FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-82 A.C. No. 15-19374-300393
v.	
RIVER VIEW COAL, LLC, Respondent	Mine: River View Mine

DECISION

Appearances: Elizabeth Friary, Esq., U.S. Department Labor, Nashville, Tennessee, for Petitioner

Gary McCollum, Esq., River View Coal, LLC, Lexington, Kentucky, for Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(d). The Secretary's petition alleges that River View Coal, LLC ("River View") is liable for a total of seven violations of the Secretary's mandatory safety standards for underground coal mines." 30 C.F.R. § 75. It proposes the imposition of penalties totaling $9,748.00. A Decision Approving Partial Settlement was issued on October 23, 2013 for six of the seven citations. The parties presented testimony and documentary evidence at a hearing in Henderson, Kentucky on the one remaining citation with a proposed penalty of $687.00. Post-hearing briefs and responses to my intent to take judicial notice of certain documents were submitted by both parties.[1]

[1] The parties filed responses to my intent to take judicial notice of documents that explained the effects of electrical current on the human body. These documents were from the Occupational Safety and Health Administration (OSHA) and the Department of Health and Human Services (DHHS). The Secretary did not object. The Respondent argued that the court should decline to take judicial notice of the documents or, alternatively, take judicial notice of additional documents that reflect the effect of direct current (DC) on the human body. Ultimately, I took judicial notice of the OSHA and DHHS documents as well as the additional documents that Respondent proposed.

After consideration of evidence on the record, the judicial notice documents, and post-hearing briefs submitted by the parties, I find that the Secretary has proven a violation as alleged. I impose a civil penalty in the amount of $125.00 for the violation.

The parties submitted the following stipulations: 1) River View operates the River View Mine; 2) River View is subject to the Mine Act and the undersigned has authority to hear the case and issue a decision; 3) River View is a mine as defined in section 3(h) of the Mine Act; 4) River View produced 7,582,894 tons of coal in 2011; 5) At all times relevant to this proceeding, River View had an effect upon interstate commerce within the meaning and scope of section 4 of the Mine Act; 6) Copies of the citations in contest are authentic and were served on River View by an inspector employed by MSHA; 7) River View timely contested the violations; 8) Imposition of a reasonable penalty will not affect the ability of River View to remain in business. Ex. J-A.

Findings of Fact and Conclusions of Law

The River View mine is a large underground coal mine with two seams, the No. 9 and the No. 11. Tr. 17. On August 3, 2012, MSHA Inspector Sammy Pollard, Jr.[2] conducted an E01, general inspection, in the No. 11 seam for diesel equipment and outby equipment. Tr. 16, 17. He was accompanied by the No. 11 seam safety director, Jerry Hedgepath.[3] Tr. 17.

Citation No. 8508352

Citation No. 8508352 was issued by Pollard on August 3, 2012 at 7:00 a.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.512 which states, "[a]ll 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. . . ." The violation was described in the citation as follows: "[t]he operator failed to maintain the electrode holder provided for the welder located on the CO#5080 2-man Diesel Mantrip in safe operating condition in that the insulation provided on the electrode end is broken and missing for 1 inch on both sides. . . ." Ex. S-1.

Pollard determined that the violation was reasonably likely to result in lost workdays or restricted duty, that it was S&S, that one person was affected, and that the level of negligence was moderate.

[2] Pollard joined MSHA in 2009 as a coal mine inspector. Tr. 15-16. He worked for several underground coal mines from 1994-2009, 2 years of which were as a section foreman. Tr. 14-15. He is certified as a Kentucky foreman, instructor, and Southern Illinois mine examiner. Tr. 16. Pollard is not a certified electrician. Tr. 38.

[3] Hedgepath has been an employee at River View since 2009. Tr. 112. He started as an assistant safety director and was the safety director of the No. 11 seam at the time that the citation was issued. Tr. 113. Before starting at River View, he spent 23 years in the underground coal mining industry as a mechanic. Tr. 114. Hedgepath is a certified underground and surface foreman, and a certified electrician. Tr. 116.

Pollard testified that he issued the citation because about one inch of insulation on both tips of an electrode holder on a welder were missing. Tr. 18, 20. Hedgepath confirmed this condition. Tr. 128. The welder was attached to a two-man diesel trip, used by belt mechanics, and was powered hydraulically from the engine. Tr. 19. It was available for use at the time that the citation was issued. Tr. 21.

An electrode holder is an insulated clamp, located on a welder, and when squeezed, opens up to allow space for a welding rod. Tr. 20, 98, 99, 125; Ex. R-1. The clamp holds the rod in place while welding occurs. Tr. 20. Pollard stated that the purpose of the insulation is to prevent accidental contact which could result in electrocution or a shock. Tr. 20, 22.

