

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 8, 2018

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

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-125
A.C. No. 15-19358-364163

Mine: Parkway Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True PLLC, Lexington, Kentucky, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) against Armstrong Coal Company, Inc. (“Armstrong” or “Respondent”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). The sole matter at issue in this proceeding is Order Number 8506201,¹ which was issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).²

A hearing was held in Madisonville, Kentucky, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I

¹ Five violations were initially at issue in this proceeding, but the parties settled four of them prior to hearing. The settlement was approved by Order dated December 15, 2015.

² The issuance of an order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard and that at the time the violation occurred, the mine had already received a predicate 104(d)(1) citation in the preceding 90 days. 30 U.S.C. § 814(d)(1).

found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold Order Number 8506201 as written and assess a penalty of \$9,122.00 against Armstrong for the reasons set forth below.

II. STIPULATIONS

The parties have entered into the following stipulations:

1. Armstrong is subject to the Mine Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Armstrong is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the order contested in this matter was issued.
4. Armstrong has an effect upon commerce within the meaning of section 4 of the Mine Act, 30 U.S.C. § 803.
5. Armstrong has Mine ID 15-19358.
6. Armstrong mined 1,347,372 tons of coal in 2013 and 1,125,164 tons of coal in 2014.
7. The order in this docket was properly served on Armstrong by a duly authorized representative of the Secretary on the dates stated therein.
8. The penalty proposed in this docket would not affect Armstrong’s ability to remain in business.

Joint Ex. 1; Tr. 7.³

III. FACTUAL BACKGROUND

The one violation at issue in this proceeding was written by MSHA Inspector Matthew Stone⁴ on April 4, 2014 at the Parkway Mine, an underground coal mine operated by Armstrong in Kentucky. Ex. S-1. Inspector Stone had traveled to the mine that day with six other MSHA personnel to conduct an impact inspection, which was prompted by an incident several months earlier where MSHA had received a hazard complaint about respirable dust sampling⁵ at the mine. Tr. 44, 91-92, 134; Ex. S-5. After investigating the complaint, MSHA had issued a

³ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 through S-6 and the Respondent’s exhibits are numbered R-5 through R-8. *See* Tr. 124, 162, 177.

⁴ Stone works for MSHA as a roof control specialist. In his five years at MSHA, he has also worked as a health specialist and as a regular coal mine inspector. He worked in the coal mining industry as a continuous miner operator from 1997 to 2011 before being hired by MSHA in September 2011. Tr. 43, 64.

⁵ Operators of underground coal mines are required to minimize miners’ exposure to harmful respirable dust by, among other things, maintaining the mine’s atmospheric dust concentrations at or below certain levels and conducting dust sampling to ensure compliance. *See* 30 C.F.R. Part 70.

citation on January 24, 2014 alleging that Armstrong had knowingly allowed miners to leave their respirable dust sampling devices at a power center instead of wearing them during the shift, in violation of the Secretary's mandatory respirable dust sampling procedures. Tr. 91-92; Ex. S-5. The January 24 citation was issued under section 104(d)(1) of the Mine Act, placing the mine on the "d-chain," which refers to a chain of increasingly severe sanctions the Secretary is authorized to impose on operators under 104(d). Ex. S-5; see *Lodestar Energy, Inc.*, 25 FMSHRC 343, 345-46 (July 2003).⁶ The mine was still on the d-chain at the time of the April 4, 2014 impact inspection.

Inspector Stone and his colleagues arrived at the mine that day to initiate the impact inspection at approximately 3:15 PM, just after the 3:00 production shift (the second shift) had begun. Tr. 44, 72-73, 177. The miners working the second shift had already gone underground because the mine engaged in "hot-seating," a practice in which a lapse in production is avoided by sending the incoming shift directly into the mine before the miners on the preceding shift have exited. Tr. 18-19, 84-85, 100, 113, 141, 227-28. While Stone and the other MSHA inspectors were waiting for a ride to take them underground, they reviewed the pre-shift books and mine maps and Stone issued a citation for a recordkeeping violation. Tr. 46-47, 151-52; Ex. S-6. At about 4:00 PM, the inspection party descended into the mine, joined by Armstrong safety representative Steven J. DeMoss and miner representative Brandon H. Shemwell. Tr. 47, 52, 102.

