FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 31, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-318
Petitioner	:	A. C. No. 15-17587–118112-01
	:	
	:	Docket No. KENT 2007-319
	:	A. C. No. 15-17587–118112-02
v.	:	
	:	Docket No. KENT 2007-344
	:	A. C. No. 15-17587–119033-01
	:	
	:	Docket No. KENT 2007-345
OHIO COUNTY COAL COMPANY,	:	A. C. No. 15-17587–119033-02
Respondent	:	
	:	Freedom Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melissa M. Robinson, Esq., William B. King, II, Esq., Jackson Kelly, PLLC, Charleston, West Virginia, on behalf of Ohio County Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petitions allege that Ohio County Coal Company is liable for eleven violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and propose the imposition of civil penalties in the total amount of $7,610.00. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. At the commencement of the hearing, the parties moved for approval of a settlement agreement resolving six of the alleged violations. The Secretary agreed to vacate two citations and Respondent agreed to withdraw its contest of four citations and to pay the assessed penalties in full. That proposed settlement will be approved herein. For the reasons set forth below, I find that Ohio County committed four of the five remaining violations, and impose civil penalties in the total amount of $3,350.00.

From November 2006 through April 2007, the Secretary's Mine Safety and Health Administration conducted inspections of Ohio County's Freedom Mine, located in Henderson County, Kentucky. The eleven citations at issue in these cases were issued during those inspections. Ohio County timely contested the violations and assessed civil penalties.

Citation No. 6692124

Citation No. 6692124 was issued by MSHA inspector Anthony Fazzolare on November 28, 2006. It alleges a violation of 30 C.F.R. § 75.202(a), which requires that coal mine roofs, faces and ribs, in areas where persons work or travel, be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock outbursts.

The violation was described in the "Condition and Practice" section of the Citation as follows:[1]

> Located at the XC 34 just inby the "2A" Belt tail there were 8 damaged roof bolts. These roof bolts have had draw rock fall from around them exposing areas of unsupported top measuring approximately 13 feet 7 inches by 6 feet 6 inches or 47.5 square feet. Another area measured approximately 15 feet by 10 feet, or 150 square feet. A breaker/feeder had been sitting in this spot and was just moved to the "2B" belt tail last shift. Failure to identify and correct this condition indicates a higher than moderate degree of negligence on the operator's part. Any miners working in this area could easily be hit by falling rock.

Ex. G-9.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $4,100.00 was proposed for this violation.

The Violation

As noted in the citation, the area in question was located in or near a crosscut, just inby the tailpiece of the 2-A belt. The citation was issued at 9:45 a.m. On the previous midnight shift, a feeder that had been at that location was moved about 240 feet onto a new beltline designated 2-B. That belt was at a right angle to the 2-A belt and dumped coal onto it. The feeder was a Stamler BF 17, a very large piece of equipment, approximately 40 feet long and 14

[1] Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

to 16 feet wide, weighing about 40 tons. It is a relatively tall piece of equipment, which makes it difficult to position properly in the Freedom mine, where the coal seam is only 42-48 inches high. Tr. 242-43. Walter Wood, Ohio County's maintenance manager, traveled with Fazzolare on the inspection and confirmed the observations noted in the Citation.

Ohio County does not contest the fact of violation. It argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that 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).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, 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) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), 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., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to properly support the mine roof.[2] An injury to a miner struck by material falling from the unsupported area would most likely be reasonably serious. Therefore, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The area in question was located where the belt line made a 90 degree turn. Prior to the feeder move, miners had used the area as a regular travelway. However, a new route had been created, and it was no longer used for that purpose. Tr. 240. Persons were required to be in the area approximately three times per day. Belt examinations were done on each of two production shifts, and an on-shift examination was conducted on the third shift. Tr. 83-84, 257, 263, 266.

The likelihood of an injury producing event must be evaluated by considering the likelihood of two specific events occurring simultaneously, a rock or other material falling from the roof and the presence of a miner directly underneath it. The frequency with which rocks, sufficient to cause a reasonably serious injury, would fall from the inadequately supported area is unknown and unpredictable. There is no evidence that any material fell from the area while the inspection party was present. Persons passed through the area three times per day, although not necessarily under the inadequately supported roof. Fazzolare did not know for certain whether persons would travel under it. Tr. 83. Belt examiners traveled on one side of the belt, and could conduct their examinations without going into the area of danger. Tr. 83, 258. Moreover, it is likely that an examiner would have noticed the problem and avoided exposure to the inadequately supported roof. As Wood noted, "that's their job," and they should have seen and corrected the problem, "like we did." Tr. 257. Because of the uncertainty of potential rock falls, and the fact that those potentially exposed to the hazard were trained examiners who were in the area infrequently and should have observed and avoided the hazard, I find that the occurrence of an injury causing event was unlikely.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Fazzolare certainly qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur, as opposed to could occur. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996)

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[2] As with Citation No. 6692129, Ohio County contends that fully grouted bolts continued to support the immediate roof in the absence of support plates. That contention is rejected. See the discussion, *infra*.

