

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

May 19, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-537
Petitioner	:	A.C. No. 15-17651-135834-02
	:	
v.	:	
	:	
ROCKHOUSE ENERGY MINING	:	Mine No. 1
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Vicki L. Mullins, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Rockhouse Energy Mining Co., (“Rockhouse”). The matter arises under sections 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”). 30 U.S.C. §§ 815(a), 820(a). In the petition, the Secretary alleges Rockhouse, in three instances, violated safety standards for underground coal mines, standards that are set forth in Part 75, Title 30, Code of Federal Regulations. 30 C.F.R., Part 75. She further alleges each of the violations was a significant and substantial contribution to a mine safety hazard (“S&S”). She proposes a total assessment of \$5,160 for the alleged violations.

After the Secretary’s petition was filed, Rockhouse answered, asserting it did not violate the standards, or, if it did, that the violations were not S&S. Rockhouse also took issue with the gravity and negligence findings MSHA’s inspector made with regard to each alleged violation.

After the matter was assigned to me, I scheduled it to be heard in Pikeville, Kentucky. Due to difficulties in finding a hearing site in Pikeville, the location was changed to Hazard,

Kentucky.¹ At the hearing the parties presented testimonial and documentary evidence regarding the alleged violations. Also at the hearing, but prior to going on the record, I asked counsels if they objected to my issuing a bench decision with regard to each of the alleged violations. Counsels stated they did not. Rather than submitting post-hearing briefs, counsels were given, and accepted, the opportunity to summarize their parties' positions at the close of evidence. Tr. 11-12.

My findings follow. Editorial changes have been made for clarity's sake.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
66576439	12/13/07	75.202(A)

The citation states in part:

Additional roof support is needed in the 010-0 MMU left return [N]o. 1 entry starting at x-cut 4 of the No. 7 belt and extending inby to x-cut 11, a distance of approximately 560 feet. A roof fall has occurred in the [N]o. 12 x-cut and the entry outby. This show[s] signs of adverse conditions in that there are cutters along each rib line, large pieces of draw rock are hanging ready to fall, and visible cracks [are] running with the entry.

This airway is required to be traveled by the weekly mine examiner once per week.

Gov't. Exh. 1.

In pertinent part, section 75.202(a) requires "[t]he roof . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards relating to falls of the roof."

Regarding Citation No. 66576439, I stated:

I find the violation existed as [set forth] in the citation and as testified to by [MSHA] Inspector David Stepp. In making this finding[,] I [do not] discredit the testimony of . . . [Rockhouse's weekly examiner, Mike] Muncy[;] I simply believe Mr. Stepp's testimony reflects a more complete and . . . full [recollection] of

¹Hazard was not as convenient as Pikeville for the witnesses and counsels, and I thank them for their willingness to accommodate me.

the conditions that existed [in the No. 1 entry] on December 13. I find that Inspector Stepp's description of the draw rock that existed in the cited 560-foot area of the . . . [No. 1] entry, . . . [and in particular] the channeling that existed on both sides of the entry, ranging from hairline cracks to . . . [cracks] up to two to three inches wide, to be indicative of an entry that was taking weight and that was showing marked signs of progressive deterioration. The cited roof required either additional support, or needed to be removed from access to miners, something Rockhouse did [later] by endangering it off.

I further find the condition was . . . [S&S]. The hanging draw rock, as Mr. Stepp testified, posed a visually obvious danger to Mr. Muncy as he traveled the area [during the weekly examinations he conducted]. And the channeling and cracks indicated[,] as mining continued[,] rock was reasonably likely to fall. Indeed, Mr. Stepp's believable testimony that he noted fallen pieces of rock in the cited area of the entry . . . is persuasive to me that the progression of the deterioration had reached the point where falling rock could be expected.

Mr. Muncy traveled the area weekly. Had the citation not been issued, it is reasonably likely he would [have] continued . . . [making the examinations and] . . . he would have been a moving target as he rode through the cited area. I recognize [a] rock or roof fall would have had to coincide with his passage . . . to injure him, but I cannot base a [non-S&S] conclusion on the fact he would have had. . . to . . . [be] at the wrong place at the wrong time to . . . [be] struck. It is enough that the roof was reasonably likely to fall and that Mr. Muncy was required regularly to travel where . . . falls were reasonably likely to occur. Had Mr. Muncy been hit, he most likely would have suffered a serious injury or worse. [T]hus, I find the violation was both S&S and serious.

[However,] I do not believe the Secretary has established anything more than moderate negligence on Rockhouse's part. The roof's condition was progressive. While I infer . . . [the condition of the roof] constituted a violation on December [6, when the entry was last examined] . . . I cannot find, based on the evidence, [the roof's condition was so serious . . . on December 6 . . . [it then] constitut[ed] an S&S violation. [T]herefore, I cannot conclude the roof's

condition was so glaringly obvious [on December 6] that the failure of Rockhouse to [additionally] support . . . [the roof] or to danger it off at that time constituted high negligence. [In addition,] . . . the Secretary has not [otherwise] shown between December [6] and December [13] that Rockhouse[’s] management [should have] been aware of the condition of the roof as it existed on December [13].