When Inspector Stone arrived on the #1 unit he traveled directly to the working face to inspect the equipment, starting with the Company No. P2 roof bolting machine, which was blowing dust out of its exhaust system. Tr. 47-49, 102-03, 115, 155. He issued three citations on the roof bolter, including one citation alleging deficiencies in the machine's dust collection system and another alleging the machine had not been subjected to an adequate dust parameter examination at the beginning of the shift to ensure compliance with the dust control requirements set forth in the mine's ventilation plan.⁷ Ex. S-6; Tr. 49-51, 115, 156. He then took air readings and inspected the Company No. M22 continuous mining machine, which revealed no deficiencies. Tr. 51-52.

At around 9:00 PM, Inspector Stone asked Shemwell to get section foreman Billie Q. Hearld. Tr. 21, 57-58, 104. When Hearld arrived, Stone requested the results of the section's fifth hour dust parameter examination. Tr. 23, 52-53, 58, 105, 163. The testimony conflicts as to whether the examination had actually been performed by then, but admittedly, Foreman Hearld did not yet have the results. Tr. 23. After speaking to Hearld and two equipment operators, Inspector Stone felt certain that the fifth hour examination had not been conducted. Tr. 59, 88. Accordingly, he halted production and issued the order that is the subject of this proceeding, Order Number 8506201, which alleges that a fifth hour dust parameter examination was not

⁶ Armstrong had initially contested the predicate citation and associated civil penalty before Administrative Law Judge Margaret Miller in Docket No. KENT 2014-601, but the operator subsequently withdrew its contest.

⁷ Armstrong initially contested both of these violations but ultimately settled them for reduced penalties. *Armstrong Coal Co.*, No. KENT 2014-585 (Apr. 30, 2015) (unpublished ALJ order).

conducted on either of the mine's two mechanized mining units. Tr. 59-60, 105; Ex. S-1. Stone characterized this violation as an unwarrantable failure to comply with a mandatory safety standard. Ex. S-1; Tr. 62-63. The violation was issued as a 104(d)(1) order because of the unwarrantable failure designation and because the mine was already on the d-chain due to the issuance of the predicate 104(d)(1) citation in January. Ex. S-1. The order was written at 9:50 PM. Ex. S-1. Afterward, Foreman Hearld personally checked the dust control parameters for each piece of equipment on the section and recorded the results at the power center. Tr. 24-25, 35-36, 105. Inspector Stone terminated the order at 10:30 PM with notation that the required examination had been conducted and no deficiencies had been found. Tr. 63-64, 76-77, 171-73; Ex. S-1.

IV. LEGAL PRINCIPLES

A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

B. Gravity

Gravity is generally expressed as the degree of seriousness of a violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator's part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the

circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs “may evaluate negligence from the starting point of a traditional negligence analysis” rather than adhering to the Secretary’s Part 100 definitions); *accord Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

More serious consequences can be imposed under the Mine Act for violations that result from the operator’s unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Assoc’d Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal*, 31 FMSHRC at 1351. However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

V. FINDINGS AND DISCUSSION

A. Violation of 30 C.F.R. § 75.370(a)(1)

Order Number 8506201 alleges a violation of § 75.370(a)(1), which mandates that each operator of an underground coal mine develop and follow a ventilation plan that is designed to control methane and respirable dust and is suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1). Ventilation plan provisions are enforceable as mandatory safety standards at the mine once they have been approved by the Secretary. *Martin County Coal*

Corp., 28 FMSHRC 247, 254 (May 2006); *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989). In this case, Armstrong is alleged to have violated a provision of the Parkway Mine's approved ventilation plan requiring dust parameter examinations to be conducted each shift.

