**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 11, 2009

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. VA 2009-29 |
| Petitioner | : | A.C. No. 44-07137-165421-01 |
| v. | : | |
| | : | |
| PATRIOT MINING, LLC., | : | Mine: No.2 |
| Respondent | : | |

**DECISION**

Appearances: Francine Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger:

**Statement of the Case**

This case is before the Commission based on a petition for assessment of civil penalty filed by the Secretary of Labor alleging the violation by Patriot Mining ("Patriot") of various mandatory safety standards set forth in Title 30 Code of Federal Regulations.

The matter was initially assigned to Judge Michael Zielinski, who scheduled the matter for December 9, 2008. On December 5, 2008 the case was re-assigned to the undersigned Judge, and was heard on December 10 and 11, 2008, in Bristol, Tennessee.

The scope of the hearing was limited, pursuant to the parties' agreement, to the issue of significant and substantial relating to the following citations: 6641392, 6641363, 6641381, 6641385, 6641379 and 6641354.[1] Also, Respondent challenged the existence of the condition or

[1]Patriot had filed a motion for an expedited hearing relating to the following " significant and substantial" violations; 6641354, 6641363, 6641369, 6641370, 6641379, 6641381, 6641385 and 6641392. The Secretary did not object to the motion. At the hearing, Respondent withdrew the request to expedite regarding Citation Nos. 6641369 and 6641370, and to have them litigated at a future date.

practices cited in Citation No. 6641392.[2]

I. Whether Citation Nos. 6641392, 6641363, 6641381, 6641385, 6641379 and 6641354 are significant and substantial

At the conclusion of the limited hearing, a bench decision was rendered which, with the exception of the correction of matters not of substance is set forth below:

A. Citation No. 6641392

1. Violation of 30 C.F.R. § 75.523-1(a)

Patriot operates an underground coal mine. A battery-operated scoop is used to transport materials down to the underground mine. The scoop is equipped with a parking brake. In addition a "panic bar" that consists of a bar on the left side, and another on the right side of the cab. If either of these bars is hit, it has the effect of de-energizing the equipment i.e. a breaker switch is thrown which completely cuts off electric power to the scoop.

On September 4, 2008, James Carroll, an MSHA inspector, inspected the scoop. After he tested the panic bar, he issued a citation alleging a significant and substantial violation of 30 C.F.R. § 75.523-1(a), which in essence, requires that all self-propelled electric face equipment used in active workings of underground mines, "shall be provided with a device that will quickly de-energize the tramming motors of the equipment in the event of an emergency." (Emphasis added).

On the morning of September 4, before the arrival of the inspector, the operator of the scoop, Jerry Tensel Freeman, was in the process of conducting his pre-shift examination prior to the use of the scoop. As part of his inspection he hit the panic bar in order to check the parking brake. The panic bar successfully put in operation the parking brake, which is one of its functions; however, Freeman felt that the parking brake needed adjustment to make it more firm, and he stopped his pre-shift examination.

After Freeman commenced to work on the parking brake, the inspector arrived on the section and asked Freeman to check the parking brake. He did it one time and it did not operate, i.e., it did not cut the power. According to Freeman, that day he hit the panic bar four times; three out of

[2]Regarding Citation Nos. 6641354, 6641363, 6641370, 6641379, 6641381, and 6641385, Respondent stipulated "... to the condition or practice as set out in the citation." (Respondent's Proposed Stipulations).

the four times it did work and did de-energize the equipment. After Freeman performed his test, the inspector hit the panic bar with normal pressure and it did not de-energize the equipment. He then used additional force and it did de-energize the equipment.

Regardless of whether Freeman tested the equipment four times or three times, it is clear that the panic bar did not consistently do what it was designed to do, i.e., de-energize the scoop in the event of an emergency. I find that the fact that it did function with the application of additional force equates to a lapse in time in de-energizing the scoop. Further, in investigations subsequent to the issuance of the citation, it was discovered that a certain piece of equipment that the panic bars were attached to, which was critical to the operation of de-energizing, had been bent and prevented the panic bars from being depressed quickly. Additional force was necessary. The bent piece was subsequently fixed, and the bar operated properly.

Based on all the above, I find that the evidence supports the finding of a violation in that the panic bar did not operate consistently and quickly. The fact that it didn't do it every time certainly indicates that it was not operating in the manner that it should in order to comply with the regulation.

