FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 25, 2013

PRAIRIE STATE GENERATING CO., Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2009-711-R
	:	Citation No. 6680548; 09/17/2009
v.	:	
	:	Docket No. LAKE 2009-712-R
SECRETARY OF LABOR,	:	Citation No. 6680549; 09/17/2009
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Mine: Lively Grove Mine
Respondent,	:	Mine ID: 11-03193
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-171
Petitioner,	:	A.C. No. 11-03193-201615
	:	
v.	:	
	:	
PRAIRIE STATE GENERATING CO.,	:	
Respondent.	:	Mine: Lively Grove Mine

DECISION ON REMAND

Before: Judge Miller

This matter is before me on remand from the Commission, *Prairie State Generating Co.*, 35 FMSHRC ___, slip op., Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013), and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Prairie State Generating Company ("PSGC"), at its Lively Grove Mine pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820 (the "Mine Act").[1] For the reason's set forth below, I **AFFIRM** the citations as issued and assess a $200.00 penalty.

[1]A hearing on Docket Nos. LAKE 2009-711-R and LAKE 2009-712-R was held on February 9th and 10th, 2010. At the time of the hearing, the Secretary had not yet proposed a penalty for the two subject citations. Accordingly, the above captioned penalty proceeding, LAKE 2010-171 was not addressed in the court's May 21, 2010 decision on the merits, nor in the Commission's July 16, 2013 decision remanding certain issues for additional analysis. The remanded issues and penalty portion are addressed in this decision.

I. BACKGROUND

On August 28, 2009, PSGC re-submitted a ventilation and roof control plan originally dated July 31, 2009, to MSHA. The parties entered into negotiations and discussed various plan provisions. In September 2009, PSGC communicated its intent to implement the unapproved plans in order to bring the subject contests. By agreement between MSHA and the Contestant, the mine began operation without an approved ventilation plan or approved roof control plan in place. Subsequently, on September 17, 2009, MSHA issued two technical citations alleging that PSGC was operating its mine with an unapproved ventilation plan in violation of 30 C.F.R § 75.370(d) and an unapproved roof control plan in violation of 30 C.F.R. § 75.220(a)(1). Contestant requested a hearing to challenge two citations. [2]

The first contested citation, Citation No. 6680548, alleges a violation of 30 C.F.R. § 75.370(d), which states that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." In deciding whether to approve a proposed ventilation plan, MSHA looks to § 75.370(a), which provides in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a).

The second contested citation, Citation No. 6680549, alleges a violation of 30 C.F.R. § 75.220(c), which states that "[n]o proposed roof control plan or revision to a roof control plan shall be implemented before it is approved." Section 75.220(a)(1) explains that the "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

On May 21, 2010 this court issued a decision affirming the citations on the grounds that the Secretary, by way of the Mine Safety and Health Administration ("MSHA") district manager whose district includes the location of the Lively Grove mine, did not abuse his discretion in rejecting the mine's proposed ventilation and roof control plans. In reviewing the district manager's rejection of PSGC's proposed plan provisions, the court applied the "arbitrary and capricious" standard.

On review, the Commission upheld the court's decision to apply the "arbitrary and capricious" standard of review to the district manager's decision rejecting the mine's proposed plan provisions. The Commission stated that "'absent bad faith or arbitrary action, the [district manager] retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval.'" *Prairie State Generating Co.*, 35 FMSHRC ___, slip op. at 5, Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013)(quoting *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996)). Moreover, the Commission found that substantial evidence supported the court's findings that the district manager did not abuse his discretion in denying approval of the mine's proposed plan provisions calling for extended cuts, wider entries and

[2] A fuller background can be found in this court's May 21, 2010 decision on the merits, 32 FMSHRC 602 (May 2010) (ALJ).

longer diagonals. However, the Commission remanded the contest cases back to the court to apply the arbitrary and capricious analysis, consistent with Commission Rule 69(a),[3] to six additional proposed ventilation or roof control plan provisions: air quantities in the last open crosscut; red zone issues in the roof control plan; numbers of turns in the crosscuts; curtain setback; using mesh in-cycle in the roof control plan; and, the roofbolter in relation to the continuous miner. *Prairie State Generating Co.*, 35 FMSHRC ___, slip op. at 10, Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013).

On September 20, 2013 the parties submitted additional stipulations indicating that the only issue that remained in contest was "[t]he amount of air required in the last open crosscut: whether it should be 9,000 cfm and 12,000 cfm, depending on the number of open crosscuts or 20,000 cfm and 25,000 cfm." Additional Stips. 2-3. Accordingly, this Decision on Remand addresses whether the District Manager abused his discretion in deciding this singular issue, and, if necessary, the appropriate penalties for the two citations.