A dust parameter examination is an examination of the working section that involves taking air readings, checking for proper placement of ventilation controls, and checking each piece of equipment on the section, including the roof bolters, continuous miners, and feeder, to ensure compliance with the respirable dust control parameters set forth in the ventilation plan. Tr. 24, 54-55, 149-50, 202, 212-13, 231-32; 30 C.F.R. § 75.362(a)(2). The section foreman must certify the results of the examination by date, time, and initials. Tr. 37, 56; 30 C.F.R. § 75.362(g)(2). At the Parkway Mine, the equipment operators are charged with performing the required dust parameter checks on their respective equipment and the results are then conveyed to the section foreman. Tr. 33-34, 172, 239-40. By regulation, a dust parameter examination must be completed during the first hour of each shift. 30 C.F.R. § 75.362(a)(2). An additional dust parameter examination must be completed "every fifth hour of production" pursuant to the mine's ventilation plan, which states, "Fifth hour dust perimeter [sic] checks will be made within the fifth hour of production and recorded on site." Ex. S-2 at 21, 22, 25. This provision was added to the ventilation plan due to the Parkway Mine's history of noncompliant respirable dust samples. Tr. 53.

According to the Secretary, the phrase "fifth hour of production" refers to the fifth hour of the production shift, meaning that the fifth hour dust examination for the 3:00 PM production shift should be conducted between 8:00 and 9:00 PM. Sec'y Br. 6-11; *see* Tr. 86. Inspector Stone testified that when he asked Foreman Hearld for the results of this exam, Hearld admitted it had not been completed even though he knew it was past time to do so. Tr. 53, 58. Stone said he also spoke to a roof bolter and miner operator who told him the fifth hour checks had not been conducted. Tr. 59, 88. In the order, he alleged:

The approved ventilation plan is not being followed on the #1 unit (MMU 001-0/002-0). The mine operator has failed to conduct the fifth hour dust parameter examination to assure compliance of the respirable dust controls specified in the mine ventilation plan. ... When ask[ed] to provide proof of the fifth hour dust parameter examination section foreman Billy Hearld admitted he did not conduct the examination.

Ex. S-1.

Armstrong argues that all the credible evidence proves the required fifth hour checks were, in fact, completed by the equipment operators before Stone asked about them, and therefore no violation occurred. Resp. Br. 11-14. Armstrong also argues that the deadline to complete the checks had not yet passed because it was not the "fifth hour of production." *Id.* at 10-11. According to Armstrong, this means five hours of *actual* production; any down time that has occurred during the shift does not count toward the five hours. *Id.* at 6-10. When Inspector Stone asked for the dust checks, five hours of actual production had not yet taken place because the shift had not begun producing coal until 3:40 PM and the equipment had been downed for at least an hour due to the inspection. Tr. 141-48; Ex. R-6; Ex. R-7.

I reject Armstrong's interpretation of "fifth hour of production" as illogical and not supported by the evidence. DeMoss was the only witness whose testimony supported this interpretation. He stated that the equipment operators keep running their equipment until they reach five full hours of production before stopping to conduct dust parameter checks. Tr. 148. But this would require each equipment operator to independently track production and stoppage times during the shift in order to determine when to conduct his checks. DeMoss could not explain how he expected rank-and-file miners to accomplish this task given that there is no way for each individual equipment operator to know if another piece of equipment has been taken out of service during the shift and for how long. *See* Tr. 181-82. Also, if each equipment operator were individually responsible for deciding when to perform his checks, the timing of the checks would vary between different pieces of equipment and between shifts, which would be chaotic and unenforceable. Furthermore, all the other evidence reflecting the actual practice at the mine contradicts DeMoss's account that the fifth hour is calculated by tracking production time and subtracting down time. Roof bolter Joshua Q. Divine testified he performs the fifth hour checks five hours after the first hour checks without tracking production time. Tr. 207. Miner operator Phillip W. Keeton said he performs his checks around 8:00 PM when working the 3:00 PM shift, regardless of down time or how long the miner has been running. Tr. 245-47. Unit mechanic John P. Wilson, who performs dust checks on the feeder, also said he conducts his checks between 8:00 and 9:00 PM, and Foreman Hearld agreed that the fifth hour falls "[a]round 8:00," indicating they are simply counting the hours from the beginning of the shift. Tr. 23, 213. Bolstering this testimony, instruction cards distributed by Armstrong to equipment operators at the Parkway Mine state that dust parameter checks will be conducted on the fifth hour "of each shift." Ex. S-5 (emphasis added).

