FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 4, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-497
Petitioner	:	A.C. No. 15-18241-136323
v.	:	
	:	
CLOVERLICK COAL CO., LLC,	:	Mine # 1
Respondent	:	

DECISION

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Richard Darrell Cohelia, Cloverlick Coal Company, LLC, Benham, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Cloverlick Coal Company, LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of $16,587.00. A hearing was held in Kingsport, Tennessee. For the reasons set forth below, I affirm the citations, after modifying three of them, and assess a penalty of $2,834.00.

Background

Cloverlick Coal Company operates Mine No.1, an underground coal mine, in Harlan County, Kentucky. During a July 2, 2007, inspection of the mine, MSHA Inspector Samuel Ray Creasey observed an oxygen tank and an acetylene tank which he believed were not being properly stored. In addition, the acetylene tank was not being maintained in safe operating condition. While inspecting on July 23, 2007, Inspector Creasey determined that an adequate on-shift inspection had not been conducted on the No. 3 belt flight for the 002 MMU (mechanized mining unit). Finally, on August 30, 2007, he concluded that the approved ventilation plan in effect at the mine was not being followed. The resulting four citations were contested by the company and scheduled for trial.

At the beginning of the trial, the parties announced that they had settled Citation No. 6665561, concerning the inadequate on-shift inspection, and that the operator had agreed to pay

the proposed penalty in full. (Tr. 11.) Evidence was taken on the three remaining citations and they will be discussed in the order issued.

Findings of Facts and Conclusions of Law

Citation No. 6665550

During the course of his July 2 inspection, Inspector Creasey observed an oxygen tank and an acetylene tank lying, in an inverted manner, on the trailer of a mantrip. (Tr. 16-17.) As a result of this observation, Inspector Creasey issued Citation No. 6665550 alleging a violation of section 75.1106-3(a)(2) of the Secretary's regulations, 30 C.F.R. § 75.1106-3(a)(2). The citation stated that the "Condition or Practice" resulting in the violation was that:

> The oxygen and acetylene tanks for the 001 MMU are not being stored in a safe manner. They are both tilted in an upside down direction and the oxygen cylinder has its top extending 6" off the back of the trailer that is being used to haul them. They are also not adequately secured to the trailer.

(Govt. Ex. 1.) Section 75.1106-3(a)(2) requires compressed gas cylinders stored in an underground coal mine to be "[p]laced securely in storage areas designated by the operator for such purposes, and where the height of the coalbed permits, in an upright position, preferably in specially designated racks, or otherwise secured against being accidently tipped over."

The inspector testified that the oxygen tank extended approximately six inches off the back of the trailer. (Tr. 17.) He further testified that the tanks could be stored upright in this mine. (Tr. 17.) These tanks are used in repair work, such as oxygen cutting and torch work. (Tr. 20.) Inspector Creasey admitted that he did not check to determine whether the tanks were empty or full. (Tr. 29.) Cloverlick did not present any evidence on this citation.

The oxygen and acetylene tanks were apparently not in use. An oxygen tank and an acetylene tank that are both lying upside down on a mantrip trailer cannot be considered to be in an upright position or otherwise secured against being accidently tipped over. As a result, I find that the operator violated section 75-1106-3(a)(2) as alleged.

Significant and Substantial

Inspector Creasey determined that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-104 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.* 6 FMSHRC 1573, 1574 (July 1984). Whether a violation is S&S 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).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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*, 6 FMSHRC at 3-4.

Inspector Creasey testified that the position of the acetylene tank created an explosion hazard because the inverted position would cause the acetone to run to the valve where it would not separate from the acetylene, making the acetylene more volatile. (Tr. 17-18, 22.) He opined that such an explosion would result in loss of limbs, broken bones, burns or lacerations. (Tr. 22.)

With regard to the oxygen tank, the inspector testified that the position of the tank hanging off of the rear of the trailer created the potential for the top of the tank to be knocked off, exposing the valve. (Tr. 18.) He speculated that if the valve was broken off, the pressure would be released from the top of the tank, projecting it "like a missile" in the opposite direction. (Tr. 18-19.) Inspector Creasey testified that the tank likely weighed about 70 pounds. (Tr. 19). He said that the tank was used and transported on a daily basis throughout the mine. (Tr. 21.) He stated that if the tank did become a missile and hit someone, it would cause "fractures, contusions, bruises." (Tr. 22-23.) As previously noted, the company presented no evidence on this citation.

The evidence clearly establishes the first two criteria, the violation of a safety standard and distinct safety hazards, explosions and propulsion, resulting from the violation. It also establishes a reasonable likelihood that injuries of a reasonably serious nature, loss of limb, broken bones, burns, lacerations or contusions would result from the violation. As is frequently the case, however, it is the third criterion where the Secretary's proof fails.

