FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

December 28, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-778
Petitioner	:	A.C. No. 15-07082-142073-03
v.	:	
	:	
FREEDOM ENERGY MINING CO.,	:	Mine No. 1
Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Vicki Mullins, CLR, Mine Safety and Health Administration (MSHA), Pikeville, Kentucky, for the Petitioner;
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLC, Morgantown, West Virginia for the Respondent.

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Freedom Energy Mining Company ("Freedom") of 30 C.F.R. § 75.202(a) and § 75.400. Pursuant to notice, the case was heard in Richmond, Kentucky on October 15, 2009. Subsequent to the hearing, each party filed proposed findings of fact and a brief.

I. Violations of 30 C.F.R. § 75.202(a)

After both sides rested, the parties agreed to make oral arguments and accept the format of a bench decision. The decision, with the exception of corrections of non-substantive matters, is set forth as follows:

A. Citation No. 6657078

1. Violation of 30 C.F.R. § 75.202(a)

Freedom Energy operates the coal mine at issue. On February 7, 2008, MSHA Inspector Roger Workman inspected the underground operation. He examined the belt entry, and observed gaps in a corner of a rib located at crosscut No. 21 where it intersected with the belt entry.

He issued a citation alleging a violation of 30 C.F.R. § 75.202(a) which provides as follows: "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The inspector testified that the gap was fourteen inches in the rib side and along the crosscut side, and six inches wide in the rib side along the belt entry. As a consequence of the gaps that extended to the top of the ribs, a block at the intersection of the track entry and the crosscut had separated from the ribs. The block was approximately three feet wide along the crosscut side and thirty inches wide along the entry side.

Respondent conceded that the facts established a violation. Further, the inspector's testimony as to the conditions he observed was not contradicted. Thus, I find that there was a violation of Section 75.202(a).

2. Significant and Substantial

The critical issue is whether or not the violation was significant and substantial as alleged in the citation.

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine 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." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "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 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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.

In *U. S. Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> 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.*, 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).

(emphasis added).

The record establishes that Respondent violated a mandatory standard, i.e., Section 75.202(a). Also, I find, based upon the testimony of the inspector, that people do work in the area, although it is not clear how frequently they work in the area and how close to the rib they are when they perform their duties. However, there certainly is a possibility, as explained by the inspector, that the rib could fall, and a person could be pinned between the rib and the belt, and crushed, or seriously injured. At this point, I am just recognizing that a hazard was created. I am not commenting at all upon the degree of the hazard.

The critical issue in this case is the third element set forth in *Mathies,* which requires a reasonable likelihood of an injury-producing event. Here the injury-producing event would be material falling off the rib. The record does not contain sufficient evidence that there were facts in existence that would have made the injury-producing event reasonably likely to have occurred.

The inspector indicated that portions of this rib or a rock could fall on persons working in the area. However, there is an absence of any evidence of the existence of any physical conditions that would lead to a conclusion that the hazard of a fall of either the entire rib or a portion was reasonably likely to have occurred. There was not any evidence of any of the ribs being under pressure. There was not any evidence adduced of deterioration of the rock pillars. There was not any evidence presented of any defects in the roof. Therefore, I find that the evidence is insufficient to

establish the third element of *Mathies*. Hence, I find it has not been established by a preponderance of the evidence that the violation was significant and substantial.

3. Penalty

The Secretary conceded that the violation was abated in a timely fashion. The Secretary submitted a list of the company's history of violations. I find there is not anything in that exhibit to militate in favor of an increase or decrease in penalty.

The parties stipulated that the imposition of a penalty would not affect the operator's ability to continue in business. Also, the parties stipulated regarding the coal production of the company, as apparently relating to its size. However, there is not any other evidence relating production statistics to the size of the company. Therefore, I find that there is not sufficient evidence in the record to justify either an increase or a decrease in penalty based upon that factor.

I find the gravity of the violation to have been moderate. I find that, regarding gravity, the focus of the evaluation is the degree of seriousness in terms of the type of injury, even though the likelihood of its occurrence may be remote. Since there was a possibility of a person being crushed or suffering a broken bone, I conclude that the level of the gravity was moderate.

I find that the cited conditions were extensive and obvious due to the height and width of the gap in the ribs in two locations. However, there is not any persuasive evidence as to the length of time the conditions existed. The inspector indicated that he observed that there was rock dust in the cracks, which would indicate that the cracks were in existence first, and then the area was rock dusted. But the record does not contain any evidence when the last rock dusting occurred in relation to the cracks.