The Secretary's interpretation of "fifth hour of production" as referring to the fifth hour of the shift is consistent with the evidence discussed above reflecting the actual practice at the mine. It is also consistent with other examination regulations, which typically require examinations to be conducted within a specific, determinate time period. *See, e.g.*, 30 C.F.R. §§ 75.360(a)(1), 75.364(a), 75.512-2. Further, requiring dust checks to be completed during the fifth hour of the shift, rather than the fifth hour of actual production, promotes safety by ensuring that checks will occur at regular intervals at the beginning and middle of each production shift.

Based on the analysis above, I find that the phrase "fifth hour of production" as used in the Parkway Mine's ventilation plan clearly refers to the fifth hour of the production shift because it would be unreasonable to interpret it any other way. Because the language is clear, it should be enforced as written. *See Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016) (stating rule that clear regulations are usually enforced as written); *Martin County Coal*, 28 FMSHRC at 255 (applying law governing regulatory interpretation to plan provisions). Even if there were room for doubt, the Secretary's interpretation of an ambiguous regulatory provision is entitled to deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997); *Hecla*, 38 FMSHRC at 2122. For the reasons discussed above, I find that the Secretary's interpretation of "fifth hour of production" as referring to the fifth hour of the shift is reasonable and serves the overall safety-promoting purposes of the Mine Act. Accordingly, it is entitled to

deference. Because any person familiar with the mining industry and Mine Act would reach the same interpretation, I also reject Armstrong's argument that it was not on notice of this interpretation.

Because fifth hour checks must be conducted during the fifth hour of the shift, they should have been completed between 8:00 and 9:00 PM on the day of the inspection. A preponderance of the evidence shows they were not timely completed.

Although Foreman Hearld, who was called as an adverse witness by the Secretary, said that the equipment operators had conducted the checks by the time Inspector Stone asked for the results around 9:00 PM, (Tr. 33-34), his testimony on this point was unconvincing. The only reason he could provide for believing the equipment operators had performed the checks was that it was their job to do so. Tr. 34-35. He admitted he did not actually ask each equipment operator whether the checks had been performed. Tr. 24-25. Moreover, he responded to Stone's inquiry about the dust parameter examination by leaving and performing the required checks on each piece of equipment himself. Tr. 24-25, 35. There would have been no reason for him to redo these checks if the equipment operators had already completed them; his actions indicate they had not.

DeMoss's testimony was also unconvincing. Although he insisted the checks had been completed, incongruously, he also testified that it was not time to do them yet because it was not the fifth hour of production. Tr. 183-84. When pressed to explain why the equipment operators would have done the checks if it was not time yet, DeMoss at first said he did not understand the question, then said the equipment operators must have been nervous because MSHA inspectors were present, but finally admitted he did not know if the checks had actually been completed after all. Tr. 184-85, 189. His testimony struck me as self-serving and manufactured, and I decline to credit it.

Armstrong called three rank-and-file equipment operators as witnesses, but each of them stopped short of affirmatively stating that he had completed his dust checks the night of the inspection. Wilson testified, "I don't recall exactly doing that." Tr. 213. Keeton also said he did not specifically remember performing the checks. Tr. 238. Divine said he was sure he would have done them, but it was clear he was speaking generally and had no specific memory of the night in question. Tr. 204-05, 208. Overall, these witnesses' testimony was vague and seemed evasive and coached at times.