Pollard did not know what the output voltage of the welder was when he cited the condition and was not familiar with the specifics of how to determine whether the missing insulation would be dangerous if a miner unintentionally came in contact with the bare metal. Tr. 36, 40.

However, Michael Moore[4], a certified electrician and MSHA electrical inspector, believed that the missing pieces of insulation posed a danger to miners. Tr. 51, 52. Moore explained that the amps that the welder puts out are what can injure a person.[5] Tr. 51. He maintained that if a miner touched the bare spot left by the missing insulation when up against wet metal[6], he would have received 2,000 milliamperes (mA). Tr. 55, 57. In reaching this number, Moore took notice of the fact that the resistance rating of the human body is between 500 and 1500 ohms, depending on how dry the body is. Tr. 58.

Moore, however, did not contact anyone at River View Mine to obtain the voltage output of the welder during normal mining operations, a number that Respondent's counsel asserted was needed to perform accurate calculations. Tr. 66. In addition, when Respondent's counsel did the math with Moore[7] at the hearing, they reached a number of 28 mA, which Moore agreed was correct. Tr. 66. Moore contended that any amount over 20 mA would create a shock that affects the heart. Tr. 73. He determined this from internet research. Tr. 76.

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[4] Moore has been an electrical inspector with MSHA since 1986. Tr. 47. He received his Bachelor's degree in electrical engineering technology and completed an apprenticeship in hydraulic, electrical, and mechanical areas. Tr. 46. Moore is a certified electrician and foreman and has performed welding tasks in the past. Tr. 47-48.

[5] Moore further explained that amps are needed for the actual operation of the equipment and milliamperes are used for the calculation of human exposure. Tr. 74.

[6] Pollard posited that the belt mechanics may use the welder on metal belt headers which are damp areas because of the sprays used to prevent dust. Tr. 23.

[7] During this analysis, Moore used 140 amps in the calculation as an estimate. Tr. 65. The welder could run up to 240 amps. Tr. 65.

Respondent called Daryl Halcom[8], Alliance Coal Company's electrical safety inspector, to rebut Moore's testimony. Halcom confirmed that the welder had direct current (DC), which is current that moves in a straight line and does not vary or change. Tr. 83. He spoke with the chief electrician at the River View Mine and asked the chief to check the voltage output of the welder while welding. Tr. 85. Halcom testified that the chief reported that the output voltage was 22 to 35 volts.[9] Tr. 85.

In making his calculations, Halcom stated that the resistance of a human body is 1,000 ohms fingertip to fingertip and that it takes one volt to push one amp through one ohm. Tr. 92. He calculated that the welder would create an exposure of 35 mA and that if accidentally touched by a miner, would only tingle. Tr. 93.

Arguments and Analysis

Respondent argues that no violation of section 75.512 exists because the Secretary failed to prove that the welder attached to the mantrip was electrical. Resp. Br. at 10. It states that the welder and its components were attached to a diesel personnel carrier and powered by a diesel engine, which does not constitute electrical equipment. *Id* (citing *Mettiki Coal Co.*, 11 FMSHRC 2435 (Dec. 1989) (ALJ), where the judge vacated a citation for failure to record examinations of two diesel-powered locomotives, stating that the locomotives were not subject to section 75.512 even though its lights and gauges operated off an electric generator).

The Secretary argues that the welder is in fact electrical equipment because it is undisputed that the welder ran on DC current, and a large portion of the testimony at hearing involved assessing the electrical shock potential and whether it was a hazard. Sec'y Resp. at 2. He also distinguished *Mettiki Coal* from the current situation, pointing out that the citation was issued for failure to record an examination of two diesel locomotives that contained lights and gauges that were an integral part of their operation as opposed to this case where the welder was not an electrical component of the mantrip. Sec'y Resp. at 5-6.

I find the Secretary's arguments to be persuasive and give deference to his interpretation. It is undisputed by the testimony at hearing that the welder ran on DC current and had the potential to cause an *electrical* shock. Here, the welder was added on to the mantrip and was not an integral component or part of the mantrip's operation as in *Mettiki Coal*. While the welder ran on a diesel engine, it was still a piece of electrical equipment and subject to section 75.512.

[8] Halcom is presently employed by Alliance Coal Company as a safety class instructor on electrical safety. Tr. 78-79. He graduated from Eastern Kentucky University with a degree in industrial technology, specializing in electronics. Tr. 78. He also worked for Peabody Coal for 26 years as maintenance foreman and chief electrician. Tr. 79. Afterwards, Halcom joined MSHA for 7 years as electrical inspector. Tr. 79. He is a certified underground and surface mine foreman, instructor, and a master electrician. Tr. 81, 82.

