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December 3, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-479
Petitioner	:	A.C. No. 12-02147-150573
	:	
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	Mine: Francisco

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The Secretary of Labor ("Secretary") filed a motion to approve settlement. The case involves twelve citations issued under section 104(a) of the Act with a total penalty assessed at $104,464. In denying the Secretary's request to settle this matter, I take into consideration the enormous volume of cases pending and the pressure on the CLR's to settle cases and move them along. However, I have signed off on a number of settlements with this particular mine operator in the past few weeks and did so reluctantly on many of them for that reason. The settlements have given more than generous reductions in penalties and modifications of citations with little explanation.

I conclude that the reduced penalties proposed by the Secretary against Black Beauty Coal Company ("Black Beauty") would not adequately effectuate "the deterrent" purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). I reach this decision based upon my conclusion that the penalties proposed by the Secretary are greater than an 80% reduction of the original penalties and such a reduction encourages mine operators to contest the penalties in the hope of receiving such a reduction. The fact that a mine operator can obtain such a drastic reduction does not encourage the mine to comply with the requirements of the Act.

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), 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.
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> 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 at 292. 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 purposes of the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has recently reiterated that in determining the amount of a penalty, a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission also emphasized that when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Id.* The Commission warned in *Sellersburg* that without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." 5 FMSHRC at 293. The information provided by the Secretary in this case does not allow me to provide a sufficient explanation for the penalty reduction.

The Secretary's representative in this case has proposed to modify six of the twelve citations to non-S&S violations, to vacate two citations, and to modify the gravity of citations. The operator has agreed to pay one violation as issued. The overall proposal calls for a reduction in the penalty from $104,464 to $20,394. On the penalty amount issue alone this proposal is not appropriate. In addition to the total penalty I also base my decision on the lack of factual bases to modify six violations to non-S&S and modify the gravity of three others. The Secretary included in its proposal that the Francisco mine had "28 previous violations in the 15 month period preceding these violations" and that the payment of $20,394 will not affect the mine's ability to continue in business. While I can accept the stipulation regarding the mine's ability to pay, the history of violations was not included and was in error. First, the history

included only 15 months, and, second, it did not take into consideration the more than 25 violations issued between the date of the first citation in this docket and the date of the most recent citation.

Citation No. 6672623 charges a violation of § 77.502 of the Secretary's regulations because the "outer insulation on the cord that supplies 110 V.A.C power to the shop light has a cut/tear exposing the bare inner conductor leads in one location. The shop light was in service in the train load out facility." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the violation to non-S&S and reduce the penalty from $13,268 to $807 because the electrical circuit was protected with a ground fault circuit interrupter breaker. A number of cases have found similar violations to be significant and substantial. *Ely Fuel Coal Co.*, 13 FMSHRC 488 (Mar. 1991)(ALJ)(An admitted violation of § 77.502-2 for failure to conduct a monthly examination of electrical equipment was S&S because serious injuries can occur from malfunctioning electrical equipment.); *Laurel Run Mining Co.*, 11 FMSHRC 1815 (Sept. 1989)(ALJ)(Violation of § 77.502 was significant and substantial because of risk of electrical malfunctions.).

Citation No. 4263736 charges a violation of § 77.1606(c) because the "No. 303--013 Driltech drill being used in the No. 4 pit was not being maintained in a safe condition. When inspected the offside camera was found defective, preventing the operator from seeing anything along the offside area of the drill." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary proposes to modify the violation to non-S&S, with low negligence and reduce the penalty from $3,143 to $285. The Secretary states that even with the inoperable camera, the operator had useable mirrors and an audible warning system to prevent an accident. A number of decisions have deemed a violation of this standard to be significant and substantial. *S&M Construction Inc.*, 19 FMSHRC 566 (Mar. 1997)(ALJ)(An area of missing tread on the rear tire of a trailer attached to a truck was an S&S and "unwarrantable" violation of § 77.1606(c).); *Quarto Mining Co.*, 15 FMSHRC 1311 (June 1993)(ALJ), *rev. denied* (July 16, 1993)(Malfunctioning steering wheel was an S&S violation of § 77.1606(c).); *Triple B Corp*., 8 FMSHRC 833 (May 1986)(ALJ)(Citation for violation of §7 7.1606(c) due to cracked rear view mirror and excessive play in mine truck's steering system was found to be significant and substantial because cracked mirrors could cause driver to back into pedestrians or over highwall, and steering defect made it extremely difficult to handle truck; both violations were reasonably likely to cause serious or fatal injuries.).