The operator argues that Freeman was prevented from completing the examination, because he was in the process of his pre-shift examination, and had to stop the examination in order to comply with Carroll's requests. I note that Freeman testified and had he continued with the examination he would have fully tested the panic bar by hitting it on the left side and hitting it on the right side. Responds argues, as a defense to the citation, that had this been done he would have picked up on the fact that the panic bar was not operating quickly, and would have had it fixed. It is Respondents position that the citation should be dismissed.

Respondent relies on *Giant Cement Co.*, 13 FMSHRC 286 (February 18, 1991). (Melick, J.) I find that reliance on this case misplaced. In *Giant Cement, supra,* the issue before Judge Melick was not whether there was a violation of a standard dealing with equipment, not whether equipment was functioning in conformity mandatory with a regulation. Rather, the operator therein was charged with not having made corrections in a timely manner, and Judge Melick held that it was premature time to find a violation because the inspection had not been done yet. In contrast, the case at bar, the issue is not whether a violative condition was corrected in a timely manner. The operator herein was cited on the ground that a piece of equipment was in such a condition that it did not comply with a regulatory standard. It is too speculative to rely on the fact that this condition would have been picked up

on a pre-shift examination, and would have been acted upon, especially in light of the fact that at times the bar sometimes worked, and at other times sometimes it didn't work. It's just too hypothetical to rely on the independent judgment and action of a person as a way of defeating the violation.

For all these reasons, I find that the Secretary did establish a violation of Section 75.523-1, *supra*.

2. 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 the 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 825 (April 1981).

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Following the dictates of *Mathies, supra,* I find that the operator did violate a mandatory standard, and this contributed to the risk of an accident happening, i.e., a miner banging a head on a low roof or running over a cable. The key issue is the third factor in *Mathies*, i.e., whether the Secretary has established the reasonable likelihood of a of an injury-producing event.

The scoop at issue does not have a canopy. The average height roof is 48 inches, according to the inspector's testimony that was not contradicted. There are places where as measured by him, the height was only 42 inches. Thus there was a risk of the scoop operator coming in contact with the low roof and having to push the panic bar very quickly. If it does not work quickly, any risk of resulting injuries would be exacerbated. In addition, the inspector described various physical conditions that would tend to support a reasonable likelihood of an injury occurring event in addition to the low height of the roof. The inspector described poor visibility, the fact that there were, at times, persons, machinery, and cables in the vicinity of the operation of the scoop. None of this testimony was impeached or contradicted. He also indicated that as the battery of the scoop runs down it creates a condition where the equipment could become stuck in the tramming mode, and as a result, "the brake" will not stop the scoop. (Tr. 35). Taking into account a combination of all the above, I find the Secretary has established a reasonable likelihood of an injury-producing event.

The inspector also testified that there was a reasonable likelihood of various injuries that he described as contusions, abrasions, broken limbs, and also crushing injuries. This testimony was not contradicted or impeached.

For all the above reasons I find that the third and fourth elements of *Mathies* have been met, and that the Secretary has established that the violation was significant and substantial.

B. Citation No. 6641363

1. Violation of 30 C.F.R. § 202(a)

Citation 6641363, alleges a violation of 30 C.F.R. § 75.202(a), and sets forth the existence of various conditions in that formed the basis for the issuance of the citation. The inspector testified regarding the existence of these conditions. In essence, the Company does not dispute the existence of those facts. Under these circumstances and, I find that a reasonably prudent person familiar with the industry would have recognized that additional support is necessary, and so I find a violation of Section 75.202(a).

2. Significant and Substantial

In addition to the existence of a violation of a mandatory standard, because of a lack of adequate roof support in the cited area, I find that the violation contributed to the hazard of a roof fall. With regard to the third and fourth elements set forth in *Mathies, supra,* i.e., the reasonable likelihood of a roof fall and resultant serious injuries, I note a combination of factors in the record. In addition to the cited conditions, the inspector testified to three cracks in the roof in the area, each 15 feet long and between 1/8th of an inch and 1/4 of an inch wide. This testimony was not impeached or contradicted. The testimony of the operator's witnesses indicated that the main function of the roof bolt heads and plates was to prevent drawrock from falling. The inspector testified that he observed drawrock, approximately five feet by two to three inches thick, on the floor under the area cited. The witness for the company, Jerry Maggard, indicated that when he was in the area he did not see any drawrock on the floor. I don't find this testimony sufficient to contradict that of the inspector. Maggard was not in the area at the same time that the inspector was. He was there about 10 hours later. Thus, his testimony does not contradict what was seen by the inspector at the time that he saw it. Also, I find the latter's demeanor credible on this point.