Brian Slone, Respondent's mine foreman, testified that the company had not been cited by previous inspectors for the cited conditions. This testimony was not impeached or contradicted. Further, there is not any evidence that the company had any prior knowledge of these conditions. I thus find the existence of factors significantly mitigating Respondent's negligence.

Taking into account all of the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 ("the Act"), I find that a penalty of $250 is appropriate.

B. Citation No. 6657084

1. Violation of 30 C.F.R. § 75.202(a)

On February 12, 2008, Workman issued a citation based upon the existence of a crack in the roof in the No. 1 crosscut, alleging a violation of Section 75.202(a).

Workman indicated that the crack extended approximately twenty feet in the intersection. He approximated that it was between one inch and eighteen inches wide. According to Workman, some sections may have been smaller; some areas larger. Workman indicated that he observed jagged pieces of rock. He also indicated that miners do, on occasion, work in the area. Rodney Chapman, one of Respondent's mine foremen, who accompanied Workman, did not contradict Workman's testimony regarding the dimensions of the crack.

It is Respondent's position that cribs had been installed in the area, and as a consequence there was not any hazard.

I find, taking into account the length and width of the crack, and the inspector's observation of jagged pieces of rock, that there was some hazard related to a fall of the roof. I thus find that it has been established that Respondent violated Section 75.202(a).

2. Significant and Substantial

The inspector was asked for his opinion as to why he found the violation significant and substantial.[1] His testimony is as follows:

> Q. Okay. And why did you think an accident was reasonably likely?
> A. Well, this area is real muddy ...
> ... It's got mud and water on the mine floor, and you've got your noise from your belt head. And then you got miners that has to work in this place to maintain it. And that eliminates your -- you can't hear the -- if your roof made a noise, you wouldn't hear it for the belt head. And if you're standing in mud too long, it limits your mobility. So I -- if a piece of this

[1]Some of his testimony was in response to questions regarding gravity, and some was given in response to specific questions regarding significant and substantial.

rock fall, I don't know if a person could move fast enough to get away from it or I don't think he'd hear it.

***

Q. Did you mark this particular violation as significant and substantial?
A. Yes, I did.
Q. Why?
A. Because you got men working in the area. The belt line's under violation to be cleaned and rock dusted. If an accident would occur, it would be the -- more than likely it would be a permanently disabling injury.

(Tr. 51-53.)

I note that the critical issue, the reasonable likelihood of an injury-producing event, i.e., a roof fall, was not addressed. There is not any persuasive evidence that would tend to establish a reasonable likelihood of the roof falling, i.e. the specific conditions that would have made such an event reasonably likely to have occurred. Therefore, I find that the Secretary has not met her burden of establishing that the violation was significant and substantial. Hence, I find the violation was not significant and substantial.

3. Penalty

A number of factors are in common with those I discussed with regard to the prior violation, except for the following; the cited condition was extensive and obvious due to its length and width; the company's witness testified that cribs had been installed a few days, or maybe a week, before the citation was issued, and an inference could be drawn that this condition had been in existence at least a few days before it was cited.

Considering all the factors in 110(i) of the Act, I find that a penalty of $500 is appropriate.

II. Violations of 30 C.F.R. § 75.400

A. Citation No. 6656083

1. Violation of 30 C.F.R. § 75.400

On February 12, 2008, Workman inspected the tail end of the B-9 conveyor belt. He indicated that he observed accumulations of loose coal, float dust, fine coal, and coal inside the tail roller, which was sixty-eight inches off the ground. He indicated that the coal was piled at

both ends of the roller, extended one half the way up the shaft of the roller, and was twelve inches deep. He testified that there was coal inside the belt frame, and it was in contact with the bottom belt of the conveyor. According to Workman, the belt was running in the accumulations, which were black at the roller, and dry at the tail piece. Further, there was float coal dust on the mine floor under the tail piece. The float coal dust extended from rib for to rib for approximately 320 feet outby the tail. He described the accumulation as a thin coat on top of rock dust, and estimated that it was about a sixteenth of an inch to a one-eighth inch deep. However, he did not measure its depth. Essentially, the operator did not contradict or impeach the inspector's testimony with regard to the extent and location of the accumulations of coal.

The inspector issued a citation alleging a violation of 30 C.F.R. § 75.400 which, as pertinent, provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." I find based on the testimony of the inspector, and considering the extent of the accumulations, that the operator was not in compliance with Section 75.400.