In addition, the company witnesses offered discrepant accounts of how dust parameter checks were usually recorded on the section. Divine testified that no one wrote down the results of their checks, while Keeton testified that he wrote down his results to give to the foreman, and DeMoss asserted the results were relayed to the foreman by memory but later admitted to having testified at deposition that the equipment operators were supposed to record the results on pieces of paper. Tr. 188-89, 207, 236. These discrepancies suggest the mine had no established procedure for ensuring that dust parameter checks were being completed.

The Secretary presented testimony from Justin Greenwell, a former roof bolter for Armstrong, that the checks were not being completed at all. Greenwell had been working on the

cited section for about a year prior to the inspection but said he had never conducted or even heard of dust parameter checks before Inspector Stone raised the subject. Tr. 116-17. Corroborating this assertion, Foreman Hearld invoked his Fifth Amendment right not to respond when asked whether it was his regular practice to conduct and certify fifth hour dust parameter examinations, which raises an adverse inference that it was not. Tr. 30-32, 38. The implication that Armstrong failed to regularly conduct dust parameter examinations is also consistent with the ample evidence of ongoing dust control problems at this mine. As previously noted, the requirement to perform fifth hour dust checks was added to the ventilation plan due to the mine's history of noncompliance with respirable dust standards, and the April 4 inspection was spurred by the mine's recent receipt of a citation for falsifying dust samples. Tr. 53, 91-92; Ex. S-5. Shemwell, a scoop operator on the cited section, described witnessing problems such as dusty roads and missing ventilation curtains and said that "we didn't really have any dust control" until after the inspection. Tr. 106-08. At the beginning of the inspection, Inspector Stone had observed a roof bolter blowing dust out of its exhaust system and had issued citations for a deficiency in the machine's dust collection system and an inadequate first hour dust parameter exam. Tr. 47-51; Ex. S-6. Greenwell was one of the miners operating this roof bolter and testified that when he arrived on the section that day he had raised concerns that the dust collection box was full, but Foreman Hearld had instructed him to continue bolting rather than stopping to clean it.⁸ Tr. 114. The foregoing evidence reveals a lax attitude toward dust control at this mine, and against this backdrop, I credit Greenwell's testimony that he worked at the mine for a year without ever being asked for dust parameter results.

After considering all the evidence, I find that the fifth hour dust parameter checks had not been completed by the time Inspector Stone asked for the results. I further find that the evidence indicates Armstrong regularly failed to perform these checks. This conduct violated the mine's ventilation plan and § 75.370(a)(1).

B. Gravity

Inspector Stone assessed this violation as unlikely to cause injury and non-S&S, but capable of causing permanently disabling injuries to twelve miners. Ex. S-1; Tr. 60-62. He explained that failure to conduct dust parameter examinations prevents the mine operator from knowing if any ventilation or dust control problems exist that need to be corrected. Tr. 61.

Armstrong's failure to conduct a fifth hour dust parameter examination created a hazard that miners working on the unit would be exposed to unrecognized, unaddressed dust control deficiencies. This was an active working section where coal was being drilled from rock in an enclosed underground environment, so dust control deficiencies would have exposed miners to

⁸ Armstrong attempted to impeach Greenwell's credibility by introducing testimony that the dust collection system on the roof bolter appeared to have been "sabotaged" by a knife slit and that "it just seemed like Greenwell had it out for" Hearld. Tr. 215-16, 244. The record does not support these allegations. Greenwell came across as a credible witness whose testimony was corroborated by the other evidence. He had no motive to sabotage his own machine or concoct allegations against mine management, especially considering that he no longer worked in the mining industry at that time of the hearing. Tr. 112-13. He had voluntarily quit his job with Armstrong after discovering at age 28 that he had black lung. Tr. 118.

