FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577/FAX 303-844-5268

April 10, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. PEABODY CABALLO MINING, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2012-1311 A.C. No. 48-00993-293531 Rawhide Mine

DECISION

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Meredith A. Kapushion, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Peabody Caballo Mining, LLC, ("Peabody") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Gillette, Wyoming, presented closing arguments, and submitted case summaries.

The Secretary proposed a total penalty of $734.00 for two citations adjudicated at the hearing. Both citations were issued at the Rawhide Mine, a surface coal mine in Campbell County, Wyoming. For the reasons expressed below, I modify Citation No. 8475874 and vacate Citation No. 8475971.

On May 16 and 17, 2012, MSHA Inspector Wayne Johnson inspected the Rawhide Mine. Inspector Johnson has worked as a Mine Safety and Health Inspector for more than 7 years. (Tr. 15). He earned an Occupational Safety Degree from Marshall University and graduated from the Mine Safety and Health Academy. *Id.* Inspector Johnson testified that he has twenty-six years of experience in coal mining. He was accompanied by Jeff Wheeler, safety representative at the mine site, during the inspection. (Tr. 19).

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation 8475874

Inspector Johnson issued Citation No. 8475874 on May 17, 2012, for an alleged violation of section 77.206(e) of the Secretary's safety standards. (Ex. G-1). The citation alleges that a roof access ladder upon the MCC building did not have sufficient toe clearance at the ninth rung. Inspector Johnson determined that an injury was reasonably likely to occur, that such an injury could reasonably be expected to result in lost workdays or restricted duty, and that one person would likely be affected. Further, he determined that the violation was significant and substantial ("S&S") and the operator's negligence was moderate. Section 77.206(e) of the Secretary's safety standards provides that "[f]ixed ladders shall be anchored securely and installed to provide at least 3 inches of toe clearance." 30 C.F.R. § 77.206(e). The parties agree that the fixed ladder at issued was anchored securely. The Secretary proposed a penalty of $634.00 for this citation.

Inspector Johnson testified that the ninth rung was approximately 8 feet above the ground and there was 1 to 1 1/2 inches of toe clearance behind the rung. (Tr. 22-23). Inspector Johnson testified that Wheeler agreed that the measurements were accurate. (Tr. 24-25). Inspector Johnson testified that two horizontal insulated pipes, which ran perpendicular to the ladder, contacted the ladder at the same level as the ninth rung, thus interfering with the toe clearance on that rung. (Tr. 26-27). Inspector Johnson further testified that the insulation of the piping showed signs that miners' feet contacted the pipes while using the ladder. (Tr. 27-28).

Inspector Johnson chose to cite the ladder after learning that miners used it to maintain the heating and air conditioning system ("HVAC") upon the roof of the building. (Tr. 23-24). Adding to the danger posed by this allegedly hazardous condition, Inspector Johnson testified that miners carried large HVAC filters up the ladder every month. (Tr. 30, 68, 80-82). Because miners climbing the ladder could fall approximately 8 feet onto the hard ground below, Inspector Johnson testified that the injury could be permanently disabling. (Tr. 29). He marked the gravity as "lost workdays or restricted duty" in the citation. (Ex. G-1; Tr. 75-76).

Duane Myers, the Safety Manager for the Mine, testified that he had 35 years of experience in coal mining. (Tr. 114). He testified that miners could maintain three points of contact while ascending the ladder. (Tr. 129). He did not believe that miners climbed the ladder holding a HVAC filter; instead, they dropped a rope to raise the filter after climbing the ladder. (Tr. 153). He also disputed the measurement of space between the ladder rung and the insulated pipe, testifying that 3 inches of toe clearance existed if the measurement was taken at a slight angle. (Tr. 136-137). Myers admitted that if he were consulted when the ladder was installed, he would advise that it be placed where the pipes would not interfere with any of the rungs. (Tr. 141).

For the reasons set forth below, I uphold Citation No. 8475874 but reduce the level of negligence.

Parties' Arguments

The Secretary argues that the cited condition reflects a clear violation of the toe clearance requirement. The standard requires at least 3 inches, yet the inspector testified that the interfering pipes allowed no more than 1 1/2 inches. (Tr. 11). The Secretary argues that an injury was likely due, in part, to the severe weather that occurs in Wyoming. (Tr. 11, 30-31). The inspector believes that miners who climb the ladder are frequently carrying HVAC filters or tools. (Tr. 24, 30).

