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

September 8, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 2008-436
	:	A.C. No. 11-03054-148746
	:	
	:	Docket No. LAKE 2009-057
	:	A.C. No.11-03054-163984-01
v.	:	
	:	Docket No. LAKE 2009-058
	:	A.C. No.11-03054-163984-02
	:	
BIG RIDGE, INC., Respondent	:	Docket No. LAKE 2009-059
	:	A.C. No.11-03054-163984-03
	:	
	:	Docket No. LAKE 2009-378
	:	A.C. No.11-03054-177990-02
	:	
	:	Mine ID: 11-03054
	:	
	:	Mine: Willow Lake Portal

DECISION

Appearances: Tyler Mcleod, Esq., and Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Arthur M. Wolfson, Esq. and Jason P. Webb, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Big Ridge, Inc.

Before: Judge Melick

These cases are before me upon petitions for civil penalty 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 Big Ridge, Inc., ("Big Ridge") with multiple violations of mandatory standards and seeking civil penalties for the alleged violations. The general issue before me is whether Big Ridge violated the cited standards as alleged and, if so, what is the appropriate civil penalty for these violations. Additional specific issues are addressed as noted. During hearings, the parties reached a settlement regarding a number of charging documents and submitted supportive documentation post hearing. I have reviewed the representations and documentation submitted with respect to those charging documents and find that the settlement is acceptable within the framework of section 110(i) of the Act. An order approving that settlement accompanies this decision.

Order Number 6673440

As amended, this order, issued pursuant to section 104(d)(2) of the Act, alleges, alternatively, a violation of the standard at 30 C.F.R. § 75.362(a)(2), 30 C.F. R. § 75.363 (a) and 30 C.F.R. §

75.363(b), and charges as follows:[1]

> An inadequate on-shift examination was conducted on the MMU 002-0 coal production unit during the 6:30 a.m. - 3:30 p.m. shift of January 24, 2008. The conditions detailed in Mine Citation/Order No. 6673438 were neither posted nor recorded in a book maintained for that purpose.
>
> The conditions were extensive, obvious and readily identifiable to the certified person (foreman) conducting the on-shift examination

For the reasons that follow, I find that the Secretary has sustained her burden of proving a violation of the standards at 30 C.F.R. § 363(a) and 363(b). Accordingly, there is no need to consider herein whether there was also a violation of the standard at 30 C.F.R. 75.362(a).

The cited standard at 30 C.F.R. § 363(a) provides as follows:

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[1] Section 104(d) of the Act 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 that mine.

a) Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

The standard at 30 C.F.R. § 363(b) provides as follows:

(b) A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate record keeping requirements.

Inspector William Keith Roberts of the Department of Labor's Mine Safety and Health Administration ("MSHA") who has more than eleven years experience as an MSHA Inspector and significant industry experience, issued the subject order on January 25, 2008.Roberts testified that, at the beginning of the day shift on that date, he observed approximately 19 tons of loose coal and coal dust in mechanized mining unit number two. According to Roberts, the unit was idle at that time and the foreman from the prior working shift had left the piles of loose coal behind. Indeed, Respondent's Safety Manager, Bart Schiff, admitted at hearings that there were coal accumulations in the cited area including coal piles next to the continuous miner. He also acknowledged that although there was a layer of rock dust on top of the coal it was not mixed within the piles and that an explosion could lift that rock dust and expose the coal and coal dust underneath. Roberts issued the order at bar for an inadequate on-shift examination by the foreman and for failing to identify, immediately correct and post and record this material.

Roberts opined that loose coal and coal dust in a gassy mine is a hazardous condition. The subject mine is classified as a "gassy" mine liberating more than two million cubic feet of methane every 24 hours. Roberts testified that amounts far less than what he observed have been shown in test conditions to further propagate a mine fire or explosion, and that the presence of such coal dust could turn an ignition into an explosion. He also noted that this material in a working section is of particular concern since there are trailing cables, cable reel equipment and electrical equipment that may become damaged and are known fire sources. Miners were also working immediately outby on a construction project.