Citation No. 6672625 charges a violation of § 77.1104 because "accumulations of combustible material in the form of oil and oil soaked fines was allowed to accumulate on the Taylor fork truck 450 Co. #320-036. These accumulations ranged in depth from 1/8" to 1/4" approximately. Engine oil was leaking out of the valve cover gasket area and running on the exhaust manifold and down the side of the engine block to the belly pan." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary has proposed to modify the citation to non-S&S and reduce the penalty from $3,143 to $634 because if a fire were to occur,

the operator could easily stop and exit the equipment. Accumulation violations may potentially be determined to be significant and substantial. *Little Sandy Coal Co*., 17 FMSHRC 1638 (1995)(ALJ). (A surface coal mine operator's admitted violation of combustible materials standard, § 77.1104, was S&S. An inspector observed several leaks in the hydraulic system of a Hitachi shovel used to load overburden into haulage trucks, and also observed pools of oil under and around the operator's cab and oil on the equipment's frame. There was a reasonable likelihood of an ignition of the "extensive" accumulations of oil and grease.).

Citation No. 6672746 charges a violation of § 77.1711 and states "[n]o person shall smoke or use an open flame where such practice may cause a fire or explosion. A miner was observed smoking in the immediate area of flammable and combustible material located on the company grease truck." The items on the grease truck included starting fluid, kerosene, grease, oil and fuel soaked rags, and other oils. The fuel truck was within 30 feet of the grease truck and both were servicing a dozer. The inspector determined that the violation was S&S, marked the gravity as "highly likely" to result in a "fatal" injury, and found high negligence. The Secretary has proposed to modify the citation to non-S&S with moderate negligence and reduce the penalty from $42,944 to $362, because it is not likely that the combustible materials would be ignited by someone smoking next to the vehicle. The Secretary proposes to reduce the negligence because management was not aware of the violation. The reduction in penalty is extreme, as is the modification from S&S to a non-S&S violation without some further explanation regarding the facts and the factual basis for making such modification.

Citation No. 6672771 charges a violation of § 77.205(b) because the travelway in the conveyor rail tunnel was strewn with debris creating a trip hazard near the belt and rollers. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary proposes to modify the violation to non-S&S with a reduction in penalty from $3,996 to $807 because the "single obstacle could be easily recognized and avoided." Travelways can be particularly hazardous in mining conditions, and violations of regulations pertaining to them have often been found to be significant and substantial. *Summit Anthracite Inc*., 29 FMSHRC 1062 (Nov. 2007)(ALJ)(An operator committed an S&S violation of § 77.205(b), for failing to keep a travelway clear of stumbling hazards in the generator building.); *Cyprus Emerald Resources Corp.,* 11 FMSHRC 2750 (Dec. 1989)(ALJ)(Where coal refuse and hoses were found in preparation plant and refuse bin building walkways which provided access to areas where persons were required to work or travel, a S&S violation of §77.205(b) occurred.); *Consolidation Coal Co.,* 8 FMSHRC 1735 (Nov. 1986)(ALJ)(Obvious, long-term accumulation of slurry and water on floor of slurry pump house where miners were required to work caused slipping hazard, is significant and substantial violation of § 77.205(b), and was due to unwarrantable failure of operation to comply with standard.); *J.A.D. Coal Co.*, 7 FMSHRC 733 (May 1985)(ALJ)(Violation of § 77.205(b) was the result of high negligence because travelway leading to head roller of belt was covered completely with loose coal and it appeared that coal accumulations had been present for several days. The violation was serious because it exposed employees to fall hazard which could have resulted in serious injury or death.).