2. Significant and Substantial

The inspector characterized the violation as being significant and substantial. In this connection, he concluded that a hazard existed at the tailpiece because he has "seen tailpieces when they allowed the coal to run in them to the bearing to get hot and start smoking and sometimes catch on fire. [sic]" (Tr. 167.) He explained his reasons for marking the gravity of the violation as "reasonably likely" as follows:

> At the bearing, it wasn't running hot at that time, in a few minutes running it could dry the grease out. And then you'd have the metal inside the bearing running metal to metal. And it could become hot and ignite fire at the tailpiece because there's combustible material at the tailpiece.

(Tr. 170.) (emphasis added)

In this connection, he stated that coal dust was in contact with the bearing and was getting inside the bearing. He opined that with continued operations for two to three hours, the lubricant "probably" would dry out. (Tr. 174.) He testified that he "had that happen in the past in mines [he] worked at." (Tr. 175.) He was specifically asked to explain why he marked the violation as significant and substantial, and he indicated that there was "a good possibility" of ignition at the tailpiece because the bearing was being exposed to combustible material, "and due to people working outby and from being in smoke." (Tr. 176.)

I find that the record establishes the first two elements set forth in *Mathies,* 6 FMSHRC 1. Although the inspector opined that in normal operations the lubricant and the bearing would dry

out after two or three hours causing friction which will ignite the combustible material,[2] there was not any evidence adduced as to how frequently lubrication is checked, or more is added. Aside from proffering his opinion, the inspector did not provide any basis for his conclusion with regard to the amount of time it would take, in normal operations, for the lubricant to dry out.

Further, I note the absence of ignition sources or conditions which would have made it reasonably likely for a fire to have resulted with continued operations. Thus, there was not any evidence of a hot or red bearing or other metal members, metal to metal rubbing,[3] float coal dust in the air, or inadequate air ventilation.

For all these reasons, I find, within this context, that it has not been established that the hazard of an injury producing event, i.e. a fire or explosion, was reasonably likely to have occurred. Thus, I conclude that it has not been established that the violation was significant and substantial.

3. Penalty

I incorporate herein the earlier discussion of penalty factors relating to the company's operation as set forth above, *supra* Section I. The Secretary indicated that the violative conditions were abated in a timely fashion. Because the accumulations existed for a length of 320 feet extending rib to rib, I find that they were extensive, especially considering that the entire length of the belt was only approximately 1,100 feet.

The evidence is not clear with regard to the length of time that the conditions had been in existence. There is not any evidence that the belt was out of alignment which could have caused the accumulations to have occurred very quickly. Also, Workman testified that the accumulations were dry at the tailpiece, which would tend to indicate that any spillage was not very recent. However, there was not any specific evidence adduced as to whether the

[2]It is significant to note that in earlier testimony, when he was specifically asked to provide his reasons for considering the violation to be "reasonably likely," he explained that as a consequence of the lack of lubricant and resultant metal to metal contact within the bearing, it "could become hot and ignite fire." (Tr. 170.) (emphasis added) This qualification dilutes the weight to be accorded his subsequent testimony that the dry condition of the bearing "will" ignite combustible material. (Tr. 171.)

[3]It is significant that at cross examination, Workman was asked whether he identified any heat source. He responded as follows: "Well, I think the tail burning is a heat source because even though it wasn't hot, it had a potential. And had the mine continued to run that way, I think you would have a hot bearing." (Tr. 191.) (emphasis added) In the absence of any further explanation, I find that this testimony is insufficient to predicate a finding that it was "reasonably likely" that continued operations would have resulted in a hot bearing.

accumulations were uniformly "dry" throughout their various locations, nor was there evidence adduced as to whether the inspector actually touched the accumulations and, if so, at what locations. On the other hand, Rodney Chapman, who accompanied Workman, testified that the accumulations were wet, and had a "shiny glow" (Tr. 229.), which indicated to him that the material had been sprayed when it came through the feeder, and that the accumulations had recently occurred. Considering all of the above, I find that the level of negligence was no more than moderate.

Because the accumulations could have resulted in burns or smoke inhalation, I find that the level of gravity was moderate.

Considering all of the factors of 110(i) of the Act, I find that a penalty of $500 is appropriate for this violation.