Roberts also noted that despite having failed to first remove the 18.99-ton piles of coal from the floors and ribs, Respondent placed only a "very light layer of rock dust" in the area from a slinger-type rock dusting machine. According to Roberts, this machine does not rock dust the floor, but rather the rock dust that ended up on the floor and the accumulation piles was simply residue that had not attached to the ribs or roof. According to Roberts, the rock dust layer was thinner than a sheet of paper thus rendering it insignificant.

Roberts further opined that underneath the thin layer of rock dust were deep piles of pure coal and coal dust. He noted that the concussive forces from an explosion would suspend approximately one inch of the material into the air thereby exposing the pure combustible material in the accumulations. The cited loose coal and coal dust therefore constituted a condition that would create or increase the possibility of loss in the event of an ignition or fire.

Roberts noted that foreman Les Hawkins was obligated to perform the subject on-shift examination on the January 24 day shift and that Hawkins was also required under section 363(a) to post the hazardous conditions with a conspicuous danger sign and immediately correct the conditions or keep the area posted until the conditions were corrected. He was also required under section 363(b) to record the conditions and the corrective action in the on-shift examination reports. The Secretary maintains that Hawkins failed to comply with both of these requirements.

The subject unit was considered a "spare" unit since a scheduled crew was not assigned, but rather miners elected to work this area on their days off. It is undisputed that this unit last produced coal during the day shift (i.e., 6:30 a.m. to 3:30 p.m.) on January 24 when Hawkins was the foreman. In Respondent's pre-shift and on-shift reports, the mine examiners had repeatedly noted, "unit needs more cleaning". The examiners placed these comments under "remarks"on January 24- 3 a.m. to 7 a.m, and 7 p.m to 11 p.m, . Hawkins therefore was on notice that cleanup efforts were needed before he worked the unit on the January 24 day shift, but failed to clean the unit, report the condition, or post the area as a hazard pending corrective action.

The on-shift report for the subject shift shows that the section was in fact in production on the day shift January 24, and that Hawkins was present, Hawkins failed to record information concerning the purported loose coal piled around the unit, or why he failed to clean the unit as noted by the pre-shift examiners. Hawkins also failed to post the area. Considering the credible testimony of Inspector Roberts, significantly corroborated by Mr. Schiff, I find that a reportable hazard in fact existed and that Hawkins therefore violated the requirements of sections 75.363(a) and 75.363(b). Even applying a "reasonably prudent" person test it is clear that the significant size and amount of combustible accumulations herein constituted a "hazardous condition" within the meaning of the cited standard. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). I note, however that the violation was not deemed to have been "significant and substantial" and it is therefore of lesser gravity.

The Secretary also maintains that the violation was the result of Respondent's unwarrantable failure. Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard,"

"intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

When determining whether conduct is "aggravated" all the facts and circumstances must be considered to see if any aggravating factors are present. These factors include, "the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation." *Consolidation Coal Co.*, 22 FMSHRC 340, (Mar. 2000).

The pre-shift examiners reported that the unit needed cleaning since at least the midnight shift before Hawkins worked on the unit. Roberts testified that the mine produced the 18.99 tons of loose coal and coal dust during more than one mining cycle. He explained that accumulations in a normal mining cycle would be produced in a single location to be cleaned. This situation, however, involved extremely large accumulations in multiple areas. Thus, it is clear that Respondent permitted the conditions to exist for an extended period of time. Roberts further emphasized that this was not a remote location, but rather at the last open crosscut across all the headings. The conditions were therefore extensive and obvious and Hawkins was working in the area the entire shift in question, yet failed to address the serious problem in any manner.

In addition, Safety Manager Schiff acknowledged that Hawkins was required to do an on-shift examination. After Roberts told Schiff there would be an enforcement action for the accumulations and potentially for the examination, mine manager Terry Ward arrived on the unit. Ward told Roberts that the unit had in fact produced coal on the previous day shift and that he and Hawkins specifically discussed at that time the need to clean the unit. When Roberts asked Ward why nothing had been done, Ward stated that it was not entirely Hawkins' fault since Hawkins's requested a coal scoop but Ward had removed if from that area to be used on a nearby construction project.