airborne respirable rock drill dust containing coal and silica particles. These particles are harmful when inhaled, particularly silica particles, which become embedded in the lung tissue and cause scarring over time. Tr. 63. Armstrong argues that “conditions on the section were good,” noting that no actual dust control problems were identified when the fifth hour checks were finally conducted (which was the reason Inspector Stone marked the probability of injury as “unlikely”). Resp. Br. 15-16; Resp. Reply Br. 5; Ex. S-3 at 8. Armstrong also suggests that a dust parameter examination was unwarranted because so little production took place during the shift in question. Resp. Br. 15-16; Tr. 140. But, as discussed above, the evidence is clear that Armstrong habitually failed to conduct dust parameter checks regardless of production, not just on this one occasion. The fifth hour dust parameter examination requirement had been added to the mine’s ventilation plan due to its history of dust control problems, as exemplified by Inspector Stone’s issuance of two citations for dust control deficiencies on a roof bolting machine earlier in the inspection and the mine’s receipt of a predicate 104(d)(1) citation several months earlier for falsification of dust samples. Ex. S-5; Ex. S-6. If normal mining operations had continued without issuance of Order Number 8506201, any further dust control problems that arose on the cited section would not have been promptly identified and addressed due to Armstrong’s failure to conduct the fifth hour checks. I find that this failure posed a hazard that miners would develop permanently disabling injuries due to respirable dust exposure.

Armstrong disputes that the hazard would affect all twelve miners on the section because this was a split-air unit, meaning that a dust control problem on one side of the unit would not necessarily impact the other. Resp. Br. 16; *see* Tr. 62, 78, 175-76, 206. However, a fifth hour dust parameter examination was not conducted on either side of the unit, exposing the miners on both sides to the hazard. Tr. 83-84.

Because this violation exposed all the miners on the section to permanently disabling injuries from exposure to respirable dust, and because of the importance of dust control in underground coal mines, I find that this was a serious violation.

C. Negligence and Unwarrantable Failure

The Secretary asserts that this violation involved high negligence and was an unwarrantable failure to comply with the cited safety standard because Armstrong was aware of the requirement to conduct fifth hour dust parameter examinations as mandated in the ventilation plan, yet regularly failed to do so, posing a serious risk to miners’ health. Sec’y Br. 11-15. Inspector Stone testified he designated the violation as an unwarrantable failure due to “the history of this section” and “the issues encountered at the start of the shift,” namely, the fact that he had observed a roof bolting machine discharging rock drill dust from its exhaust system and cited it for an inadequate first hour dust parameter examination. Tr. 62-63.

Armstrong contests the Secretary’s allegations of high negligence and unwarrantable failure, asserting that the violation presented no danger to miners and that Inspector Stone failed to consider mitigating circumstances raised during the inspection, including that it was not Foreman Hearld’s responsibility to do the dust checks and that he obtained the results quickly after the inspector asked for them. Resp. Br. 14-17; Resp. Reply Br. 5-6.

Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice that greater efforts were necessary for compliance with the cited safety standard.

The fifth hour dust parameter examination requirement that is the subject of this proceeding was added to this mine's ventilation plan due to its history of dust control problems. Tr. 53. Less than 90 days before the inspection, Armstrong received a 104(d)(1) citation for falsifying dust samples. Ex. S-5. The mine's violation history data submitted by the Secretary reveals numerous other dust control violations received in the fifteen months preceding the inspection, including two violations of the dust parameter examination regulation. Ex. S-4. Just a few hours before Order Number 8506201 was written, Inspector Stone issued a citation for an inadequate first hour dust parameter examination. Ex. S-6. The prior violation was written on the same section during the same shift and issued to the same person, DeMoss. Ex. S-1; Ex. S-6. I find that this mine's history and the citation issued a few hours earlier served to place Armstrong on notice prior to the issuance of this violation of the need to make greater efforts to comply with the dust parameter examination requirement.

