during Wolf Mountain's previous test of the pull-cord switch. A reasonably prudent person familiar with the mining industry, the salient facts, and the protective purpose of the safety standard would agree that Wolf Mountain met its duty of care with respect to compliance with the safety standard.

I **MODIFY** Citation No. 8477208 to indicate that the violation of was not the result of Wolf Mountain's negligence. In all other respects the citation is affirmed. Although I am not

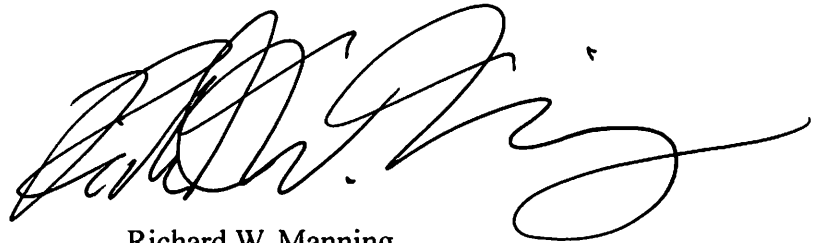
bound by the penalty point system developed by MSHA, I note that if the penalty is recalculated using MSHA's system taking into consideration my no negligence finding, the penalty would be about \$100.00 with the reduction for good faith abatement. 30 C.F.R. § 100.3. I find that a penalty of \$100.00 is appropriate for this violation. I considered all of the penalty criteria in assessing this penalty.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Wolf Mountain has a history of three violations during the previous 15 months, only one of which was designated as S&S. (Ex. G-1). Respondent is a small to medium-sized independent contractor. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Citation No. 8477208 is **MODIFIED** to show that Wolf Mountain was not negligent with respect to the cited violation. Wolf Mountain Coal, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.⁴



Richard W. Manning
Administrative Law Judge

Distribution:

Daniel R McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518 (Certified Mail)

Wolf Mountain Coal, Attention: David Bettcher, P.O. Box 6206, Sheridan, WY 82801 (Certified Mail)

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⁴ 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.