I do not find Ward's excuse that he was using the coal scoop for other purposes was a mitigating factor. Indeed, Roberts' discussion with Ward established that both the foreman and the mine manager knew that there were significant loose coal and coal dust accumulations throughout the unit on January 24, if not before and that the foreman had requested a scoop to clean the unit, but the mine manager would not provide the scoop and that the foreman did not implement any other means to remove the coal from the unit. These factors are indicative of an unwarrantable failure to comply.

I also find that Respondent had been placed on ample notice that it had an ongoing problem

with accumulations. At the time of his inspection, Roberts viewed the violation history for the previous 24-month period and noted that the mine had previously been cited for 164 violations of the cited standard during that time. He testified credibly that these violations were discussed with the Respondent in pre- and post-inspection conferences, in addition to informal meetings during the course of the inspection period. Respondent was thereby placed on notice that additional compliance efforts were necessary. See *Enlow Fork Mining Co.,* 19 FMSHRC 5, 11-12 (Jan 1997).

Within the above framework of evidence, is clear that the violation cited in Order No. 6673443 is proven as charged, and that it was the result of Respondent's unwarrantable failure.

Order Number 6673462

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the standard at 30 C.F.R. § 75.220(a)(1) and charges as follows:

> The mining of perimeter cut #25 in the previously mined room developed off Entry 8@ 42+50', MMU 014-0, was not compliant with the approved roof control plan. The perimeter cut was mined in a manner that not only holed the cut through into the preceding perimeter cut but also eliminated the required 5' wide coal fender between the perimeter cuts.
>
> This pillar recovery effort resulted in only a small "stump" of coal between the perimeter cuts and the rib line of the room. This small fender has subsequently crushed out due to its reduced width and the weight of the roof strata. The mining method at the cited location presented a distinct roof fall hazard to the continuous mining machine operator.

The relevant pages of the mine operator's approved roof control plan are set forth in Appendix A, attached hereto and exhibit G-8.

The roof control plan ("Plan") stated in relevant part as follows with respect to engaging in perimeter mining:

> 1. This plan can be seen on sketches on pages 20-24 [Appendix A pp. 5-9].
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> * * * *
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> 5. If a perimeter cut inadvertently holes into the preceding cut, the miner machine will immediately stop and pull out of this cut and proceed to the next cut (Ex. G-8 p.24 and Appendix A p.4).

The Plan included a sketch that illustrates the manner in which the continuous mining machine is to make the perimeter cut, as well as the requirement that the remaining coal fender must be equal to or greater than five feet in width (Ex. G-8 pps. 22 and 27 and Appendix A pps.2 and 7). The coal fender is the remnant of coal left between two perimeter cuts to help support the roof, which is illustrated as the triangle shape on the Plan (Appendix A p. 7).

Inspector Roberts testified that this sketch depicted a cut similar to the one at issue. He further testified that a five-foot coal fender is the minimum amount of coal necessary to adequately support the immediate and main roof. The Plan also included a sketch illustrating a perimeter cut where the remaining coal fender is configured differently in light of the angled headings. In this illustration, the fender was required to be equal to or greater than five feet at the back end of the fender or six feet at the front end. (Ex. G-8 p. 29 and Appendix A p. 9).

Roberts explained that while he was performing a five-day spot inspection in unit four, he noticed a large number of timbers and cribs at the mouth where there typically should only be three timbers. This area was immediately adjacent to a frequently traveled shuttle car road. Roberts observed the missing coal fender and walked around the area to view the condition. Roberts testified that based on his observation, it was "obvious" that the miner operator had not only holed through the fender but continued to mine out the remaining portion of the fender toward the rib, leaving only a small triangular coal stump behind the miner at the front end of the fender. He concluded that this small stump then crushed out from the weight of the roof leaving no roof support. Roberts explained that, under the Plan, in the event the miner holes through the fender, the miner operator is required to immediately cease mining and withdraw the machine from that cut and start a new perimeter cut if there is one to be made. Roberts opined, however, that since there were no other cuts to be made in this instance, the operator would have had to back the equipment into the panel entry headings. Roberts opined that the miner operator apparently did not wish to do this. Based upon his experience as an equipment operator and a face boss in pillar recovery methods, Roberts opined that the miner operator had approached the fender at an incorrect angle and cut through the entire fender after holing through.