(to prove S&S nature of violation, Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur). Accordingly, I find that the violation was not S&S.

Negligence

Fazzolare determined that Respondent's negligence was high because he believed that the condition existed prior to the move of the feeder, and should have been discovered during the preshift examination done before the third-shift crew started to work. Tr. 74-75. Ohio County contends its negligence was no more than low, because the damage occurred during the move of the feeder, and there had been no intervening examination. Fazzolare disagreed, because the damage to the roof was in a location consistent with it having been caused by ram cars, and believed that those moving the feeder would have known of any damage caused during the move.

I find Fazzolare's testimony more persuasive. From his experience, he believed that the damage had been caused by ram cars striking the mine roof while loading coal onto the feeder. Tr. 63-66, 74-75, 92. As he described it, ram cars would ride up on spilled coal as they backed up to the feeder's loading platform (referred to as the "duckbill"), and the tail of the car would hit the mine roof. Tr. 63-64. Wood confirmed that there is "inherently a lot of spillage" in the loading process. Tr. 250. The damage would have been done on production shifts and would have existed before the start of the non-production third shift, during which the feeder was moved. Fazzolare also believed that the location, nature and extent of the damage was consistent with damage caused by ram cars in the loading process.

Wood testified that the damage could "very easily" have occurred during the feeder move. Tr. 243. As Wood described the procedure, the feeder would first be trammed back away from the belt. The part of the feeder that dumped onto the belt would often be up against the mine roof, and would scrape the roof as it was trammed back. Tr. 244-45, 274-75. He stated that the damaged bolts were not actually in the crosscut, where the ram cars loaded, but were between coal pillars, where the feeder could have scraped the roof as it was trammed back. Tr. 254.

Fazzolare testified that the damage was extensive, and was located in the crosscut, where the ram cars would have dumped coal. Tr. 60, 74-75, 92. While his recollection of events on the day of the inspection was, admittedly, "vague," he had recorded in his contemporaneous field notes that the location of the roof damage was in the crosscut, which was consistent with his theory of causation. Tr. 56; ex. G-10. I find that the location of the inadequately supported roof was in the crosscut, where ram cars had loaded. The extensiveness of the damage also supports Fazzolare's version of events. He testified that, if the damage had been caused during the move of the feeder, it would not have been as extensive. Tr. 74-76, 92. Wood testified that the feeder would be trammed back away from the belt only for a short distance, i.e., 18 to 20 inches, then lowered to facilitate the move. Tr. 274. Once lowered, Wood did not believe that further contact with the roof would be likely. Tr. 275. Wood's explanation of the cause of the damage is inconsistent with the extensiveness of the damaged area.

I find that the damage to the bolts had been caused prior to the feeder move, and should have been discovered during the preshift examination for the prior shift. Accordingly, I find that Ohio County's negligence was properly assessed as high.

Citation No. 6692129

Citation No. 6692129 was issued by Fazzolare on December 7, 2006. It also alleges a violation of 30 C.F.R. § 75.202(a). The violation was described in the "Condition and Practice" section of the Citation as follows:

> Draw rock had fallen from around the permanent roof support on the haul road for MMU 001-0 exposing unsupported top measuring approximately 10 feet by 8 feet, or 80 square feet. A vehicle had traveled under the unsupported top.

Ex. G-11.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $838.00 was proposed for this violation.

The Violation – S&S

This violation also involves an area of inadequately supported mine roof. As with the previous Citation, Ohio County does not challenge the fact of the violation. It disputes the Secretary's S&S and negligence allegations. The S&S analysis involves the same considerations as the preceding citation. There, because only trained mine examiners might encounter the hazard, and any exposure would have been infrequent, the violation was determined to be not S&S. However, the area in question here was located on a haul road, an area frequently traveled by rank and file miners. Tr. 97. Several types of vehicles traveled the road, some of which did not have canopies to protect the operators from falling rocks. Tr. 96-97. Material had fallen from around one bolt and loosened the plate, creating an area of inadequately supported roof approximately 8 feet by 10 feet. Tr. 194. At least one vehicle had traveled under the inadequately supported roof area. Tr. 95. These facts substantially alter the outcome of the S&S analysis.

