FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

December 16, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-1083
Petitioner	:	A.C. No. 15-02709-150056 -01
	:	
v.	:	Docket No. KENT 2008-1084
	:	A.C. No. 15-02709-150056-02
	:	
HIGHLAND MINING CO., LLC,	:	
Respondent	:	Highland No. 9 Mine
	:	

DECISION

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Michael Cimino, Esq., and Brad Oakley, Esq., Jackson Kelly, Charleston, West Virginia, on behalf of behalf of the Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act") charging Highland Mining Co., LLC ("Highland") with 39 violations of mandatory standards and seeking civil penalties for those violations. The general issue before me is whether Highland violated the cited standards as charged and, if so, what is the appropriate civil penalty to be assessed for those violations. Additional specific issues are addressed as noted.

At hearings, the parties proffered that a partial settlement had been reached regarding 36 of the charging documents at issue herein. A formal motion for settlement of those charging documents was submitted post hearing proposing civil penalties of $78,340.00 for the violations charged therein. I have reviewed the documentation and representations submitted and find that the proposed settlement is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly, an order directing payment of those penalties will be incorporated in this decision.

As a preliminary matter at hearings, and by subsequent post hearing motion, the Secretary modified Order Number 6695564, issued on November 27, 2007, from an order issued pursuant to

section 104(d)(2) of the Act to a citation issued pursuant to section104(a) of the Act.[1] The Secretary also modified Order Number 6695579 from an order issued under section 104(d)(2) of the Act to one issued under section 104(d)(1) of the Act.

Citation Number 6695769

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.1725(a) and charges as follows:

> The beltline on 064 MMU was not being maintained in safe operating condition. A belt roller top chair had broken loose from the belt frame and was lodged between the top and bottom belts. Smoke from the top chair rubbing the belts was in the air and the top chair was hot to touch. The company stopped the belt and removed the top chair from between the top and bottom belts.

The cited standard provides that "mobile and stationary machinery and equipment shall

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[1] Section104(d) provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to mine.

be maintained in safe operating condition. Machinery or equipment in unsafe condition shall be removed from service immediately."

Jeffrey Winders, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), was inspecting the Highland No. 9 mine on April 12, 2008 when he smelled smoke from what he recognized as burning rubber. He tracked the smoke to the belt where a belt roller top chair had broken loose from the belt frame and was lodged between the top and bottom belt. He observed smoke emanating from the top chair which was rubbing against the belt. He also noted that the top chair was hot to the touch. To remedy the problem, the company representative stopped the belt and removed the top chair from between the top and bottom belts. Within this framework of undisputed evidence, it is clear that the violation is proven as charged.

The Secretary also maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum,* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Austin Power Co. v Sec'y of Labor,* 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

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.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984). *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, Inspector Winders opined that, under continued normal mining operations, the cited condition would worsen and result in a fire. According to Winders' credible testimony, there was coal inside the belt framing. It may reasonably be inferred that, under continued mining operations, it is reasonably likely that hot pieces of belt would ignite such coal. Should a fire occur, it is reasonably likely that burns or smoke inhalation would result causing injuries to persons working on the return side, i.e. two roof bolters, a miner operator and a miner operator helper. Within this framework of credible evidence, I conclude that indeed the violation was "significant and substantial." In reaching this conclusion, I have not disregarded the inspector's

acknowledgment that he found no methane in the area nor coal accumulations in contact with the rollers. He further acknowledged that he did not see any belt shavings on the ground and did not detect any carbon monoxide. However, not only did he observe smoke emanating from the belt in contact with the top chair, but I find his conclusion credible that, under normal continued mining operations, that condition would likely result in additional smoke and fire.

Based on Inspector Winders' acknowledgment, however, that the condition could have existed only moments before his discovery and that he did not believe that the condition was recognized by anyone, I conclude that the Secretary has failed to sustain her burden of proving the existence of negligence. This factor is taken into consideration in reducing the Secretary's proposed penalty for this violation.

Citation Number 6695564

This citation, originally issued as a "section 104(d)(2)" order, was modified, as previously noted, to a citation issued pursuant to section 104(d)(1) of the Act and alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.203(b). The citation charges as follows:

> The No. 1 and No. 2 entries on the No. 4 (064-0) MMU were driven together in the last open crosscut at spad 11+07. The entries were driven together due to not having a proper sight line installed, to project the direction of mining in the crosscut between the No. 2 and No.1 entries one crosscut outby the last open crosscut,and one properly installed to turn the right crosscut to pick up the No. 1 entry. The No. 1 entry cut into the No. 2 entry on the second cut leaving an 8 inch pillar on the inby side.

The cited standard provides that "[a] sight line or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits."

MSHA Inspector Archie Coburn, Jr. testified that he was at the subject mine on November 27, 2007 when he observed that the No. 1 and No. 2 entries on the No. 4 unit were driven together in the last open crosscut at spad 11+07. Coburn was not present when the entries were cut, but nevertheless concluded that the entries were driven together due to not having a proper sight line installed to project the direction of mining.