I find that the testimony of this highly qualified and experienced mine inspector to be entitled to prevailing weight and that, therefore, I find the violation to have been proven as charged. In reaching this conclusion I have not disregarded the arguments presented by Big Ridge attempting to discredit the expert testimony of Roberts. However, I find those arguments unconvincing. I also find significant the unexplained absence of first hand testimony from the participants in this incident, namely the miner operator and the foreman Hawkins.

The Secretary has further alleged 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 (December 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 (Aug. 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 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, I find that a roof fall under the circumstances herein was reasonably likely for several reasons. First, the removal of the coal fender created an excessively wide roof. Based upon his background and experience (including as an MSHA Roof Control Specialist), Roberts credibly testified that excessive widths are the primary cause of roof falls. He explained that the 90-degree perimeter cut created a four-way intersection, with one leg of the intersection unsupported without roof bolts. Because the fender had been largely removed, the width of the unsupported area was significantly increased, exposing miners to a roof fall. I further find that Respondent was aware of the excessive width and the danger posed because it had installed a substantial number of timber cribs at this location. When perimeter mining is properly performed pursuant to the Plan the mine need only to place three timbers (without any cribs) at the mouth of the rooms for roof support and to alert miners to stay out of the unbolted rooms.

A second factor is that the subject mine has a history of unplanned roof falls in four-way intersections. Roberts testified that there were 75 unplanned falls from 2005 to the time he wrote the subject order and approximately 120 falls between 2005 and 2010. Roberts noted that all of the falls occurred at intersections and primarily four-way intersections. In this case, the removal of the fender increased the cross-sectional area by a minimum of 20 feet beyond the minimum 68 feet limitation in the Plan.

According to Roberts, the miner operator was exposed to the hazard at the time the fender was holed through and while the fender was being removed. He also found that the shuttle car operators were in this location and also exposed to the hazard. The perimeter cuts were also adjacent to the active working section near the power center and dump point which were frequented by foremen. Roberts anticipated that a miner exposed to a roof fall at this location would sustain fatal crushing injuries since the fall material would typically be six to eight feet thick, the width of the crosscut and anywhere from 15 feet to 100 feet long. Within the above framework of evidence, I find that the violation was "significant and substantial" and of high gravity

I further find that the violation was the result of the operator's unwarrantable failure. Big Ridge had been, for one thing, recently placed on notice of the specific perimeter mining requirements of the Plan. Inspector Roberts had issued Citation Number 666740 on October 11,

2007, which involved facts similar to the situation herein. In that case Roberts observed a fender holed through in two locations in violation of section 75.220(a)(1). Like the present order, this action violated item 5 of the Plan, since the continuous miner failed to stop and withdraw from the cut. To terminate that citation Roberts required that production personnel be re-instructed in the requirements of the same Plan provision at bar.

Based on his background and experience as a section foreman, and his knowledge of the subject mine, Roberts opined that it was absolutely key that Hawkins ensure proper maintenance of the fender in this location to protect the miner operator and shuttle car operators during the mining process. I further find that section foreman Hawkins was grossly negligent. Roby Podoriscki, a mine manager for Big Ridge, explained that a hole through typically occurs due to an inexperienced miner operator, an incorrect angle of the cut, or a misdirected sight line. Podoriscki acknowledged that the foreman is ultimately in charge of directing the miner cuts. He testified however that Hawkins was moving cables on a continuous miner while the fender was being obliterated in this instance. While there is some evidence that Hawkins may have been suspended or fired specifically for allowing this incident to occur, I do not consider that evidence herein in determining negligence as it is contrary to social policy to discourage the taking of steps in furtherance of added safety. See Rule 407, Federal Rules of Evidence. In any event, it is the well established law that foremen are held to a high degree of care and that their actions are imputable to the mine operator.