Ohio County argues that the subject area was to the side of the entry, and that the grouted bolt still retained most of its holding power, making the fall of additional material, and an injury causing event, unlikely. Fazzolare did not dispute that the bolts retained some support for the main roof. His concern was the "immediate" mine roof, where draw rock could become loose due to the effects of being exposed to the mine atmosphere, particularly drying during the winter season. Tr. 99-100. Plates held against the roof by the bolts provide the primary support for the immediate roof. I find his testimony more credible. The bolt's grouting did not substantially protect against falls of draw rock from the immediate roof, which was a recurrent problem at the Freedom mine. Tr. 202-03. At this location, even the plate had not provided sufficient support,

because draw rock had fallen from close to the bolt, loosening the plate. While the inadequately supported area may have been more to the side of the entry, it extended almost to the mid-point, and vehicles using the haul road could travel under it. Charles Travis, the Freedom Mine safety manager, acknowledged that there were some vehicle tracks over to the side of the entry. Tr 199. As noted in the citation, at least one vehicle had traveled under the inadequately supported area.

I find that, as to this citation, the Secretary has carried her burden of proof, and that the occurrence of an injury producing event was reasonably likely. The violation was S&S.

Negligence

Fazzolare determined that Ohio County's negligence was moderate based on an assessment that the condition had existed for at least one shift. However, aside from that entry in his notes, he did not recall what formed the basis of that conclusion. Tr. 98. He did not know when the rock had fallen, or when a vehicle had traveled in the area. Tr. 109. As to the vehicle that had traveled the area, he admitted that the operator may have been an hourly person, and not realized that the condition existed. Tr. 107-08. In light of these concessions, I find Ohio County's negligence to have been low.

Citation No. 6692130

Citation No. 6692130 was issued by Fazzolare on December 7, 2006. It alleges a violation of 30 C.F.R. § 75.517, which requires that power wires and cables be insulated adequately and fully protected.

The violation was described in the "Condition and Practice" section of the Citation as follows:

> The energized 995-volt trailing cable for the Joy 14/15 Continuous Miner, Co. No. M-13, located in MMU 001-0, was not adequately insulated. Upon close inspection, with the power locked and tagged, the inner wires of the cable could be seen. Continued dragging of this cable across the mine floor will eventually bare these inner wires and expose a potential shocking hazard.

Ex. G-12.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $838.00 was proposed for this violation.

The Violation

The rubber-coated cable supplying 995-volt electrical power to the continuous miner runs from the miner, along the rib of the entry, to a power center. It consists of two power leads, two

ground wires, and a monitor wire. It is also shielded, i.e., the cover includes a conductive layer that is designed to pick up any electric current leaking from the inner leads and cut off power to the cable through a ground fault system. Tr. 214. On the day in question, Fazzolare examined a spot on the cable where it had been spliced. The tape covering the splice had been "roughed up." Tr. 213. He examined it closely, bending and manipulating it, and was able to see the inner leads. Tr. 213. After the power had been cut off, the splice tape was cut away. The inner leads were intact and remained insulated, and the cable's shielding was also intact. Tr. 218.

While Ohio County argues that there was no defect in the cable before Fazzolare examined it, it does not challenge the fact of violation, but argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

S&S

Fazzolare believed that a miner could receive an electrical shock by handling the deteriorating splice in the cable. Tr. 117, 132. He did not dispute the fact that the insulation on the electrical conductors was intact, such that the splice did not present a shock hazard at the time of the inspection. His concern was that, with continued dragging of the cable along the mine floor, the opening would become larger allowing small rocks to enter, "eventually" wearing away the insulation of the inner leads "if not caught." Tr. 122, 129. The presence of the shielding and monitor wires did not alter his analysis, because he cited a recent example where a miner was injured handling an electrical cable by current that was below the threshold of the ground fault system. Tr. 125-26.