With regard to exposure of miners to the hazzard, I note first of all that pumpers are required to go to the area once a week to examine a pump. Also, pre-shift examiners enter the area daily. I take cognizance of the argument of the company, in essence, that the shearing of the bolts and the creation of the conditions observed by the inspector would have been observed in any subsequent examination. Also, it is a standard operating procedure of the company to note any hazardous conditions and tag the area where they exist, in order for the conditions to be corrected. Whether that would have been done in this case is somewhat hypothetical. It depends upon the judgment of the respondent's examiner.

Considering all the above and the fact that the miner's are exposed to the cited area on a regular basis, I find that the third and fourth elements of *Mathies, supra,* have been met. I thus concude that the violation was significant and substantial.

C. Citation No. 6641381

1. Violation of Section 75.202(a), *supra*

With regard to Citation 6641381, the operator has stipulated to the existence of the conditions referred to in the citation which indicates the

existence of various conditions, including a rock brow. The inspector elaborated on that condition with regard to the hazards of a roof fall. A reasonably prudent person would have recognized that the roof was unsupported, and that additional support should have been provided. Since none was, I find a violation of Section 75.202(a), *supra*, as charged.

2. Significant and Substantial

Essentially for the reasons I set forth above, *infra*, I find that the first two *Mathies, supra,* elements have been met. However, there is a serious issue with regard to the third element of *Mathies, supra*. The evidence would appear to indicate that there was probably a reasonable likelihood of a rock fall. However, in order to fit within the third element the it must be established that there was a reasonable likelihood that the rock fall will result in serious injuries. There has to be evidence of exposure of miners on a somewhat regular basis. The inspector indicated that he saw tracks in the cited crosscut. However, the record is not clear. Although these tracks may have existed, was this a one-time event? There isn't any evidence to indicate that vehicles with tracks go into the area on a regular basis. The Secretary argued that individuals who perform examinations of the adjoining entries, (the track and the travelway entries), could enter the cited crosscut, and persons could traverse the crosscut to examine the pump. Certainly, these events are possible, but there isn't any evidence that travel into the area was reasonably likely to have occurred. The only evidence with regard to travel in that area based upon personal knowledge consists of the testimony of Mike Williams, the operator's mine forman. I found him a credible witness. He outlined his route of travel, both in examining the travelway and belt entries, and the pump which he does on a daily basis. In executing all these duties none of his routes took him through the crosscut at issue. He also indicated that in examining the travelway entry when he looks into the crosscut in question, he is able to observe violative roof conditions, without the necessity of entering into a crosscut. I find there is not any persuasive evidence that there was a reasonable likelihood that miners would enter the crosscut at issue on a somewhat regular basis.

Next, although there was a reasonable likelihood of a fall from the various conditions referred to, there isn't any evidence in the record that is persuasive with regard to the fall propagating out beyond the boundaries of the crosscut into areas where persons travel, i.e., the adjacent entries. There isn't any evidence as to the distance between the specific violative conditions, and the various entries. For all these reasons I find that it the third element of *Mathies, supra,* has not been established and that the violation was not significant and substantial.

D. Citation No. 6641385

1. Violation of Section 75.202(a), *supra*

I take into account the stipulation by the company that it does not contest the existence of the conditions set forth in the citation. Basically the facts alleged in the citation, and set forth by Carroll in his testimony do not in any significant fashion differ from those presented regarding Citation No. 6641381. So for the reasons I set forth in my decision with regard to that matter, I find that a violation of Section 75.202(a), *supra* has been established.

2. Significant and Substantial

I do not find any significant distinction in the facts presented here and the facts presented regarding Citation No. 6641381. There is evidence of tracks in the crosscut in issue. Carroll referred to several tracks, three and four-wheelers. However, there wasn't any evidence adduced as to or how often vehicular traffic goes through this crosscut. The record is silent as to whether the presence of tracks was a one-time occurrence. Also, were is not any facts adduced relating to the reason why the vehicles went into the crosscut. There was adduced evidence that there was a rock duster in the area, but there wasn't any evidence adduced as to how frequently the crosscut is rock dusted. The Secretary has the burden on all these issues. I find that there is not clear and convincing evidence that miners are required to be present in the crosscut at issue on a regular or frequent basis. For these reasons, I find that the third element of *Mathies, supra,* has not been met and, therefore, the violation is not significant and substantial.

E. Citation No. 6641379

1. Violation of 75.202(a), *supra*

The uncontroverted evidence indicates the presence of a brow that extended 10 feet. The evidence adduced yesterday established the hazard that this condition creates. Therefore, I find that a violation of Section 75.202(a), *supra*, has been established.