Citation Number 6667476

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Combustible material in the form of hydraulic oil, automatic transmission fluid and oil/fluid-saturated coal dust has been permitted to accumulate immediately beneath the exhaust pipe of the non-permissible Alpha diesel-powered mantrip, Co. No. MT-08. The accumulations are approximately 1/8" to 1/4" in depth along the entirely of the enclosed 9" x 6' tunnel that houses the drive shaft and exhaust pipe. The exhaust pipe is neither wrapped with heat resistant material nor otherwise shielded from contact with these accumulations of combustible material.

The cited standard, 30 C.F.R. §75.400, provides that "[c]oal 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."

Inspector Roberts issued this citation on November 23, 2007, when he observed what he found to be accumulations of combustible fluids and coal on a mantrip. Roberts explained that he observed a combination of hydraulic oil, automatic transmission fluid and motor oil, with oil saturated coal dust, immediately beneath the exhaust pipe of the non-permissible diesel powered mantrip. According to Roberts, the fluids and coal were in the chamber or tunnel that runs down the center of the machine from the rear of the engine along the drive shaft and exhaust pipe toward the rear of the vehicle. Using a tape measure in the tunnel area Roberts estimated the accumulations to

be approximately 1/8 to 1/4 inches deep along the entire area. I find the expert testimony of Inspector Roberts to be credible and sufficient to prove the violation as charged.

The Secretary also maintains that the violation was "significant and substantial". The mantrip was located on the surface and available for transport underground. It carried 14 miners in and out of the mine and, they would, according to Roberts, be affected from smoke in the event of a fire. He designated the violation as "significant and substantial" on the basis that the combustible materials were in close proximity to the exhaust. He opined that the surface temperature of the subject exhaust pipe while the vehicle was in use would be sufficient to ignite the material, or could intensify a fire that started at another location on the machine. Roberts was particularly concerned in this instance since the exhaust pipe on this vehicle was not wrapped with heat shielding, thus exposing the fluid to the exhaust heat.

While there appears to be no dispute that the various substances cited were combustible at some temperature I find that the Secretary has failed to sustain her burden of proving the temperatures at which these materials would ignite and the temperatures to which they were exposed. The opinion testimony of Inspector Roberts that these materials would ignite from the heat of the exhaust is simply *ipse dixit* i.e. based on a bare assertion resting solely on the authority of the individual expert, and is insufficient without some underlying factual basis. Without that essential foundation, there is no basis to determine the likelihood of an event or the likelihood of injuries. Accordingly, I do not find that the Secretary has met her burden of proving that the violation was "significant and substantial." Rather, the violation was of lesser gravity.

I find however that the violation was the result of operator negligence. The credible evidence is that the mixture of combustible fluids and coal had existed for several shifts, was extensive and was obvious. According to Roberts, the vehicle had an access door that allowed an examiner or vehicle operator to simply look through to identify the condition. Roberts discovered the condition in this way. Roberts also explained that there had been an ongoing issue with cleaning accumulations on equipment. In the previous 18-months there had been more than 150 citations of the standard at issue. Moreover, Roberts testified that he had had discussions with the mine's safety personnel, including Bob Clarida, Bart Schiff, Tom Patterson, (safety director), Mark Cavinder (business unit manager), and Ricky Phillips, (mine superintendent) and that a significant topic of these discussions was the accumulations on equipment and equipment clean up programs. This evidence clearly demonstrates at least a moderate degree of negligence.

Citation Number: 6674611

As amended, this citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.512 and charges as follows:

> "Except when testing the machinery, guards shall be securely in place while machinery is being operated." The face plate (guard) on the #5 (995 volt) breaker had been damaged. The face plate had been distorted, opening a 2 inch by 6 inch gap down the side of the breaker. Exposing bare conductor lead 3 inches inside the panel.

The cited standard provides as follows:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Inspector Bobby Jones had been an MSHA inspector for four years, specializing in coal mine safety and health, but also has 32 years of underground coal mine experience in many capacities. Jones testified that he issued the citation at bar on August 8, 2008, after observing a two inch by six inch opening on a breaker cover panel that exposed the inner conductors of a 995 volt breaker. According to Jones, the breaker controlled a circuit used to power the continuous miner and, although a cable was not plugged into the outlet supplied by the circuit, the upstream, or back side, of the breaker was still energized. The 995 volt circuit controlled by the breaker was but one circuit and outlet that were part of a larger assembly i.e. the number five transformer used to supply electrical power throughout the production unit. Other circuits and outlets of varying voltages were supplied by and located on the transformer and were in close proximity to the damaged breaker face plate. These other circuits supplied electrical power to equipment such as roof bolters, feeder breakers, chop saws, and microwave ovens. According to Jones, there were numerous pieces of equipment deriving power from the transformer so there were numerous electrical cords leading from the transformer, ranging in size from one-and-a-half inches in diameter for a roof bolter cable to three inches in diameter for a continuous miner cable.