Citation No. 6672786 charges a violation of § 77.1608(b) because the spoil dump site near the employee parking lot "has an extensive cracking." The cracks measure up to 18 inches wide by 27 inches deep, for a distance of approximately 200 feet. The inspector observed a dump truck back up between the crack and the face of the dump site. There was the potential for a failure of the ground to support the weight of the dump truck. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the citation to non-S&S with a reduction in penalty from $3,405 to $207 because the condition was "not likely to result in an accident considering the size and location of the crack in relation to the size and location of the highwall." The decisions bear out the fact that spoil dumps with cracks may well be cited as significant and substantial. *Kerry Coal Co.*, 17 FMSHRC 2110 (Nov. 1995)(ALJ)(A surface coal mine operator committed an S&S violation of § 77.1002, which requires "necessary precautions" to minimize the possibility of spoil material rolling into the pit when box cuts are made. The unstable condition of the cited spoil banks showed that the operator had not taken "necessary precautions," and falling material included two- to three-foot rocks. The company's MSHA-approved ground control limit on the angle of spoil banks was clearly a "precaution" the company was required to observe under § 77.1002, and the inspector testified the spoil banks were not sloped at a 60-degree angle as required by the plan, but were cut close to a 90-degree angle. The violation was S&S because a front-end loader was operating under one spoil bank as rocks and other material fell near the machine. The violation also resulted from high negligence because the company knew or should have known of the sloping requirements and the "dangerous angle of the walls was obvious."); *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998), *aff'g in part, vacating and remanding in part, and rev'g in part* 17 FMSHRC 2086 (Nov. 1995)(ALJ)(An operator committed an S&S violation of § 77.1608(b) in connection with an April 1993 refuse pile collapse, based on photographs showing tire tracks going to the edge of the area that broke away and the testimony of a truck driver.); *Hobet Mining & Construction Co.,* 7 FMSHRC 1175 (Aug. 1985)(ALJ)(Operator committed an S&S violation of § 77.1608 where inspector observed truck dumping too close to edge of embankment in presence of foreman. The hazard was reasonably likely to cause serious injury and the foreman's failure to abate hazard demonstrated serious lack of reasonable care.); *Zapata Coal Corp.*, 6 FMSHRC 2639 (Nov. 1984)(ALJ)(Dumping of coal 30 feet beyond edge of high wall is significant and substantial violation of § 77.1608(b) requirement that dumping occur at safe distance back from edge of bank which may fail to support truck weight.).

The Secretary has not provided sufficient information to determine if the six citations listed above should be modified to non-S&S violations. A significant and substantial violation is described in section 104(d)(1) of the 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)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987)(approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, the Commission provided additional guidance:

> 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., Inc.*, 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).
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> 7 FMSHRC 1125, 1129 (Aug. 1985).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

In the Motion to Approve Settlement the Secretary does not state a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For example, in the electrical violations listed above, the Secretary does not present a factual bases to show that there was not a possibility that a miner would suffer electric shock if the condition continued as it was found. Similarly, in Citation 6672746 the Secretary did not provide a bases to understand why it is believed that someone smoking in an area where flammable or combustible materials were, does not present a possibility of a fire or explosion and of someone being injured as a result. There is no basis presented to reduce the original penalty for this citation from $42,944 to $362. The Secretary gives me little information to believe that an accident will not occur as alleged in Citation No. 6672786. The same is true of each violation that is proposed to be modified to non-S&S.

Citation No. 6672765 charges a violation of § 77.210(b) because a delivery driver was observed standing in the bed of a pickup truck while a miner was hoisting a 1100 pound load from the bed of the pickup. The driver had both hands on the load and no tag-line in place as the load was removed from the bed. The inspector determined that the violation was S&S and marked the gravity as "reasonably likely" to result in a "fatal" injury. The Secretary has proposed to modify the violation to "permanently disabling" with a reduction in penalty from $3,996 to $1,795. The reason given is that the injuries would not be fatal due to the position while the load was being moved.

Citation No. 6672787 charges a violation of § 77.1608(e) because no berm, backstop or spotter was in place at the spoil dumpsite. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "fatal" injuries, and found moderate negligence. The Secretary proposes to modify the violation to "lost work day" with a reduction in penalty from $3,405 to $1,026 because the truck would "have gotten stuck in the soft dump site material before it could have backed off the highwall."

Citation No. 6672772 charges a violation of § 77.502 because an electrical box "[was] not being maintained in safe condition." When the electrician opened the box, water poured out, and it was seen that water and coal dust had accumulated inside the box where energized wires were spliced. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the citation to "lost workdays" with a reduction in penalty from $3,996 to $1,203 because several safety features would have to fail before a miner would be fatally injured.

The above three citations are proposed to be changed by modifying the gravity from fatal to some other designation without providing a basis for doing so. The facts as set forth in the citations provide a basis for designating the injuries as fatal on their face. The Secretary has not provided sufficient information to prove otherwise.

The two citations that are proposed to be vacated are Citation No. 6672747 for a grease truck with flammable materials stored without a proper warning sign, and Citation No. 6672749 for lack of task training of the miner who was caught smoking near combustible material. The Secretary vacated these citations because "the cited condition was not found to be a violation of any applicable standard."

I have considered the representations and documentation submitted and I conclude that the proposed settlement is not appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **DENIED.**

Margaret A. Miller
Administrative Law Judge

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