Travis, who traveled with Fazzolare, testified that the opening in the splice tape was extremely small, and would not have been perceived as a problem by most observers. Tr. 219-20. The shielding and insulation of the conductors was intact, and the violation was abated simply by re-taping the splice. Tr. 221. He agreed that the splice could deteriorate if not properly cared for, but noted that splices are checked on a regular basis and re-taped if necessary. Tr. 228-29. He also explained that miners are trained to not handle cables at splices when the cable is energized. Tr. 218. Cables are checked weekly, and miner operators examine them before operating the equipment. Tr. 126-27, 219-20. He also noted that the continuous miner operates at 995 volts, which is classified as "low voltage," and that miners wear gloves, although he conceded that the gloves were not insulated to provide protection from electrical shock. Tr. 23.

A cable splice that has been allowed to deteriorate to the point that electrical conductors are exposed would present a serious shock hazard. While classified as "low," the voltage was more than adequate to cause a serious or fatal injury. Neither the miners' work gloves, which were not insulated, nor the shielding system, would assure that no injury occurred. However, the condition cited was not hazardous at the time. According to Fazzolare, it could have become hazardous "eventually," "if not caught." There is no evidence as to the length of time that would have had to elapse before the condition became hazardous. At the time of the inspection, the splice was located some distance from the continuous miner, where the cable would have been

handled less frequently. Tr. 221. Before the condition could result in an injury, it would have had to undergo multiple pre-operational examinations and weekly inspections, and not been identified as a problem in need of correction, and a miner would have had to ignore his training and handled the energized cable at the splice.

Considering all of these factors, I find that the Secretary has not proven that the violation was reasonably likely to have resulted in an injury producing event, and that the violation was not S&S.

Negligence

Travis testified that the tape of the splice was roughed up in spots, not "very pretty," and doubted "that anybody would have ever seen any problem with this." Tr. 219-20. Fazzolare conceded that the condition was "not very obvious," and was observable only on "close inspection." Tr. 126. I find that Ohio County's negligence was low.

Citation No. 6692131

Citation No. 6692131 was issued by Fazzolare on December 7, 2006. It alleges a violation of 30 C.F.R. § 75.503, which requires that electric powered equipment that is taken into or used inby the last open crosscut be maintained in permissible condition. The violation was described in the "Condition and Practice" section of the Citation as follows:

> The operator failed to maintain the Fletcher Double Boom Roof Bolter in a permissible condition. When checked, the right front light had a loose packing gland where the cable enters the light fixture.

Ex. G-13.

Fazzolare determined that it was unlikely that the violation would result in a lost work days or restricted duty injury, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 was proposed for this violation.

The Violation

Maintaining permissibility of electric-powered equipment inby the last open crosscut is critical to assuring that sparks or arcing from electrical components cannot cause an ignition or explosion of methane liberated by the mining process. The permissibility of housings of electrical components is typically determined by measuring to assure that openings are no greater than 0.004 of an inch. Inspectors probe openings in joints with a 0.005-inch feeler gauge and determine that permissibility is intact if the feeler gauge cannot be inserted. Tr. 141.

The wires that supply electricity to the lights on the roof bolter are encased in rigid conduit that is connected to an elbow joint that is, in turn, connected to the lamp housing. The

connection to the housing is sealed by a packing gland in which a rubber grommet is encapsulated. Screwing down the top of packing gland compresses the grommet, forcing it to expand, sealing any openings. Tr. 139, 279. When properly compressed, the flexibility of the rubber grommet allows some movement of the lamp housing. Tr. 280. Previous fittings were similar in design, except that fiberglass rope was used instead of rubber. More force was needed to compress the rope. Consequently, the cap was screwed tighter, and the connection was rigid. Tr. 280-81.

The permissibility of the packing gland joint cannot be measured with a feeler gauge, and no other objective test for determining the permissibility of such fittings in the field was identified. Tr. 141, 287. Fazzolare did not attempt to measure the suspected opening. Tr. 145. He assesses permissibility by trying to move the lamp. If he can "rock it by hand," in his opinion, it is too loose, and he deems the joint non-permissible. Tr. 140. Wood testified that the newer rubber grommet packing glands allow movement of the lamp housing when the grommet is properly compressed, and that an over-tightened packing gland may result in a violation. Tr. 280-81.

Fazzolare testified that, in his experience, if the fitting was "that loose," there would be at least a 0.005-inch gap. Tr. 146. However, he did not explain the basis of that conclusion, and it is unlikely that it was the product of accurate measurements. More significantly, he admitted that he had no way of knowing whether the joint was actually sealed. Tr. 147. I find that the Secretary has failed to prove by a preponderance of the evidence that the packing gland joint had not been maintained in permissible condition. The Citation will be vacated.