According to Jones, in addition to plugging and unplugging the cables that supplied the various pieces of equipment, miners entered the transformer area to perform a number of other tasks throughout the day, including pre-shift and on-shift examinations, gas checks, breaker resets, and heating up their meals, either with the help of a microwave oven or, because the transformer is warm, the transformer itself. Jones testified that miners also used chop saws plugged into the transformer to cut drill steels generally eight to ten feet in length. There is no dispute that steel readily conducts electricity when in contact with energized electrical components, such as those exposed by the damaged breaker panel. Based on the credible testimony of expert witness Bobby Jones, I find the violation has been proven as charged.

The Secretary also argues that the violation was "significant and substantial." In this regard, Inspector Jones testified that numerous electrical cables, some as large as three inches in diameter, were present on the ground around the damaged breaker panel, along with rocks and chunks of coal. There is no dispute these objects presented tripping and stumbling hazards. Jones testified that the floor of underground coal mines is uneven and littered with rocks and chunks of coal. Jones also testified that there was no ambient lighting in the area and that the miners' cap lights served as the sole source of light. Thus, the presence of numerous cables, rocks, and chunks of coal in an unlit area with an inherently uneven surface made it reasonably likely that, given continued normal mining operations, a miner would trip and come into contact with the energized conductors exposed by the damaged breaker panel. Jones further testified, without contradiction, that contact with 995 volt

electrical current would most likely result in electrocution. Clearly, the violation was "significant and substantial"and of high gravity.

In reaching this conclusion, I have not disregarded Respondent's assertion that its policy requiring miners to wear gloves and boots when working with the electrical cables diminished the likelihood of an accident. However, according to the credible testimony of inspector Jones, the gloves required by Respondent's glove policy were plain leather gloves, not voltage-rated electrical protective gloves. Such gloves are not designed to protect the wearer against electrical current but, if clean and dry, may have afforded a small, but indeterminate amount of electrical protection.

Respondent also asserts that miners' use of rubber boots reduced the likelihood of electrocution. However, both Jones and Barras testified that rubber boots do not provide protection from electrocution if a miner falls while in contact with the electrical current, as uninsulated parts of the miner's body, such as knees, backs, or shoulders would come into contact with the ground and thereby allow the electrical current to flow through and exit his body.

Respondent further argues that the presence of rubber mats around the transformer also provided miners protection against electrocution. However, the mats used by Respondent were not true electrical protective equipment, rather they were pieces of an old conveyor belt that was no longer suitable for its intended purpose. These mats were not subject to periodic testing and, as Jones testified and Barras admitted, were not designed to serve as electrical protective equipment nor were they tested or evaluated to determine quantitatively the electrical protection, if any, they afforded. The small size of the mats also reduced or negated any electrical protection they would provide in the event of a fall. The mats, which were approximately two feet square, would not fully prevent a fallen miner from contacting the earth, thus providing a path for the electrical current to travel to ground. I also note that since Barras was not present during the inspection and did not observe the conditions giving rise to the violation, I give his testimony that an accident was unlikely but little weight.

Jones determined that Respondent exhibited a moderate degree of negligence with respect to the violation. I find, based on the credible evidence that the condition was obvious and that the section foreman would have been in the transformer area to perform the on-shift inspection. Based on his observation of the breaker the previous day, Jones credibly estimated that the condition existed for up to three shifts. Under the circumstances, I find the operator chargeable with moderate negligence.

Citation Number 6674618

This citation alleges a "significant and substantial" violation of Safeguard Notice No. 7583088 and charges as follows:

> Two mantraps were observed transporting roof bolting materials in the mantrip with the miner. DT-18 had 12 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat. DT-04 had 7 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat, 28 chain in the passenger seat behind the driver.