When evaluating the reasonable likelihood of a fire, ignition, explosion or "blast-off" there must be a "confluence of factors" present based on the particular facts surrounding the violation. *Texasgulf*, 10 FMSHRC at 501. This includes proof of a fuel source. *Id.* at 503. Here the inspector admitted that he did not know whether the tanks were empty or full. The Secretary presented no other evidence on this issue. Thus, the Secretary has not shown that the tanks contained gas. In a remarkably similar case involving an alleged violation of section 75.1106-

3(a)(2) for an oxygen tank and an acetylene tank leaning against the rib of a coal pillar in an active roadway, the Commission held that the failure of the Secretary to prove that the tanks contained fuel supported "only the conclusion that the Secretary failed to carry her burden of proof as to the critical element of a fuel source" and that, therefore, the violation was not S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284 (Dec. 1998).

Accordingly, I conclude that the Secretary has failed to prove that this violation was "significant and substantial." The citation will be modified appropriately.

Citation No. 6665551

Inspector Creasey issued Citation No. 6665551 alleging a violation of section 75.1106-5(a) of the Secretary's regulations, 30 C.F.R. § 75.1106-5(a). The "Condition or Practice" alleged to have resulted in this violation was that: "The gauge for the acetylene cylinder on the 001 MMU is not being maintained in a safe operating condition. The gauge is broken off where the pressure is read and this could possibly cause a leak when used." (Govt. Ex. 3.) Section 75.1106-5(a) requires that "[h]ose lines, gauges, and other cylinder accessories shall be maintained in a safe operating condition."

At the same time that he found the tanks inverted in the trailer, Inspector Creasey also observed that the high-pressure gauge on the acetylene tank was missing and determined that it had broken off. (Tr. 33.) He testified that hazard caused by the gauge being broken off was that:

> You wouldn't be able to tell what pressure you're letting the gas through the gauges at. And acetylene by manufacturer specification is not to ever be released over 15 psi, and without that gauge you wouldn't know what it's coming out at because above 15 psi that acetylene can be spontaneous combustion. And also, you have the danger of a leak through that gauge right there.

(Tr. 33.)

The company did not present evidence on this citation.[1] I find that the Secretary has

[1] On cross examination of the inspector, however, the operator did raise the issue of whether this citation and the previous one were duplicative, that is, attempting to punish the company twice for the same action. (Tr. 38.) The Commission has long held that "citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator." *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981). Here the standards clearly impose separate and distinct duties on the operator: (1) the storage of gas cylinders; and (2) maintaining gauges in safe operating condition.

established that the gauge on the acetylene cylinder was not maintained in accordance with the mandatory safety standard in Section 75.1106-5(a).

Significant and Substantial

Inspector Creasey designated this citation as "significant and substantial." In support of this, he testified, as set out above, that without the gauge it was not possible to determine the pressure of the gas being released. This is important, because if the pressure were over 15 psi, it could result in spontaneous combustion. He also said that gas could leak from the area where the gauge had broken off. He submitted that a fire from the ignition of gas leaking from the gauge or an explosion if the pressure exceeded 15 psi could result in amputations, broken bones or serious burns. (Tr. 34-35.)

All of this, however, depends on there being gas in the tank. As was determined previously, the Secretary has failed to establish that there was gas in the tank. Thus, the third *Mathies* criterion has also not been proven for this citation. Consequently, I conclude that the violation was not "significant and substantial" and will modify the citation accordingly.

Citation No. 6665589

During Inspector Creasey's August 30, 2007, inspection, he observed a miner cutting coal and rock in the No. 2 heading and visible rock dust throughout the No. 2 entry. (Tr. 41-43.) Mining operations were stopped and Inspector Creasey went up to the end of the line curtain. (Tr. 41-42.) He attempted to take an air reading with his anemometer, but the turbine in the anemometer would not turn. (Tr. 42.) From that point he walked to the first line curtain outby the last open crosscut and discovered that there was not a check curtain at that point. (Tr. 42.) As a result, the air was short circuiting through the area rather than going up to the face area where the miner was cutting. (Tr. 42.)

Based on these observations, Inspector Creasey issued Citation No. 6665589 to Cloverlick alleging a violation of section 75.370(a)(1) of the Secretary's regulations, 30 C.F.R. § 75.370(a)(1).[2] The "Condition or Practice" alleged to result in this violation was stated as:

> The operator is not following the approved ventilation plan in effect at this mine. The Joy Miner, S/N JM5984, was observed cutting and loading coal in the No. 2 Heading on the active 002 MMU. When an anemometer was held up behind the exhausting line curtain, it would not turn. The ventilation plan requires 6,000

[2] Inspector Creasey issued the citation as a 104(a) citation, 30 U.S.C. § 814(a), alleging that the violation was S&S and resulted from "high" negligence. (Govt. Ex. 4 at 1.) On September 18, 2007, he modified it to a 104(d)(1) citation. (Govt. Ex. 4 at 2.) On October 29, 2008, the day before trial, he modified it back to a 104(a) citation. (Govt. Ex. 4 at 3, Tr. 41.)