Citation No. 6692601

Citation No. 6692601 was issued by MSHA inspector Charles Jones on April 10, 2007. It alleges a violation of 30 C.F.R. § 75.1107-16(b), which requires that fire suppression devices be maintained in accordance with requirements specified in the appropriate National Fire Code. The violation was described in the "Condition and Practice" section of the Citation as follows:

> The take-up motor, electrical components and oil tank at the #5 belt drive were not provided with adequate fire suppression. The fire suppression water spray nozzle and piping had fallen down and were lying beside the motor on the mine floor.

Ex. G-1.

Jones determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $217.00 was proposed for this violation.

The Violation

The motor, electrical components, and hydraulic oil tank for the #5 belt drive takeup unit were located in a crosscut adjacent to the belt entry, out of the main ventilation air current that flowed outby in the entry. The water spray nozzle was part of the belt drive fire suppression system, and was supposed to be suspended over the equipment in the crosscut. Heat generated by a fire would melt a plastic plug, allowing water to flow through the spray nozzle. The hazard contributed to by the violation was that a fire starting in the area of the motor would not be suppressed timely, would generate increased smoke and other products of combustion, and could spread to the main belt drive. The belt drive and the takeup unit, including 50 feet of the belt, were protected by a deluge water system, the components of which were in good working order.

Ohio County admits that the fire suppression nozzle had fallen to the mine floor and was not properly maintained at the time of the inspection. It argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

S&S

The Secretary contends that the violation was S&S because the "condition was likely to result in smoke inhalation or burn injuries as a result of a mine fire at [that] location." Sec'y. Br. at 12. Jones' S&S determination was based on a number of considerations, including that the nozzle would be ineffective in suppressing a fire, that notice of the fire would be delayed because of the location of the equipment, and that firefighting efforts would be delayed because of difficulty ascertaining the location of the takeup motor from the secondary escapeway. Ohio

County disputes those contentions, and argues that it was highly unlikely that a fire would occur at the takeup motor and, if a fire did occur, it was highly unlikely that a miner would be injured.

As to the possibility of a fire occurring at the takeup motor, Jones identified potential ignition sources as a possible arc from the electrical equipment and friction generated by the takeup unit.[3] However, he did not identify any defects in the electrical equipment. Nor did he identify any defects in the takeup unit resulting in the generation of excessive heat due to friction. Concerns about friction at the takeup unit, which was located in the belt entry and was protected by the deluge system, bear little relevance to the seriousness of the condition at the equipment in question. He noted the close proximity of hydraulic fluid, but did not cite any leaks in the system, and conceded that the hydraulic fluid was an emulsion consisting of 40% water, which "would burn," but was "fire resistant." Tr. 38, 43. Travis explained that MSHA's mine safety and data sheet does not list a flash point for the fluid because it is 40% water. Tr. 156.

The history of fires at the Freedom mine tends to indicate that the likelihood of a fire occurring in the area of the takeup motor was remote. Jones was not aware of any fire occurring at the Freedom mine, and Travis was unaware of any belt fires at the Freedom mine. Tr. 50, 164. However, Wood, confirmed that a belt fire had occurred, apparently many years before, and was extinguished quickly enough that it was not reportable to MSHA.[4] Tr. 289.

The fallen nozzle did not provide effective fire suppression. Lying on the mine floor, the plastic plug would not be exposed to significant heat from a fire until it had reached large proportions, and the spray would not cover the intended area. However, in the absence of anything more than a theoretical ignition source, I find that the occurrence of a fire at the takeup motor was unlikely. Moreover, other factors relied on by Jones to support his conclusion were not substantiated. The mine's fire suppression system would have provided effective and timely warning of a fire at the takeup motor, and the unmarked man doors would not have caused any

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[3] The Secretary cites several additional potential ignition sources. Sec'y. Br. at 12. However, those sources were considerably removed from the equipment in question. In order for the fallen nozzle to have had any impact on a fire originating some distance from the equipment, it would have had to spread over a considerable area, and would have activated the nearby deluge system. The fallen nozzle would have had a negligible impact, if any, on the hazards presented by such a fire.

[4] Unplanned fires in underground mines that are not extinguished within 10 minutes of being discovered must be reported to MSHA. 30 C.F.R. §§ 50.2(h)(6), 50.10, 50.20. The regulation was amended in 2006 to shorten the time period from 30 to 10 minutes.

significant delay in responding to a fire.[5] Consequently, I find that even if a fire had occurred at the takeup motor, it is unlikely that a serious injury would have resulted.