[9] The test was done on a new welder, not the welder for which the citation was issued. Tr. 107. Halcom stated that the voltage output would have been the same as the cited welder. Tr. 111.

Respondent also asserts that the Secretary must prove an inadequate examination by a qualified person, as defined in the regulations, at the time of the examination, not at the time of the inspection, in order to prove a violation, Resp. Br. at 15 (citing *Excel Mining*, 35 FMSHRC 2511, 2522-2525 (Aug. 2013) (ALJ) and *Twenty Mile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 2012).

The cases cited by Respondent are quite distinguishable from this case as they involve citations for an inadequate preshift examination and an inadequate on-shift examination. Here, the inspector did not write the citation for an inadequate examination during the previous week, he wrote the citation for failure to maintain the electrode holder. The standard requires that electrical equipment be maintained by a qualified person. While Respondent argues that a qualified person meets the requirements of section 75.512-2 by performing an exam and maintenance on a weekly basis, this does not excuse or require vacating a citation for failure to address hazardous conditions in the interim. Adopting Respondent's interpretation of this standard would frustrate the protective purposes of the Act by allowing any hazard on any electrical piece of equipment to go unaddressed for up to a week. The Commission has consistently interpreted "maintain" to mean continuing functioning condition and stated that '"the inclusion of the word 'maintain' in the standard … incorporates an ongoing responsibility on the part of the operator."' *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011). Company policy required the performance of a preoperational exam before every new operator, even if one had already been done, in order to correct conditions or hazards that arise between required weekly exams. Tr. 132. If the belt mechanic found a problem, it would be his duty to report that to the qualified person who would then be responsible for addressing the issue. Tr. 140. These actions were not taken in this case.

As the most contentious issue at hearing seemed to be the level of danger that the condition posed, determining that level is not necessary to find a violation of the standard. On this front, the standard only requires that the welder have been safe to use and did not pose a potential danger. It is undisputed that touching the bare metal where the electrode holder had broken off would have caused a shock. Even if the shock was not a significant one, I agree with the testimony from Pollard and Moore that a miner's initial reaction would be to jump back, which could cause a head injury if in a confined space or cause a miner to fall or slip. Tr. 24, 53.

As a result of these determinations, I find that the welder was not maintained in safe operating condition and that Respondent violated section 75.512.

S&S

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). A violation is properly designated 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc*. 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc*., 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130. The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

I have found that the violation has been established. The failure to maintain the electrode holder contributed to a discrete safety hazard, a miner receiving an electrical shock. The validity of the S&S finding turns on whether the hazard was reasonably likely to cause an injury or injuries of a reasonably serious nature.

Pollard explained that the belt mechanics may use the welder on metal belt headers which are damp areas because of the sprays used to prevent dust, and can also be in a confined space. Tr. 23, 25. He determined that injury was reasonably likely to result because if a belt mechanic was allowed to continue working, he would use the welder in damp, wet areas, or his hands could be wet, and without insulation, he would make accidental contact with the bare metal and be shocked. Tr. 24. Pollard contended that if a miner was shocked, he might jump, and if in a confined area, could hit his head, fall down, or possibly break a leg, resulting in lost workdays or restricted duty. Tr. 24.

Moore also believed that the conditions posed a hazard to a miner that was reasonably likely to result in a serious injury because the belt mechanics had to use the welder in order to weld the belts. Tr. 49-50. He stated that a shock over 20 mA, 28 to 35 in this case, would affect the heart, and that it was highly likely that if shocked, the miner would jump, resulting in slip and fall injuries. Tr. 53. In addition, Moore maintained that underground welders normally used regular leather gloves, which could get wet, but did concede that a miner could "get by" if the gloves were dry. Tr. 50, 56.

Hedgepath did not agree with Pollard's statements about the dampness of the No. 11 seam, stating that there were many days when he walks around and his feet do not get wet. Tr. 115. He also testified that it is company policy to wear welding gloves, and that miners are disciplined for breaking safety rules. Tr. 127, 133.

Halcom confirmed that it was company policy to wear welding gloves. Tr. 100. He also disagreed with both Pollard and Moore, stating that even 35 mA would only tingle if the bare metal of the electrode holder was accidentally touched and that it was not reasonably likely to kill a miner or even cause lost workdays or restricted duty. Tr. 92, 93.

Analysis

Company policy required miners to wear welding gloves and there were disciplinary measures in place for failing to do so. Moore and Pollard testified to the fact that if regular leather gloves got wet, the protection they provide could be compromised. However, neither made any such statement about that situation being the same with welding gloves and Moore confirmed that welding gloves are of a higher grade than regular leather gloves. Tr. 51.