As amended, the cited safeguard notice, No. 7583088 issued by former MSHA inspector John Winstead on July 12, 2006, provides as follows:

> DT 15-160 was observed coming out of the mine with a ram car bed jack adjacent to the driver unsecured in the vehicle. This is a notice to provide safeguards requiring that supplies or tools, except small hand tools or instruments, should not be transported with men at this mine.

On August 11, 2009, Inspector Jones accompanied underground by Respondent's representative Donnie Hughes, observed two diesel-powered mantrips designated DT-18 and DT-04, transporting materials in the passenger compartment along with miners. Mantrip DT-18, which contained a driver and a passenger, had twelve bundles of four-foot roof bolts standing up in the rear seat behind the driver. Each bundle contained five roof bolts, with each bolt weighing approximately two pounds. Mantrip DT-04 contained seven bundles of roof bolts and a bucket of chain in the seat behind the driver, along with 28 steel chain hangers on the floorboard. Jones issued the citation at bar based upon the cited safeguard notice.

Respondent argues that the citation at bar was invalid because the safeguard notice upon which it was based was invalid. More specifically Respondent argues that the nature of the hazard was not described with the requisite specificity. The Secretary bears the burden of establishing the validity of the safeguard by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address an actual transportation hazard. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 14 (Jan. 1992). A safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985). See also *Rochester & Pittsburgh Coal.,* 14 FMSHRC 37 (Jan. 1992).

Indeed, even MSHA's Program Policy Manual ("PPM"), Vol. 5 Subpart O, requires that a valid safeguard should identify the nature of the hazard to which it is directed. The PPM states as follows:

> Where an inspector determines that a safeguard notice is necessary in order to address a transportation hazard, the specific safeguard requirements are to be determined by the inspector based on the actual, specific conditions or practices that constitute a transportation hazard at that particular mine. The inspector should document either in the notice or in the inspector's notes the conditions which provide the basis for the issuance of the safeguard notice. The safeguard notice should also identify the nature of the hazard to which it is directed. For example, if a notice to provide safeguards is issued to require a specific minimum clearance distance between pieces of haulage equipment, the safeguard should also include a statement of the hazards that the clearance distance is intended to prevent, such as injury to equipment operators from pieces of rib coal which could be knocked loose or, if the area is a walkway, injury to pedestrians by the equipment due to insufficient clearance.(emphasis added).

The Secretary's argument that a description of the condition is, in effect, a description of the hazard is contrary to both the program policy manual and commission case law. Clearly, the safeguard notice at issue did not identify with specificity the nature of a hazard to which it was directed and that Notice is therefore invalid. Accordingly, the citation at issue based on that Notice is also invalid and must be vacated.

Significantly, both inspectors also admitted at hearings that the subject Notice of Safeguard identified only the condition and not the hazard, if any, to which it was directed. Former Inspector Winstead testified in this regard in the following colloquy at hearings:

> Q. Sir, what you described for me was the condition you observed, right? The bed jack was unsecured, that's the condition, correct?
>
> A. Yes (Tr. 426)
>
> * * * *
>
> Q. But your safeguard does not also define a hazard, does it?
>
> A. No. (Tr. 427)

Inspector Jones reviewed the same Notice of Safeguard that he relied upon when he issued the citation at bar and also admitted that no hazard was identified in that the Notice. He testified in this regard in the following colloquy:

> Q. So there is no hazard defined in this safeguard as it's written?
>
> A. As it's written, no (Tr. 407)

Citation No. 6673743

This citation, issued pursuant to section 104(a) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

> The #872 Stamler coal hauler being used on the No. 3 unit was not being maintained in approved condition. An opening in excess of .005 inches was present under the lid of the operators side tram motor.