B. Citation No. 6657082

1. Violation of 30 C.F.R. § 75.400

On February 11, 2008, Workman examined the interior of an electrical control starter box, which supplies power to a conveyor belt drive. He said that he observed float dust on the floor of the box and on the electrical components. He described the float dust as black and dry. He issued a citation alleging a violation of Section 75.400. Workman's testimony regarding the accumulation of float coal and dust was not impeached or contradicted. Thus, based upon his testimony, I find that Respondent violated Section 75.400.

2. Significant and Substantial

Workman opined that ignition inside the box due to a spark was reasonably likely to have occurred, because the box is powered by 480 volts. Also, should an arc occur, flames could shoot out and injure a miner as persons travel by the box. In this connection, he noted that one person services the box once a week. Also, the belt head in the area is serviced once every twenty-four hours. Workman indicated that a person could suffer burns or smoke installation.

Workman was asked specifically whether the violation was significant and substantial and he indicated in the affirmative because men work in the area, and if there was an arc inside the box it "could" cause an ignition of the coal dust inside the box "and create serious fire." (Tr. 184.)

On cross examination, he indicated that there was only one ignition source, which would be a short circuit inside the electrical box. He indicated that he did not observe any bare wires; the wires and cables were insulated. Further, significantly, Workman indicated that when he inspected the box there was not any arcing or sparking, "[j]ust the potential." (Tr. 206.)

Arnold Fletcher, an MSHA inspector and electrical specialist, accompanied

Workman during the latter's inspection on February 12. He indicated that he looked inside the starter box and that it was covered with float dust that was grey to black in color. He indicated that there were items in the box that "could be" ignition sources, such as the presence of several electrical components, including a breaker and transformers. (Tr. 215.) He indicated that all these components are "bonded" together with an open-end connection and are not insulated; there is not anything to keep the dust from getting on them. (Tr. 217.) According to Fletcher, when dust accumulates on the connections, "carbon tracking" results, causing a "very violent arc flash, ... [and the box will] burn down." (Tr. 217-18.) However, he indicated that he does not recall "seeing any type of evidence of any past history of violent arc flashes on [the] box." (Tr. 225.)

Chapman, who accompanied the inspector, opined that any material in the box was not reasonably likely to become explosive because he did not see anything that would put float coal dust in suspension inside the box. (Tr. 248-49.)

In evaluating the third element of *Mathies,* the likelihood of an injury-producing event, i.e. a fire, I note the absence of ignition sources. I take cognizance of the testimony of Fletcher regarding uninsulated connections or connectors within the box which could cause carbon tracking resulting in a short circuit and violent arcing and flashing, causing the box to burn. However, there is not any evidence in the record that there was any carbon tracking on any connection or connector, nor is there evidence that, in continued operations, carbon tracking would result, especially to the extent of causing violent arcing. Indeed, there was not any evidence of any arcing or sparking or flashing within the box. Significantly, neither inspectors testified that there was any dust in suspension, nor did they indicate the presence of any conditions that would be likely to cause the float dust to go into suspension. Moreover, it would appear that the presence of gaskets on the door of the box would somewhat reduce somewhat the likelihood of the entry into the box of air of a velocity sufficient to cause the interior float dust to become suspended. Within the above context, I find that the third element of *Mathies* has not been established.[4]

2. Penalty

The Secretary has indicated that the citation was abated in a timely fashion. I find that should a fire have resulted, it could have caused burns or smoke inhalation. Accordingly, the level of gravity was moderate. There is not any evidence as to the length of time the violative conditions had existed, nor was evidence adduced regarding the last time prior to Workman's observations that the interior of the box was actually inspected. Workman opined that the accumulations existed more than a week because the box had "sealed lids on it." (Tr. 182.) I find

[4]I take cognizance of *Bob and Tom Coal Co.*, 16 FMSHRC 1974 (Sept. 1994) (ALJ) and *Beech Fork Processing Inc.,* 13 FMSHRC 576 (Apr. 1991) (ALJ). These cases were decided by fellow Commission judges and are not binding. To the extent that they are not consistent with the above decision, I choose not to follow them.

his opinion somewhat speculative. I thus find that the level of negligence was less than moderate. Taking to account all the remaining factors set forth in Section 110(i) of the Act as set forth above, *supra* Section I, I find that a penalty of $450 is appropriate.

ORDER

It is **Ordered** that, within 30 days of this decision, Respondent shall pay a total civil penalty of $1,700 for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Vicki Mullins, Conference Litigation Representative, District 6, District Office, 100 Faye Ramsey Lane, Pikeville, KY 41501

Carol Ann Marunich, Esq., and Sara Ghiz Koran, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 26501

/lp