Tr. 330-333.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
66576443	12/13/07	75.400

The citation states:

Accumulations of loose coal have been allowed to accumulate in the roadway of the 010-0 MMU right return airway starting at ss# 30526 and extending inby 4 x-cuts to the section feeder line. This loose coal ranged in depth from 1 to 6 inches and was deposited along the entire length of this area.

[The] area is the immediate return for the right side of the 010-0 MMU that produces coal 2 shifts per day and has a dead work crew that works 3rd shift.

Gov’t Exh. 6.

In pertinent part, section 75.400 requires “[c]oal dust, . . . loose coal, and other combustible materials . . . [to be] cleaned up and not be permitted to accumulate in active workings.”

Regarding Citation No. 66576443, I stated:

[The] Secretary has alleged a violation of section 74.400 [and] Rockhouse has conceded the violation. [See Tr. 315.]

[Regarding the Secretary’s S&S allegation,] Rockhouse’s counsel has established there were no ignition sources present on December [13,] . . . when the violation was cited. There were no equipment permissibility violations. There were no face ignitions. There was no methane. Does the record establish . . . an injury-causing event could have occurred? Yes, it does. But the Secretary’s evidence is simply too speculative to conclude one

was reasonably likely. Basically[,] the Secretary has established . . . [only] that . . . accumulations [of combustible materials] were present and that potential ignition sources might come into existence in the future [- a]nd I emphasize the word might – but i]f this were enough to establish an S&S violation, then virtually every accumulation [violation] . . . would be S&S, something . . . the Act does not contemplate.

However, the fact an ignition source could occur . . . establishes . . . the violation was serious. Clearly, had the accumulations ignited – and I’m fully persuaded by the testimony the Secretary . . . presented . . . [including] Mr. Stepp’s testimony – that the loose coal could have ignited, and that the finely ground coal dust [could have] propagated a methane explosion. If these things had happened, then all miners on the section would have been subject to serious injury . . . [or] death. [T]his is enough to make the violation serious.

[I am] further persuaded . . . the extent of the accumulations was such . . . they should have been observed and corrected during more than one preshift examination, and certainly during at least one on-shift examination. Inspector Stepp found Rockhouse was moderately negligent, which means . . . [the company] did not meet the standard of care required . . . and I agree.

Tr. 333-335.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
66576447	12/13/07	75.1403-6(b)(3)

The citation states in part:

None of the 4 sanding devices installed on the . . . diesel mantrip would work when tested. [The] mantrip was parked [underground] at the end of the track near the 010-0 MMU when inspected with no sand available on the [mantrip.] [The] mine has many hairpin curves and steep hills that must be maneuvered to exit the mine.

Gov’t Exh. 10.

Section 75.1403 permits an inspector to issue safeguards “to minimize hazards with respect to transportation of men and materials.” Sections 74-1403-2 through 75.1403-11, of

which 75.1403-6(b)(3) is a part, set out the criteria by which MSHA inspectors are guided in requiring safeguards on a mine-to-mine basis. MSHA issued a safeguard to Rockhouse on February 27, 1996, that required mantrips at the mine to be equipped with “properly installed and well-maintained sanding devices.” See Citation No. 6656447. The subject citation alleges Rockhouse did not comply with the safeguard notice’s requirement.

Prior to the Secretary’s presenting evidence with regard to the alleged violation, counsel for Rockhouse moved for partial summary decision on the S&S issue. Counsel argued an S&S finding could not be made for a safeguard violation, citing the ruling of Commission Administrative Law Judge Michael Zielinski in *Big Ridge Incorporated*, 30 FMSHRC 1172 (November 2008).² The Secretary’s counsel opposed the motion based on the same arguments the Secretary made to Judge Zielinski in *Big Ridge* and to Commission Administrative Law Judge Jerold Feldman in *Wolf Run Mining Co.*, 30 FMSHRC 1189 (December 2008) (*review granted* March 31, 2009). In *Wolf Run* Judge Feldman held, contrary to Judge Zielinski, that an S&S finding could be made for a safeguard violation. Because decisions in Judge Zielinski’s cases are pending, his holdings in *Big Ridge* and *Cumberland* are not yet final for review purposes. However, Judge Feldman’s ruling became ripe for review after Judge Feldman issued a decision in *Wolf Run* (February 26, 2009). Subsequently, *Wolf Run* appealed, the Commission granted review, and the issue of whether a valid S&S finding may be made by an inspector when he or she cites a safeguard is presently before the Commission.

After counsels stated their positions, I explained that I agreed with Judge Zielinski in all respects and that I would grant counsel for Rockhouse’s motion based on Judge Zielinski’s reasoning. Tr. 240-241. Nonetheless, counsels and I agreed evidence should be presented on the S&S issue so that if my ruling were reversed, an S&S finding could be made on the record. Tr. 241.