The cited standard provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

MSHA Inspector Dean Cripps has a degree in electrical engineering technology and

specializes in electrical installations in coal mines. He has additional experience as a coal miner. On October 12, 2008, Cripps issued the citation at bar after he inspected the number 872 stamler coal hauler and found an excessive opening under the lid of the tram motor. He explained that the maximum opening permitted is .004 of an inch, and the opening in this instance was .022. There is no dispute that the excessive opening was a violation of § 75.503. In this regard, Cripps testified that the specific hazard posed by the violation was the ignition of methane. He explained that the coal hauler transports coal from the continuous mining machine to the feeder and stops underneath, and in contact with, the tail of the continuous miner while it empties coal onto the hauler. According to Cripps, the vehicle, therefore, regularly operates close to the coal face where methane may be liberated. He noted however, that if the vehicle is maintained in permissible condition, sparking within the various compartments on the machine will not cause a methane ignition.

Cripps explained that when the subject lid to the tram motor compartment is shut, and the opening is within permissible parameters, an explosion proof environment is created within the motor compartment. Although methane may still enter the enclosure, the flame and the heat resulting from an explosion inside the container would not ignite methane that may be present outside of the enclosure. The explosive forces and gases are sufficiently cooled by the time they exit through the small permissible opening and across the flame vent or flame arresting path (i.e., the joint between the lid and the motor). Because of this cooling process, there is insufficient heat to ignite methane outside the compartment.

According to the credible testimony of Inspector Cripps, the subject hauler is used inby the last open crosscut where coal is being extracted and methane is liberated. When the methane is liberated the ventilation air carries it over the miner and the hauler. He further noted that the presence of coal dust, makes methane more explosive in that when the dust generated by the continuous miner and is mixed with methane it can lower the explosive range of methane. According to the inspector, the hauler is also exposed to methane as it travels in the last open crosscut or the return entry to and from the feeder and continuous miners. Cripps testified credibly that the presence of methane and its exposure levels are unpredictable. He also noted the subject mine is known to liberate in excess of two million cubic feet of methane in a 24-hour period, which is why it is on a 5-day spot ventilation inspection regimen.

Cripps further testified that sparking or arcing occurs in the tram motor compartment in its normal operation. The motor has brushes and commutators that create sparking and arcing while tramming. I find that Cripps' testimony is entirely credible and established that it was reasonably likely for an ignition and serious injury to occur in light of (1) the excessive opening, (2) the arcing in the tram motor compartment, (3) that the subject mine was known to liberate large quantities of methane, and (4) the hauler regularly operated near the face and in the last open crosscut where methane is liberated from the coal. The violation was accordingly, "significant and substantial"and of high gravity.

The Secretary also maintains that the violation was the result of moderate negligence. In this regard I find from the credible evidence that the opening was easily identified that qualified electricians were permitted to perform work on this vehicle and that the compartment lid was bolted on the machine and the electrician who installed the lid did so while gob was in the compartment preventing it from shutting flush. Despite the obvious nature of the condition, Respondent failed to

timely correct it and permitted the coal hauler to operate in face areas. I find accordingly that the violation was the result of moderate negligence.

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 operators ability to continue in business.

Big Ridge is a large size mine operator and there is no evidence that the penalties imposed herein will affect its ability to remain business. Big Ridge had a significant history of violations in the 24 months preceding each of the charging document at issue. There is no dispute that the violations were abated in good faith. The gravity and the negligence history have been previously discussed.

ORDER

Citation No. 6674618 is hereby vacated. Charging Documents Nos. 6673440, 6673462, 6674611 and 6673743 are hereby affirmed as issued and Big Ridge Inc., is directed to pay civil penalties of **$5,600.00, $60,000.00, $4,000.00 and $2,500.00** respectively for the violations charged therein within 40 days of the date of this decision. Citation No. 6667476 is affirmed but without "significant and substantial" findings and Big Ridge Inc., is directed within 40 days of the date of this decision to pay a civil penalty of **$8,000.00** for the violation charged therein. Pursuant to the motion to approve settlement filed herein, Big Ridge is further directed within 40 days of the date of this decision to pay civil penalties of **$272, 961.00.** The Secretary has vacated Citation Nos. 6668239 and 6683077.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution:

Tyler Mcleod, Esq., and Beau Ellis, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

Arthur M. Wolfson, Esq., R. Henry Moore, Esq., and Jason P. Webb, Esq, Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, PA 15222

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