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August 27, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. MARFORK COAL COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-374 A.C. No. 46-09092-338087 Mine: Allen Powellton Mine

DECISION AND ORDER

Appearances: Emily O. Roberts, Office of the Solicitor, U.S. Department of Labor, Nashville, TN for Petitioner;

Arthur Wolfson, Jackson Kelly PLLC, Pittsburgh, PA for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against Marfork Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves 16 citations, with penalties assessed pursuant to section 110(i) of the Mine Act. The parties have agreed to settle 15 of the 16 violations, leaving one for decision here. The parties presented testimony and evidence at a hearing held on July 9, 2014 in Charleston, West Virginia.

The parties agree that Marfork Coal Company, Inc., a subsidiary of Alpha Natural Resources, Inc., owns and operates the Allen Powellton Mine located in Raleigh County, West Virginia. Marfork is an operator as defined by the Act, and is subject to the jurisdiction and provisions of the Mine Safety and Health Act. The parties further agree that the mine is a large operator and payment of the penalty as assessed will not hinder its ability to continue in business. Exhibit G-1.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Ordie J. Sigmon issued Citation No. 7183407 on August 27, 2013 during the course of a regular inspection. The Secretary asserts that the Respondent violated 30 C.F.R § 75.1722(b), which requires guards at conveyor drives and pulleys to extend a distance sufficient

to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. The citation states, in pertinent part, that ". . . the guarding around the tail roller did not extend a distance sufficient enough to prevent miners from contacting the rotating moving parts of the tail roller . . . . The tail roller shaft extended outward 2 1/2 inches and the guarding . . . was left unsecured." Inspector Sigmon indicated that the violation was significant and substantial and the negligence was moderate. The proposed assessed penalty amount is $1,111.00.

While traveling along the belt line of the Powellton Mine, on August 27, 2013, Inspector Sigmon observed a turning shaft at the tail pulley that was not completely guarded. Mine Inspector Ordie Sigmon has been an inspector for 2 years and, prior to that time, worked in the mining industry for 15 years. The mine does not dispute that the guard was in the condition as described by Inspector Sigmon, and the mine's only witness agrees that the shaft at the tail pulley was partially covered by a piece of rubber belt used as a guard. The parties agree that the shaft is located under the feeder and that it was guarded, at least partially, with a piece of rubber belt, but that a portion of the moving shaft extended a number of inches beyond the rubber guard. The rubber guard was close to 24 inches long but, to cover the entire area, abate the citation, and avoid contact with the moving part, the guard was extended to a length of about 36 inches. The inspector explained that the rubber guard was not secured and the mine witness agreed that the shaft had pushed the guard out from its original position. Further, Sigmon explained that at one time the guard had been long enough to cover the entire area, but had been cut or trimmed with a knife, most likely as it wore away. The inspector surmised that the rubber belt guard had been somehow altered during a recent belt move. The mine agreed that the belt line is moved every other day but did not address any changes that had been made to the rubber guard. The area along the belt line is traveled every shift and, during most shifts, it is shoveled or the area around the feeder, tail pulley and shaft is otherwise cleaned.

Like most guarding violations, the dispute here is whether the area around the moving parts was accessible to any miner and, if so, would a miner come into contact with the shaft or tail pulley and become entangled in the moving parts. It is undisputed that the area around the pulley and shaft often has spillage that must be cleaned, and that cleaning is done with a four foot long shovel, usually while the miner is on his knees to clean under and around the belt. Cleaning of the area around the belt line, and specifically around this feeder and tail pulley, is conducted while the belt is in operation and it is done nearly every shift, and sometimes more often. Here, the evidence demonstrates that with the 24 inch long rubber guard in place, there remains room for a miner to put his arm inside to such an extent that it would contact the moving parts. It would be difficult to do that after the guard was extended to a length of 36 inches, based simply on the length of the average human arm.

Jeremy Ball, the mine foreman at the time of the violation, explained that, in his view, the moving parts could not have been contacted even before the citation was issued and the mine extended the rubber guard. He reasoned that because the shaft and tail pulley are under the feeder, and the miner is using a four foot long shovel, the moving parts would not be contacted. Ball indicated that the uncovered part of the shaft was visible when approaching the area from the front, but not from the side. He further indicated that the tail roller was completely covered by the guard and it was only a part of the shaft that remained unguarded. It is his view that a

miner would have to want to reach the shaft, and it would not happen accidently or when cleaning or greasing the belt area. While the belt is shut down during maintenance or repairs, it continues to operate while cleaning is conducted around the tail pulley area.

Ball did not address why the guard was not secured as Sigmon indicated it should be, but the representative of the mine who accompanied Sigmon explained at the time that someone must have forgotten to secure the guard when it was last moved. Ball explained that the belt is moved every few days and Sigmon confirmed that leaving the guard unsecured after a move made it even easier for a miner to access the moving part. Sigmon testified that the goal is to have the guard be of sufficient length so that a miner will not contact the moving parts if he reaches an arm in to remove debris or is shoveling and gets pulled in by the tail pulley. Leaving enough room to shovel is important, but it must be narrow enough that an arm cannot fit into the guard while the belt is operating.

After considering the testimony of both witnesses, I find that the Secretary has met her burden to show a violation. The rotating shaft area did not have a guard that extended its entire length. Instead, the rubber guard was 24 inches long and should have been 36 inches in length. Hence, the guard, as observed at the time of the violation, did not extend a distance sufficient to prevent contact with the moving parts of the shaft and tail roller. I find further that the violation was significant and substantial.