> cfm of air and 60 FPM Mean Air at the face where coal is being mined, cut, or loaded. The first open crosscut inby the return brattice line did not have a block curtain in it and the section intake air was short circuiting into the return at this location. There was visible dust in the area of the miner and outby in the #2 entry. The miner was cutting approximately 30" of rock in this area.

(Govt. Ex. 4.) Section 75.370(a)(1) provides that: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." The ventilation plan at Cloverlick's Mine No. 1 requires 6,000 cfm of air at the "inby end of the line curtain used a[t] the working face" where MMU 002-0 is being operated. (Gov't Ex. 6 at 12.).

Charles Dewayne Baker was the second shift section foreman at Cloverlick when the citation was issued. (Tr. 67.) He testified that all the curtains were hung in the No. 2 section when he completed his pre-shift examination, somewhere between 9:00 and 11:00 p.m. (Tr. 71.) When Baker took an air sample, at that time, it was "well above" 6,000 cfm. (Tr. 72.)

Baker related that he was not present in the No. 2 heading when the inspector made his air reading and found the missing block curtain at around 11:30 p.m., but responded to Inspector Creasey's summons to go there. (Tr. 74.) He asserted that on his arrival, after the inspector told him that he did not have any air, he started to take his own air reading, but did not complete it because "Mr. Creasey, he seemed to have a problem and I wanted to find out what it was." (Tr. 74.) He claimed, however, that his "blades were turning." (Tr. 74.)

Baker said that he then sent two "car drivers" down one side of the entry to check for downed curtains and he "walked down #2 entry all the way to the feeder – right across from the feeder to check curtains myself on that side." (Tr. 74-75.) Neither the drivers nor he found any curtains down. (Tr. 75.) He testified that then: "I went back up to Mr. Creasey and to the best of my knowledge he said, 'You've got it now. You can – you can go ahead and move your miner' because he had my miner stopped." (Tr. 75.)

Baker speculated that a possible reason the curtain could have been missing was that a scoop operator had knocked it down while going through the area. (Tr. 73.) Baker testified that the scoop operator had torn down curtains in the past, and he would need reminding to hang them back up. (Tr. 73.) He said that the operator could have torn down the curtain in question and put it back up without his knowledge, although at the time, the operator had denied tearing one down. (Tr. 88.) Nevertheless, Baker also contended that the scoop operator was not a good worker and had been subsequently fired. (Tr. 88.)

On the other hand, Inspector Creasey testified that he was in the area approximately 25 minutes before the curtain was replaced. (Tr. 45.) He said that the curtain was still missing when Baker arrived. (Tr. 63-64.)

Neither side presented any other evidence to support their position. Indeed, it is difficult to discern exactly what is the company's position. Except for denying that he ever saw a missing curtain, Baker's testimony relies on implications, rather than direct contradictions, to attempt to refute the inspector's testimony. In fact, when asked by counsel for the Secretary if it was his testimony that the condition never existed, Baker responded: "No, ma'am. No, I'm just – I'm just telling you everything was up when I checked it. It was there." (Tr. 82.) In addition, when discussing whether the parties wanted to submit briefs in the case, the company's representative said that the only thing they were contesting was high negligence, that they had no problem with the citation or the S&S part of it. (Tr. 89-90.)

Nonetheless, it is necessary to address the credibility of the witnesses to decide whether there was a violation. In this regard, the inspector's testimony was coherent, straight forward and not weakened by cross examination. Further, it is essentially corroborated by his notes made at the time of the violation. (Govt. Ex. 5 at 2.) Finally, there is no apparent reason for Inspector Creasey not to tell the truth.

Contrarily, Baker's testimony was hesitant, equivocal on significant points and undermined by cross examination. Thus, his testimony that his "blades were turning" and his implication that there was never a curtain down are questionable. Furthermore, by relating that another Cloverlick foreman had been suspended without pay for three days for a similar citation, albeit a 104(d)(1) citation, he provided a good reason for not admitting the violation.[3] (Tr. 84-87.)

Accordingly, I credit the testimony of Inspector Creasey and find that the operator violated section 75.370(a)(1) as alleged.