Knowledge of Violation; Obviousness; Abatement Efforts

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Foreman Hearld was acting as Armstrong's agent at the time of the violation, as he was the person charged with responsibility for the operation of the cited section and for supervising the miners working there. See 30 U.S.C. § 802(e) (defining "agent"); *Martin Marietta*, 22 FMSHRC at 637-38. In this capacity, he was responsible for making sure that dust parameter checks were completed within the fifth hour of the shift and recorded onsite in accordance with the ventilation plan. Ex. S-2 at 25. He knew he was supposed to record the results of the checks at the power center and certify them by date, time, and initials. Tr. 37. He conceded that the checks should have been done "[a]round 8:00" and recorded by 9:00 PM, but they were not. Tr. 23-24. Hearld said "[t]here was a lot going on" the night of the inspection. Tr. 30. But it remained incumbent on him, as the foreman, to make sure the required checks were completed. It should have been obvious to him that the checks had not been done because none of the equipment operators had communicated the results to him and because he should have already attempted to collect the data so he could record and certify it. Instead, he completely ignored the fifth hour examination requirement until Inspector Stone asked about it.

Although Armstrong notes that Hearld obtained the dust parameter data quickly after being asked to do so, abatement efforts undertaken after the issuance of the violation are not relevant to the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009).

I find that Hearld had knowledge of this violation yet failed to abate it. Because he was Armstrong's agent, his knowledge and negligent conduct in failing to abate the violation are imputable to the company.

Duration of Violation; Extensiveness; Degree of Danger Posed

Although the fifth hour dust parameter checks were less than an hour overdue when Inspector Stone issued the order, the underlying violative conduct was Armstrong's failure to ensure these checks were being completed. As discussed above, the evidence shows that Armstrong regularly failed to conduct the fifth hour checks and that this conduct was part of an ongoing pattern of laxness toward dust control on the part of mine management. Thus, this violation arises out of violative conduct of longstanding duration.

This violation was also extensive in that it affected the entire section and all of the miners working there, as the required examination had not been conducted on either of the section's two mechanized mining units or on any of the equipment.

I further find that this violation posed a high degree of danger. As discussed above, failure to perform the dust parameter examination exposed miners to permanently disabling injuries from exposure to respirable dust that causes diseases such as silicosis, the prevention of which was one of Congress' fundamental goals when it passed the Mine Act. *See U.S. Steel Mining Co.*, 8 FMSHRC 1274, 1278-80 (Sept. 1986).

Conclusions

Based on the factors discussed above, particularly that a supervisor knew of this violation yet failed to abate it, that it was Armstrong's practice not to comply with the cited dust control requirement, and that Armstrong's conduct posed a high degree of danger to miners, I find that Armstrong engaged in aggravated conduct constituting more than ordinary negligence. Because a predicate 104(d)(1) citation was issued less than 90 days earlier, this violation was properly issued as a 104(d)(1) order.

Based on the same factors, I also find that Armstrong's negligence was high.

VI. PENALTY

A. Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, 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 Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

B. Penalty Assessment

The Secretary asks me to assess a penalty of \$9,122.00 for this violation. This proposed penalty was calculated using the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3.

The Secretary has submitted a violation history form showing that the Parkway Mine received 470 violations from MSHA that became final during the fifteen months preceding the issuance of this order. Ex. S-4. I find Armstrong's violation history to be moderate considering the large size of its business. The parties have stipulated that the proposed penalty will not affect Armstrong's ability to remain in business. Joint Ex. 1. My findings regarding gravity and negligence are discussed at length above in the body of my decision. The evidence reflects that Armstrong demonstrated good faith in achieving rapid compliance after notification of the violation by promptly conducting the required dust parameter checks. Tr. 24-25, 105, 171; Ex. S-1.

After considering the six statutory penalty criteria, I assess a penalty of \$9,122.00 for this violation.

ORDER

Armstrong Coal Company, Inc. is hereby **ORDERED** to pay a penalty of \$9,122.00 within thirty (30) days of the date of this Decision and Order.⁹



Priscilla M. Rae
Administrative Law Judge

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⁹ 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.