I find that the Secretary has failed to carry her burden of proving that the violation was reasonably likely to result in a reasonably serious injury. Consequently, the violation was not S&S.

Negligence

Jones evaluated Ohio County's negligence as moderate. He believed that the condition had existed for "a while," because there was rock dust and float coal dust on the nozzle, and that it should have been discovered and corrected in conjunction with belt examinations required to be conducted on the two shifts each day that production occurred at the Freedom mine. Tr. 28-31. Ohio County contends that the condition was not readily observable, and that there is no evidence that the condition had existed for any length of time, much less that it had existed long enough to have been discovered during an examination that had occurred at least two shifts earlier. It challenges Jones' testimony on the presence of rock dust and float coal dust on the nozzle, pointing out that it was contradicted by Travis, and that there is nothing in Jones' field notes regarding the presence of dust at that location. Tr. 189-92

The nozzle was lying on the mine floor near the takeup motor. Belt examiners traveled on the opposite side of the belt. While it may have been more difficult to see from that vantage point, it should have been seen in the course of an examination. I do not understand Ohio County to be contending that it is not part of a belt examiner's duties to confirm the presence of essential fire suppression equipment. Travis agreed that a fallen fire suppression hose should have been noted by a preshift examiner. Tr. 177. As to the presence of dust, I credit Jones' testimony, and find that there was some rock dust and float coal dust on the fallen nozzle, and that it had been in that condition long enough that it should have been discovered. I find that Ohio County's negligence with respect to this violation was properly assessed as moderate.

The Appropriate Civil Penalties

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[5] Freedom's carbon monoxide monitoring and fire suppression systems were in working order. The CO monitors are set to alarm at five parts per million, a very low threshold level, and a monitor was located nearby, downstream in the 245 foot-per-minute air flow. While there would have been less air flow in the crosscut where the equipment was located, some significant air flow would be required to supply oxygen to a fire, and the products of combustion would have been forced or drawn out into the belt entry's air flow, triggering the alarm. Freedom's miners and managers were properly trained to fight fires. A fire fighter approaching from inby would travel the belt entry, in its outby air flow of fresh air. Approach from outby would be through the intake entry, inby the fire, and into the belt entry through a man door. While the man doors to the belt entry were not marked, Travis explained that the location of the takeup unit was well known and readily identifiable, because the entries turned 45 degrees at that point, the only such turn in the mine. Tr. 160.

Ohio County is a very large operator, with a very large controlling entity. The assessment data reflects that, prior to an apparent change in organizational structure in 2007, it averaged 1.5-1.6 violations per inspection day during the relevant period, a relatively high incidence of violations. Ohio County does not contend that payment of the proposed penalty will affect its ability to continue in business. The violations were promptly abated.

Citation No. 6692124 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A specially assessed civil penalty of $4,100.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of $2,500.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692129 is affirmed. However, Ohio County's negligence was found to be low, rather than moderate. A civil penalty of $838.00 was proposed by the Secretary. The lowering of the level of negligence justifies a reduction in the proposed penalty. Informed by the Secretary's then applicable penalty assessment regulations, I impose a penalty in the amount of $375.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692130 is affirmed. However, the violation was not S&S and Ohio County's negligence was found to be low, rather than moderate. A civil penalty of $838.00 was proposed by the Secretary. The lowering of the gravity of the violation and the operator's level of negligence justify a reduction in the proposed penalty. I impose a penalty in the amount of $300.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692601 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of $217.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of $175.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

The Settlement

The Secretary agreed to vacate Citation Nos. 6692627 and 6692628 in Docket No. KENT 2007-344. Ohio County agreed to withdraw its contest and pay the assessed penalties as to Citation No. 6689987 in Docket No. KENT 2007-319, Citation No. 6692605 in Docket No. KENT 2007-344, and Citation Nos. 6692620 and 6692622 in Docket No. KENT 2007-345. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that, as to Citation Nos. 6692627 and 6692628 the petition in Docket No. KENT 2007-344 is hereby **DISMISSED**, and that Respondent pay a penalty of $1,357.00 for the citations that are the subject of the settlement agreement.

ORDER

Citation No. 6692131 is **VACATED**. Citation Nos. 6692124, 6692129, 6692130 and 6692601 are **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay civil penalties in the total amount of $3,350.00 for the contested violations.

Respondent shall pay civil penalties in the total amount of $4,707.00 for the settled and contested violations within 30 days.

Michael E. Zielinski
Senior Administrative Law Judge

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