2. Significant and Substantial

A critical issue is presented with regard to the specific location of the violative condition. It appears to be the Secretary argument that even if the violative condition was on the "tight side" ("back side") of the entry, miners

who shovel and rock dust would be exposed to the hazzards contributed by the existence of a brow. I find that there is not clear and convincing evidence in the record to establish that miners do shovel or perform other duties on the back side of the belt. The record is silent regarding the distance between the belt and the rib on the tight side; whether it is physically possible to shovel and perform other duties on this side; and whether all such work can be performed from the wide side. There is not any credible evidence regarding under what conditions and how frequently work would have to be done on the tight side, if at all. The inspector offered his opinion regarding some of these issues. However, I find that the record does not contain any factual bases for his opinions. I focus on the fact that the Secretary has the burden of proving by a preponderance of evidence all elements of the citation at issue, specifically the third element of *Mathies*, *supra*, i.e., the reasonable likelihood of a rock fall causing a serious injury. In order to meet this burden the evidence adduced by the Secretary must be clear and convincing that the violative condition was on the wide side, which the evidence clearly establishes is the area where men regularly traverse to perform various duties, including maintenance.[3] However, the inspector's testimony on this matter was not consistent. He first indicated that the violative condition was on the wide side or the walk side. However, on cross-examination he indicated that after the citation was issued, in preparation for abatement six timbers were installed on the back side. Further, I note the inspectors' statement on cross-examination that six timbers were installed on the back side. However, later on in the trial he changed his testimony and indicated that timbers were set on the wide side. He attempted to explain that inconsistency by indicating, in essence, that he just did not recall. Because his testimony was inconsistent, I find it somewhat unreliable.

Also, the inspector's notes indicate conditions on the walkway side of the belt. (Gov't Exhibit 10). However, his testimony was not clear whether this statement was based on his recollection, or upon his having read notes that were taken by a trainee who was along with him in the inspection. It is not clear and convincing and that the statement was based strictly on his own recollection.

Maggard testified that he was the person who actually installed the timbers in question. He testified unequivocally that the timbers that were installed that formed the basis of the abatement, were on the off side and not on the walk side of the belt. I observed his demeanor and found him a credible witness.

[3]I note that examiners travel the wide side on a daily basis.

For all these reasons I find that the Secretary has not established by clear and convincing evidence that the violative condition was on the walk side. The weight of evidence establishes that the condition existed, but on the narrow side. The evidence has not established that miners are subjected to being in that area on a regular basis.

Based on all of the above, I find that the Secretary has not established the existence of the third element set forth in *Mathies, supra.* Thus, I find that the violation was not significant and substantial.

F. Citation No. 6641354

1. Violation of Section 75.202(a), *supra*

Essentially the reasons that I indicated with regard to the other citations involving issues of inadequate roof support, I find that there was a significant area of unsupported roof as depicted on Joint Exhibits 2A and 2B, and testified to by the inspector. The existence of these conditions were not put into issue by the operator. Therefore, I find the Respondent did violate Section 75.202(a), *supra*.

2. Significant and Substantial

First of all, I note that this is de novo proceeding and in analyzing the third element of *Mathies*, I have to ascertain if the evidence establishes that the violative condition was such that an injury producing event, i.e. a roof fall, was reasonably likely considering continued normal mining operations. The fact that the Company took action after the conditions were pointed out by the inspector really doesn't have much relevance. The analysis must focus on the relevant of conditions within the context of continued mining operations. I note that, as distinguished from the last two cases, the violative condition was on the wide side of a belt entry, an area where people travel. This side is where belt examiners are in the area daily. Also, shovelers work at that side. I find the existence of a hazzard of a roof fall existed along with exposure of miners. Certainly any rock falling on persons would cause a very serious injury. I find that the third and fourth elements of *Mathies, supra,* have been met.

Therefore, I find the Secretary has established the violation therein was significant and substantial.

II. Penalty

After the hearing, the parties entered into extensive settlement negotiations, and reached a settlement regarding the remainder of the citations in this case, and the penalties for the citations that were litigated. On November 25, 2009, after numerous extensions, the Secretary filed a motion seeking approval of the parties' agreement. The original assessment was $22,062 and the parties request approval of their agreement for civil penalties totaling $12,094.

I reviewed the parties' representations, along with all the evidence and filings in this case, and find that the settlement is consistent with the Federal Mine Safety and Health Act of 1977 ("The Act"), and I approve it.

## III. Order

It is **ORDERED** that within 30 days of this decision, the Respondent shall pay a total civil penalty of $12,094.00.

Avram Weisberger
Administrative Law Judge

Distribution:

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