Regarding Citation No. 66576447, I stated:

I am persuaded by Inspector Stepp’s testimony a violation existed. The safeguard [criteria] cited[, section 75.1403-6(b)(3), requires] sanding devices to be operative at all times when being used at the mine.

[T]o me this clearly means [the devices on the mantrip must be operative when the mantrip is] capable of being used as well as [when] the equipment actually is in use.

The [subject] mantrip was capable of being used. It was parked at the end of the track, true. But it was not dangered off

²Judge Zielinski also made an identical ruling in *Cumberland Coal Co.*, 30 FMSRHC 1180 (December 2008).

or otherwise placed out of service. And as Inspector Stepp rightly noted, it only required a flick of . . . [a] switch to start it up and use it.

With . . . [regard to the inspector's S&S finding,] even if I had not concluded the S&S finding ha[s] to be vacated because . . . [an S&S finding] cannot be made with regard to [a] safeguard [violation], I would . . . [invalidate] the finding in any event. I am persuaded by Mr. Adams' testimony an accident due to the mantrip's non-functioning [sanders] was not reasonably likely. First, I believe Mr. Adams' testimony established the mantrip was not reasonably likely to be used before the condition of the sanders was likely to be found and corrected. In this regard I note that other mantrips were available and were more likely to be used [than the cited mantrip.] And I also note that had the [cited] mantrip been used in the regular course of . . . [mining], its operator would have been specifically asked about its sanders. Moreover, even if an emergency arose, and the emergency required use of the cited mantrip, Mr. Adams persuaded me that [the] non-functioning sanders would [have been unlikely] . . . to cause an accident.

This is unlike a previous citation involving non-working sanders at this mine [(*See Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1154-56 (December 2008),] because there [is] no testimony in [the] situation under consideration today that the tracks were wet. [A]s Mr. Stepp explained, the mine is dry during the winter[, and t]he previous violation was cited during the . . . early days of September when, I'll take judicial notice, it is [still] hot in Pike County.

* * *

Moreover, unlike the previous citation, in this particular instance Rockhouse persuasively offered testimony from an experienced miner who had ridden numerous times on a rail mounted mantrip and who had never . . . found the need to use the [sanders] on his rides.

Because I conclude the violation was unlikely to result in an accident, I find it was only moderately serious . . . I further find Rockhouse's negligence was moderate. As Inspector Stepp initially concluded, the most likely inference from me to draw is that the sanders were brought into the mine in . . . non-working condition. But given the fact Rockhouse knew the mantrip was unlikely to be used prior to it being examined, and . . . [that when

it was] examined, the condition was likely to be found and corrected, the existence of the condition [does] not show a high lack of care.

Tr. 335-338.

CIVIL PENALTY ASSESSMENTS

Having found the alleged violations exist, I must assess civil penalties taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). With regard to the company's history of prior violations, the Secretary offered a computer printout showing those violations cited from December 15, 2007, through December 14, 2008, for which civil penalties had been paid. Gov't Exh. 12, Tr. 292-295. The printout indicates a total of 626 paid violations. This is a large history. In addition, the parties stipulated that Rockhouse is a large operator and that the proposed penalties would not affect Rockhouse's ability to continue in business. Tr. 292. Moreover, each of the citations indicates the violations were abated within a time MSHA found to be adequate. From this, I infer the company exhibited good faith in its abatement efforts.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576439	12/13/07	75.202(a)	\$2106

I stated at the hearing:

The Secretary has petitioned for the assessment of a civil penalty of \$2106 for the violation. Given the serious nature of the violation, the moderate negligence of Rockhouse and considering all of the other civil penalty criteria, I find the proposed penalty to be appropriate.

Tr. 333.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576443	12/13/07	75.400	\$2106

I stated at the hearing:

The Secretary has petitioned for the assessment of a civil penalty of \$2106 for the violation. Given the serious nature of the violation . . . [and] taking into consideration [Rockhouse's failure] to meet . . . [its] standard of care and the other civil penalty criteria, I conclude a penalty of \$1,500 is appropriate.

Tr. 335.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576447	12/13/07	75.1403-6(b)(3)	\$1304

I stated at the hearing:

The Secretary has petitioned for [the assessment of a civil penalty] of \$1304. Given the moderate seriousness of the violation[,] . . . Rockhouse's moderate negligence, [and taking into consideration the other civil penalty criteria,] I conclude [a penalty of \$800 is] appropriate.

Tr. 338.

ORDER

Within 40 days of the date of this decision, the Secretary **IS ORDERED** to modify Citations No. 66576443 and 66576447 by deleting the S&S findings and by changing line 10(A) from "reasonably likely" to "unlikely." In addition, Rockhouse **IS ORDERED** to pay civil penalties totaling \$4,406 in satisfaction of the violations in question. Upon modification of the citations and payment of the penalties, this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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