Coburn also claimed that the continuous miner operator at the scene told him that there had been no sight line but rather the rib line was used in cutting the crosscut. Coburn also alleged that Jeffery Wilkens, the section foreman, admitted that he made a mistake and had not installed sight lines. Coburn also testified that it was "obvious" to him that the angle of the crosscut was wrong.

Section Foreman Wilkens testified affirmatively that he did not tell mine Inspector Coburn that he did not use sight lines. Wilkens testified that he used fluorescent orange paint to

make a sight line but admitted that his calculations in locating the sight line were incorrect thereby leading to the misdirection of the crosscut.

Allen Rigney, the miner operator who cut the cited crosscut, is a member of the United Mine Workers of America. He testified that he in fact used a sight line to make the subject cut and that the sight line was made with reddish-orange fluorescent paint on the roof. Rigney testified that Wilkens was his foreman and that Wilkens had never asked him to cut without sight lines. Rigney also observed that sight lines can become obliterated by the swing duster. Indeed, Inspector Coburn himself also acknowledged that sight lines can be obliterated by water sprays, rock dusting or by cutting with a continuous miner. Rigney also testified that he did not notice that the angle of the cut was misdirected and that if he had he would have stopped mining and notified his boss. Rigney testified that the sight line drawn by Wilkens was eight to ten feet long and three inches to four inches wide.

Randy Johnson, Highland's safety supervisor, accompanied Inspector Coburn on his April 27, 2007 inspection. Johnson testified that he indeed saw the sight line in fluorescent orange paint in the subject area. Since Coburn, while underground, never told Johnson that he was going to write an order for the absence of a sight line, Johnson did not consider it necessary to show Coburn the sight line that was present.

In resolving the conflicting testimony, I note that the inspector had not previously disclosed the purported admissions in his deposition, nor did he report these purported admissions of Wilkens and Rigney in his notes. Considering the cross corroboration of the credible testimony of Wilkens, Rigney and Johnson, I can only conclude that the inspector's recollection of events that had occurred nearly three years before trial must have been mistaken. Under the circumstances, I find that, indeed, sight lines had properly been painted on the mine roof as required by the cited standard. Citation Number 6695564 must accordingly be vacated.

Order Number 6695579

This order, as modified to a "section 104(d)(1)" order, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.370(a)(1) and charges as follows:

> The approved ventilation, methane and dust control plan in affect [sic] at this time was not being complied with on the 4-C belt and supply road. The following conditions were present 1. The required 3,000 CFM was not present in the supply road at crosscut 15 where the company No. 38 Diesel 2 man personnel carrier was operating. The Supply Getman requiring 6, 000 CFM was also operating in the supply road at crosscut 8 out by this area. When measured, with a chemical smoke tube zero air movement was measured. 2. The air was not moving in the proper direction on the belt line from crosscut 15 to 234. The air was moving out by along the belt line. This belt line uses a heat point fire detection system. The preshift report show that the air was moving out by from the backup curtains outby through the unit air locks. This condition was reported to the mines ventilation supervisor. The preshift was signed by the Section

Foreman and Mine Foreman prior to the start of the shift. When check the air was still moving outby from the backup curtains through the air locks. The No. 4 section was in full production when the conditions were present.

The cited standard provides in relevant part that "the operator shall develop and follow a ventilation plan approved by the district manager."

It is noted that the order at issue actually charges two violations i.e. (1) insufficient air in the supply road and (2) air moving in the wrong direction on the beltline. Highland admits to the violations but maintains that they were neither "significant and substantial" nor the result of its unwarrantable failure.

Inspector Coburn testified that around 7:00 a.m. on December 5, 2007, he read the pre-shift examination book and saw the statement, "unit pre-shifted from outby low framing to faces air traveling outby from backup through airlocks outby, reported to Troy Cowan." (Ex. G-12). Coburn did not travel to the unit to inspect the reported condition but rather gave the operator an opportunity to correct it. When Coburn later arrived at the unit around 9:00 a.m., he found that the ribbons in the neutral were not moving. Coburn observed that the air was moving from the face outby through the unit airlocks and moving backwards down the belt line and supply road. Coburn testified that the air moving down the belt line and supply road was not being dumped into the return regulator at the unit airlock (Ex. G-9). Coburn further testified that the air should have been moving inby towards the low framing and that the incorrect air movement was a violation of the operator's ventilation plan. (Ex. G-10).

Coburn initially attempted to use an anemometer to determine the air movement, but since there was insufficient air movement he had to use a smoke tube. Coburn thereby determined that the air was moving away from the unit outby. Inspector Coburn also observed that a two-man personnel carrier was situated just outby the unit airlocks and had a minimal amount of air movement around it. He further testified that the two-man carrier required 3000 cubic feet per minute (c.f.m.) of air designated on the equipment's air measurement tag. Coburn also observed a Getman supply diesel in the supply road and noted that there was insufficient air for the Getman to operate in the supply road. The Getman diesel requires 7000 c.f.m. (Ex. G-9). Inspector Coburn opined that insufficient air movement over the two-man personnel carrier and the Getman supply diesel exposed the miners on the unit to carbon monoxide fumes produced by this equipment.