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" to be:

> 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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the 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 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal,* 33 FMSHRC 2357, 2365 (Oct. 2011) where it "emphasized the well-established precedent that 'the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.'" (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The S&S determination should also include a 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 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Based on the witness testimony and the documentary evidence, the mine argues that this violation is not S&S for two reasons. First, no one would get close enough to contact the moving part during the routine cleaning of the belt and, second, the area was protected by the feeder that sat on top of the tail roller and shaft. The Secretary argues on the other hand, that there was room not only for a shovel to contact the moving part, but for an arm to reach under the guard, even though located under the feeder, and come in contact with the unguarded moving shaft. The belt line, and particularly around the tail pulley, is cleaned every shift while it is in operation and at times, more often. The miner normally must get on his knees to reach into the area under the belt to clean, giving him less stability while shoveling. It would not be uncommon to reach up to unclog the area around the tail pulley during the cleaning.

The Commission has determined that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Sigmon reaffirmed that conditions he observed, that is the turning shaft that was not completely guarded with a loose rubber guard, created a hazardous condition for anyone shoveling along the tail pulley area. A miner trying to dislodge rocks or coal from the tail pulley or shaft area could reach his arm into the area to a point where he could contact the moving parts. In addition, when shoveling under and around this area of the belt, the shovel could get caught in the moving shaft, pulling the miner off his knees and as far as the moving part. Contact with the moving shaft would result in broken bones, cuts, or even a crushing injury that could result in amputation. The resulting injury was reasonably likely to be permanently disabling.

This finding is consistent with other ALJ decisions. For example, in addressing a violation of 75.1722(b), a Commission ALJ found that failure to guard the end of the discharge roller at a conveyor drive was an S&S violation. The ALJ rejected the operator's argument that the low seam minimized the risk of tripping or falling because miners worked from their knees

and found that working while on their knees increased the likelihood of inadvertent contact because, among other things, it is more difficult to maneuver from that position. *Williams Brothers Coal Co.*, 24 FMSHRC 110 (Jan. 2002) (ALJ). The operator cites to a recent decision by an ALJ in which he found that a violation of 75.1722(b) was not S&S because a feeder sat on the belt, making the unguarded area difficult to reach. *Big Ridge Inc.*, 34 FMSHRC 63 (Jan. 2012) (ALJ). However, the ALJ in that case relied upon the fact that someone would have to crouch down to reach the unguarded area and there was no evidence that it was necessary to crouch, unlike here where the facts indicate that the miner must be on his knees to shovel under the belt. As the Commission stated in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), guarding standards should be interpreted to take into consideration a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions . . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). In doing so, that employee may reach into the tail pulley area to dislodge a rock, even with the belt in operation.

I have found that there is a violation of the mandatory standard and that the violation creates the discrete safety hazard of contact with rotating moving parts on the tail roller of the conveyor belt. Given that the area around the shaft and tail pulley is cleaned while in operation every day, and sometimes more often, it is reasonably likely that someone will contact the moving part when shoveling or trying to dislodge coal from the belt. When contacting the moving part, the miner is likely to be pulled and, as a result, suffer broken bones or serious crushing injuries. Therefore, I find that the violation is significant and substantial.

II. 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 requires, that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 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 that includes a consideration of the penalty criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In the instant case, the operator is large, does not have an unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was moderate and, given the facts discussed above, I agree. I have discussed the gravity and S&S nature above and find that the $1,111.00 penalty proposed by the Secretary is appropriate in these circumstances.

The parties agreed to settle the remaining violations and I find the settlement to be appropriate. The terms of the settlement are as follows:

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
7183405	$1,111.00	$700.00	Reduce seriousness of injury from permanently disabling to lost workdays or restricted duty
7183406	$1,111.00	$1,111.00	Reduce seriousness of injury from permanently disabling to lost workdays or restricted duty.
9001693	$634.00	$634.00	None.
9001694	$2,282.00	$1,500.00	Modify the number of people from 13 to 7.
9001704	$2,901.00	$2,901.00	None.
9001707	$2,282.00	$2,282.00	None.
9001708	$5,503.00	$5,503.00	None.
9001709	$5,961.00	$2,500.00	Reduce probability of injury from reasonably likely to unlikely; Remove the significant and substantial designation.
9001712	$2,901.00	$2,000.00	Reduce the level of negligence from moderate to low.
9002149	$585.00	$585.00	None.
9002152	$2,282.00	$1,500.00	Reduce seriousness of injury from fatal to lost workdays or restricted duty; Modify the number of people affected from 20 to 12.
9002661	$2,901.00	$2,901.00	None.
9002662	$687.00	$500.00	Modify the number of people affected from 12 to 7.
9002665	$585.00	$585.00	None.
9002666	$3,405.00	$1,352.00	Reduce the seriousness of injury from fatal to lost workdays or restricted duty; Modify the number of people affected from 12 to 4.
TOTAL	$35,131.00	$26,554.00	

I accept the representations and modifications set forth both at hearing, and in the Motion to Approve Settlement and Order Payment. I have considered the representations and documentation submitted. I find that the modifications are reasonable and conclude that that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The Motion to Approve Settlement is **GRANTED**.

III. ORDER

Given my above findings, I assess a total penalty of $27,665.00 for both the settled citations and the citation addressed at hearing. The Respondent, Marfork Coal Company, is hereby **ORDERED** to pay the Secretary of Labor the sum of $27,665.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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