Significant and Substantial

Inspector Creasey designated this violation as being "significant and substantial." He said that both silicosis and pneumoconiosis were likely because the miners working in the area were "breathing rock dust because of the high quartz content in the rock. And you also have the coal dust in that area too because it's just suspended in the air and no air is coming to move it out." (Tr. 46.) He testified that the amount of dust was extensive throughout the No. 2 entry. (Tr. 50.) From the evidence, he believed that the violation "[p]ossibly existed for the entire cut. Approximately 30 minutes." (Tr. 64.)

The Commission has held that the overexposure to coal and quartz dust resulting from a violation of the respirable dust standards, sections 70.100 or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be S&S. *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). The Commissioners reached

[3] Until the day before the trial, the company believed it was facing a 104(d)(1) citation. *See* n.2, *supra*.

this conclusion based on "the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses to miners . . . ." *U.S. Steel*, 8 FMSHRC at 1281. While there can be no such presumption in this case, since a respirable dust standard is not involved, the same concerns still apply. This particularly true here, where the exposure was extensive and could have lasted as long as 30 minutes.

Applying the *Mathies* criteria, I have already found (1) a violation of a safety standard. I further find: (2) that the violation contributed to a discrete safety hazard, overexposure to quartz and coal dust; (3) that, because of the extensiveness of the dust and the length of time the violation probably lasted, it was reasonably likely that an injury would result; and (4) that the injury would be serious, resulting in silicosis and/or pneumoconiosis. Therefore, I conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed penalties of $15,953.00 for the three violations contested at the hearing. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.,* 18 FMSHRC 481, 483-484 (Apr. 1996)

In this connection, the parties have stipulated that the proposed penalties will not affect the company's ability to remain in business and that Cloverlick demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Tr. 12-13.) I find from the allied papers that Mine No. 1 is a large mine and its controlling entity is a large company. I further find that the operator has a better than average history of previous violations. (Govt. Ex. 8.)

Turning to gravity, I find that the two gas cylinder violations, Citation Nos. 6665550 and 6665551, were not very serious. However, I find that Citation No. 6665589, the ventilation plan violation, was a serious violation of the secretary's standards.

With regard to negligence, Inspector Creasey found that the operator was moderately negligent concerning the cylinder violations because they were "in an area where the pre-shifters and on-shift examiners travel through the area and they should have seen where they were . . . ." (Tr. 24, 35.) I concur with his assessment.

I do not agree, however, with his conclusion that the ventilation plan violation resulted from "high" negligence. He based this conclusion on the extensiveness of the dust and the fact that more than one person knew that the condition existed at the time. (Tr. 50.) Inspector Creasey testified that when the miner operator came out of the area he was covered with white dust. (Tr. 50.) He further testified that "anyone with . . . reasonable mining experience would know that air wasn't moving in that area." (Tr. 50.)

However, there is no evidence that Baker, the section foreman, knew of the condition. In fact, the evidence is that he was not present. What evidence there is suggests that the curtain was torn down by a scoop operator. At least, that is what the inspector was told after the curtain was re-hung and mining began again. (Tr. 54.)

The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah*, *Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). In this connection, the Commission has stated that: "[W]here a rank-and-file employee has violated the act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464.

To try to show "high" negligence, the Secretary introduced a citation that the company had received for the same violation during the previous May. (Govt. Ex. 7, Tr. 51-53.) By itself, that one citation does not demonstrate a lack of supervision, training or disciplining of its employees on the part of the operator. Furthermore, unlike this citation, the foreman (not Baker) was present while the violation was occurring when the May citation was issued. (Tr. 53.) Finally, the foreman involved in the May citation was suspended for three days without pay and the scoop operator suspected of tearing down the curtain in this case was subsequently fired. (Tr. 87-88.) This shows that the operator was taking reasonable steps to prevent rank-and-file miner's violative conduct. Accordingly, I will modify the level of negligence for Citation No. 6665589 from "high" to "low."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 6665550–$100.00; (2) Citation No. 6665551–$100.00; (3) Citation No. 6665561, in accordance with the parties agreement,–$634.00; and (4) Citation No. 6665589–$2,000.00.[4] Therefore, the total penalty in this matter is $2,834.00.

Order

In view of the above, Citation No. 6665561, in accordance with the agreement of the parties, is **AFFIRMED**; Citation Nos. 6665550 and 6665551 are **MODIFIED**, by deleting the "significant and substantial" designations, and are **AFFIRMED** as modified; and Citation No. 6665589 is **MODIFIED**, by reducing the level of negligence from "high" to "low," and is

[4] It is apparent that Citation No. 6665589 was originally assessed as a 104(d)(1) citation and that the penalty was not modified when the citation was modified. I took this into consideration in addition to the penalty criteria discussed above.

AFFIRMED as modified. Cloverlick Coal Company, LLC, is **ORDERED TO PAY** a civil penalty of **$2,834.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Senior Administrative Law Judge

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