After observing the condition, Inspector Coburn spoke with Ventilation Supervisor, Troy Cowan, about the air moving outby, in violation of the ventilation plan. Cowan stated that he had hung a curtain, shut the belt off and restarted it, and assumed that if they were working on the problem then they could continue to run. Additionally, Coburn spoke with Section Foreman Eddie Barber and asked him why the unit was still running with the air going backwards. Barber responded that because the belt was running when he arrived he assumed the condition had been corrected. Barber admitted, however, that he did not check to ensure that the condition had been corrected.

The Secretary maintains that the admitted violation was "significant and substantial." In this regard, Inspector Coburn indicated that the cited condition was reasonably likely to contribute to a discrete safety hazard, i.e. a belt fire and diesel fumes. He opined that if a fire were to occur on the belt line the personnel on the unit would not know or have any warning that there was a fire outby
because the air was moving away rather than toward them. He further opined that this condition would affect all ten persons on the unit. I find that Coburn's expert testimony is credible and provides ample proof that the cited violation was indeed "significant and substantial" and of high gravity. In reaching this conclusion, I have not disregarded Respondent's argument that there was no evidence in this case of any accumulations, heat source or ignition source for a belt fire. However, this argument fails to recognize continued mining operations as required in any "significant and substantial" analysis. It also fails to recognize the hazard of carbon monoxide from diesel emissions.

The Secretary maintains that the violation was also the result of Highland's "unwarrantable failure." This Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" and has indicated that an unwarrantable failure implies indifference, wilful intent, a knowing violator, or a serious lack of reasonable care. *Emery Mining Corporation* 9 FMSHRC 1997, 2004 (Dec. 1987). The Commission has considered a number of factors to be relevant when determining whether a violation is the result of unwarrantable failure, stating as follows:

> We examine various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order.(Citations omitted). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.

Amax Coal Co., 19 FMSHRC 846, 851 (May 1997).

Further, this Commission has found that because a supervisor is held to a high standard of care, evidence of a supervisor's involvement in the violation is an important factor supporting an unwarrantable finding. *See Lafarge Constr. Materials,* 20 FMSHRC 1140, 1145-1148 (Oct. 1998).

In this regard, Coburn testified that the violative condition was a result of the operator's high negligence and unwarrantable failure because Mine Foreman Danny Thorpe, Ventilation Supervisor Troy Cowan and Section Foreman Eddie Barber had all signed off on the fire boss report that listed the violative condition. According to Coburn, those agents of the operator, therefore knew of that condition and failed to correct it before running coal. Coburn further noted that he gave the operator at least two hours to correct the violative condition and the

operator nevertheless still failed to correct it. I find that three agents of the operator (the three supervisors) demonstrated a serious lack of reasonable care and indifference to the safety of the miners on the unit when they allowed
production to continue without correcting the violative condition. Indeed, the ventilation supervisor
and section foreman were on the unit and aware of the violative condition yet failed to verify that it had been corrected before producing coal. Under all the circumstances, I find that the Secretary has clearly met her burden of proving that the violation herein was the result of Highland's unwarrantable failure and high negligence.

In reaching this conclusion, I have not disregarded the Respondent's argument that the language in the preshift report did not place its agents on notice of the precise violative conditions cited herein. I find however, that whether or not the same precise violative conditions were set forth in the preshift report, the report provided sufficient notice of the cited ventilation problems to Respondent's agents so that they were thereby placed on notice. Moreover, aside from the notice provided by the preshift report, it is clear that Respondent's ventilation supervisor and section foreman had actual knowledge of the violative condition but failed to verify that it had been corrected before running coal. Their failure to correct those problems was therefore the result of high negligence and unwarrantable failure.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. It is also noted that Section 110(a)(3) of the Act qualifies and may supercede the provisions of section 110(i) by imposing mandatory minimum penalties for "section 104(d)" violations.

The operator is large in size and has a significant history of violations (from within twenty-four months of the violations at issue). There is no evidence that the penalties imposed herein would affect the operator's ability to stay in business. There is no dispute that the violations were abated in good faith. The gravity and negligence of the violations have previously been evaluated.

ORDER

Citation No. 6695564 is hereby vacated. Citation No. 6695769 is affirmed with a civil penalty of $1,500.00. Citation No. 6695579 is affirmed with a civil penalty of $38,500.00. Highland Mining Co., LLC, is directed to pay the above civil penalties within 40 days of the date of this decision. Further, pursuant to the motion for partial settlement filed herein, Highland Mining Co., LLC, is directed to pay additional civil penalties of $78, 340.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

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