II. AIR QUANTITIES IN THE LAST OPEN CROSSCUT

During the plan negotiations the Contestant sought a reduced requirement in its ventilation plan for the quantity of air needed to assure compliance with respirable dust standards near the continuous miner and other working areas. Victor Daiber, engineering manager for the mine, testified that a reduced quantity of air is appropriate for the unique "fishtail" ventilation of this mine. Daiber stated that the fishtail configuration improves the dust condition and methane control in a mine, (Tr. 300), and that between 9,000 and 12,000 cfm (cubic feet per minute) of air would be adequate for the particular ventilation system at this mine. (Tr. 301). He explained that a lower volume of air is adequate because the air current is effectively split, and only sweeps through half of the equipment, as opposed to all of the air sweeping across all of the equipment. (Tr. 333-34). According to Daiber, the mine's design increases the efficiency of the ventilation system, as there are two distinct last open crosscuts, each with their own mining equipment and air current, and not one last open crosscut and a walk-between. (Tr. 300, 342-43). Daiber testified that he researched every mine's dust records listed on the pertinent MSHA website from the beginning of 2007 on, and modeled the instant ventilation plan after another mine which had one of the best dust records in the district. (Tr. 301-02).

However, the Secretary does not agree, and maintains that a significantly higher air quantity is needed to ensure adequate ventilation under the respirable dust standards. The inspector testified that in a mine such as this one – with three open crosscuts and a line curtain in the fourth crosscut – it is necessary to require a higher quantity of air. (Tr. 87-88). This is because in a typical setup with this configuration, equipment must frequently travel through the curtains, which can result in a short-circuiting of the air if the curtains are not designed, installed,

[3] Rule 69(a) requires that a Commission judge's decision "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a).

or maintained properly. *Id.* This, in turn, can reduce the quantity of air at the last open crosscut, which does not meet the ventilation needs of that section.

The inspector also testified that although there are other ventilation plans in the district which allow for lower air quantities, greater quantities are actually used in order to comply with respirable dust standards. (Tr. 84-85, 124). He clarified that the lower allowable quantities found in other plans are only for operators to avoid citations for face ventilation, and that typically, other mines in the district with lower allowable quantities actually operate between 18,000 and 25,000 cfm. (Tr. 85).

MSHA proposes that between 20,000 and 25,000 cfm is necessary in this mine. (Tr. 86-87, 136-37, 238). The amount of air in the working section must be sufficient both for dust control and to dilute any methane that is liberated. (Tr. 84). The inspector testified that the mine was proposing to use a scrubber which had a rating that required 6,400 cfm of air for its use, and to have 7,000 cfm at the end of the blowing line curtain. (Tr. 85-86). He stated that, generally speaking, the starting point for evaluating the amount of air required at these locations is to provide three times those proposed quantities of air, so 19,200 cfm and 21,000 cfm respectively, so he determined that 20,000 cfm was an appropriate amount to require at the outset. (Tr. 86). 20,000 cfm would then provide adequate ventilation at the scrubber and at the end of the blowing line curtain. *Id.* The inspector described this value as an "initial evaluation" of the mine's ventilation plan, *Id.*, so presumably the value may be adjusted at a later date if the mine can show that a lower quantity of air is needed to maintain acceptable dust exposure levels.

I find that the District Manager did not abuse his discretion in requiring the mine to have higher air quantities than those sought by PSGC's proposed plan provisions. There is nothing to suggest that his decision-making was arbitrary and capricious, nor made in bad faith, nor due to an error in judgment. I find that in discussing the particular conditions at this mine, as well as other plans and practices within the district, the District Manager has considered "the relevant data and [has] articulate[d] a satisfactory explanation for" his decision, *see Twentymile Coal*, 30 FMSHRC 736, 754-55 (Aug. 2008), and has established a "rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As such, I find that the District Manager did not abuse his discretion in requiring plan provisions that required a higher air quantity in the last open crosscut.

In light of the above findings, and my earlier findings, I **AFFIRM** Citation Nos. 6680548 and 6680549.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary

that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R.§ 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
> 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties have stipulated to many of the penalty criteria. The history of assessed violations shows a reasonable history for this mine. The parties agree that the mine is a large operator, the penalties as proposed will not affect its ability to continue in business, and it demonstrated good faith in abating the violations. Additional Stips. 2. Given the technical nature of the citations, the gravity and negligence were properly assessed as low. The Secretary has proposed a $100.00 penalty for each of the subject citations. In light of my findings, I assess the penalties proposed by the Secretary for a total penalty of $200.00.

IV. ORDER

Accordingly, I conclude that the Secretary has met his burden of proving that the District Manager did not abuse his discretion with regard to above discussed plan provision. Accordingly, Citation Nos. 6680548 and 6680549 are **AFFIRMED**, and Prairie State Generating Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision. Upon receipt of payment, the contest cases are **DISMISSED**.

Margaret A. Miller
Administrative Law Judge

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