Based on the documents that I took judicial notice of, Moore's assumption that a shock of over 20 mA affects the heart would have been close to correct if the welder ran on alternating current (AC). However, the welder ran on DC current which has a very different effect at 28 to 35 mA. According to The MERCK Manual, "the threshold for perceiving DC current entering the hand is 5 to 10 milliamperes (mA). . . . The maximum amperage that can cause flexors of the arm to contract but that allows release of the hand" is called the let-go current. *The MERCK Manual of Diagnosis and Therapy* 3248 (Robert S. Porter & Justin L. Kaplan eds., 19th ed. 2011). The let-go current varies with weight and muscle mass, but for an average 154 pound male, the current is 75 mA. In order for the heart to be affected, 300-500 mA are required. *Id.* The estimated current of 28-35 mA is above the perception threshold but significantly below the let-go current.

Moore's testimony regarding the likelihood and injury revolved around the use of wet leather gloves and AC current. The current level being significantly below the "let-go" threshold, the use of welder gloves, and the fact that the areas in which the welder was used were only wet on occasion, makes the likelihood of injury too speculative to find that it was reasonably likely a miner would be exposed to the danger of a shock from the broken electrode holder. I, therefore, find that the hazard was unlikely to cause an injury or injuries of a reasonably serious nature. The violation was not S&S.

Negligence

Pollard determined that Respondent's level of negligence was moderate because the operator should have known through visual observation and a proper examination that the welder was not being maintained. Tr. 27, 31; Ex. S-2 at 21. Pollard, however, was unable to determine how long the condition existed for but noted that the last exam was on July 31, 2012. Tr. 31; Ex. S-2 at 22. He did not speak to the examiner or any of the belt mechanics to determine the approximate time that the condition occurred and agreed that it could have developed after the last weekly examination. Tr. 32.

Moore testified that the condition must have existed for several days because welders are generally used in rough conditions and someone would have to mistreat them for the insulators to break off. Tr. 142. He provided no further explanation.

Hedgepath confirmed that there were no hazards found during the weekly examination on July 31. Tr. 130. He testified that the belt mechanics are required to do preoperational exams before using the mantrip, even if it has already been done by a previous mechanic. Tr. 132. They

are to report any issues to management, and tag out the equipment. Tr. 140. In regards to the length of time that the condition existed, Hedgepath contended that damage to the welder can happen in an instant and that he has seen the tips of electrode holders break off because they become brittle from extreme heat exposure. Tr. 131, 146.

Respondent performed the required weekly examination on the mantrip and made no comments about hazardous conditions. Company policy required the belt mechanics to do preoperational exams on the mantrip before operating it, providing for the opportunity to observe and report issues sometimes multiple times per day. There was no evidence, other than Moore's general statement, presented by the Secretary as to whether Respondent mistreated the equipment and caused the electrode holders to break. In addition, there was no evidence that management was aware of the condition and the Pollard was uncertain how long the condition had existed for. Based on these facts, I find the level of negligence to be low.

Civil Penalties

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 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 (May 2006).

Ability to Continue in Business, Good Faith, and Size of the Operator

The parties have stipulated that the proposed penalty will not affect the Respondent's ability to continue in business. Ex. J-A. I find that Respondent made a good faith effort to abate the citation. The parties stipulated that the mine produced 7,582,894 tons of coal in 2011. Ex. J-A. Based on 30 C.F.R. § 100.3, I find that the size of the operator is large and therefore, that the penalty assessed herein is appropriate to the size of the business.

History of Previous Violations and Negligence

The history of violations provided reflects that 472 violations became final between May 2011 and August 2012. Ex. S-3. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24. The Secretary's form reflecting the originally assessed penalty amount for the litigated violation (Secretary's Exhibit A), does, however, give some qualitative information by assigning points for the number of violations. 30 C.F.R. § 100.3(c). For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment form for the litigated violation reflects that 2 points were assigned for overall violation history. I find that Respondent's violation history is low. The negligence and gravity of each violation is discussed at length above.

Citation No. 8508352 is affirmed. However, I find that the violation was unlikely to result in an injury of a reasonably serious nature, requiring the removal of the S&S designation, and that Respondent's level of negligence was low. I assess a penalty of $125.00.

ORDER

It is **ORDERED** that Citation No. 8508352 be **MODIFIED** to reduce the likelihood of injury from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to reduce the level of negligence from "moderate" to "low."

It is further **ORDERED** that the operator pay a total penalty of $125.00 within 30 days of the date of this order.[10]

Priscilla M. Rae
Administrative Law Judge

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[10] 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.