Peabody argues that there was insufficient evidence to support the violation. (Tr. 186). Peabody maintains that indentations upon the lower pipe insulation at the ninth rung prove that miners had sufficient toe clearance. It argues that these indentations establish that there was plenty of toe clearance when standing on the ninth rung of the ladder. (Tr. 186). There was no showing that miners were unable to maintain three points of contact at all times.

Peabody also disputed how much clearance between the rung and the pipe actually existed. (Tr. 109). Peabody noted that Inspector Johnson was the only person who climbed the ladder and took the measurement. (Tr. 64). Peabody also argues that a backguard surrounded the ladder, which prevented anyone from falling backwards. Peabody contends that the Secretary did not establish that miners carry HVAC filters, supplies, or tools as they ascend or descend the ladder. (Tr. 67). Further, Peabody noted the lack of evidence that the ladder is used during hazardous weather. (Tr. 70).

Discussion and Analysis

I find that the Secretary established a violation because the ladder did not provide the 3 inches of clearance that section 77.206(e) requires. I credit the testimony of Inspector Johnson that he accurately determined that the distance between the ninth rung and the pipes was between 1 and 1 1/2 inches.[1] His photographs corroborate his testimony. (Exs. G-3, G-5, G-8). I also find that the violation created a hazardous condition, even in ideal weather conditions when miners are not carrying tools or supplies up the ladder.

I find that the violation was S&S.[2] The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to

---

[1] Inspector Johnson could not remember if he measured the distance between the rung and the outer edge of the ladder's support structure that pressed against the pipes at the ninth rung or at a lower rung. I find that either measurement would accurately reflect the distance at issue. There is no dispute that he climbed the ladder to examine the conditions at the ninth rung.

[2] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard –

substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). I credit Inspector Johnson's testimony concerning the condition and find that the cited condition was reasonably likely to contribute to an injury. The Secretary established that the violation created a discrete safety hazard and satisfied the first two elements of the *Mathies* test. The commission has held:

> The test under the third [S&S] element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury . . . .

Musser Eng'g, Inc., 32 FMSHRC 1257, 1281 (Oct. 2010). The hazard contributed to by a violation of section 77.206(e) is the risk of falling. The location of the insulated pipe and the lack of clearance made it likely that a miner would not have a good foothold. The two insulated pipes abutted each other. It appears that miners placed the toes of their boots between the two pipes because the lack of clearance forced them to search for a better foothold. A miner is more likely to lose his balance and fall due to the poor foothold in the event of inattention, wind, or a variety of factors, which contributes to the risk of injury as a result of the 8 foot fall onto the hard ground below. While miners may maintain three points of contact much of the time, if they unexpectedly slip upon the ninth rung as a result of the poor foothold, they could fall and would likely sustain a serious injury.

I reject Peabody's argument that the backguard required by 30 CFR § 77.206(c) eliminated the severity of this violation. It is clear that the backguard would prevent a miner from falling further away from the ladder. (Tr. 67). The guard, however, would not prevent a miner from falling 8 feet to the ground or from becoming entangled in lower rungs of the ladder. A miner can easily be injured by a short fall from a ladder.

The evidence establishes that the most likely injuries would result in lost workdays or restricted duty, not a permanent disability. The gravity was serious. I also find that Peabody's negligence was low. The pipes and fixed ladder were present for many years without MSHA issuing a citation or commenting upon the situation.

Citation No. 8475874 is **MODIFIED** to reduce the negligence to low. A penalty of $500.00 is appropriate for this violation.

B. <u>Citation 8475971</u>

Inspector Johnson issued Citation 8475971 on May 16, 2012, alleging a violation of section 77.205(a). (Ex. G-10; Tr. 33). The cited standard states that a "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 77.205(a). The citation

---

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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

alleged that a travelway crossed below an elevated conveyor belt which brought coal from the crusher area into the silo. Inspector Johnson observed that there was no guarding under the conveyor belt's idlers. (Tr. 12, 36). Inspector Johnson testified that if the bearings for an idler roller failed, the roller could fall onto a miner using the travelway. (Tr. 36). One miner walked under the conveyor at least once per shift. (Tr. 37). Inspector Johnson determined that an injury was unlikely to occur but that if a miner were injured it would likely be permanently disabling. Further, he determined that the violation was not S&S and the operator's negligence was low. The Secretary proposed a fine of $100.00 for the citation.

Duane Myers testified that if an idler roller wears out it would not fail completely without obvious signs lasting for hours, such as smoke, worn belts, and noise. (Tr. 124-25). Even when they fail, Myers testified that the rollers used by Peabody at that location do not fall. *Id.*

Benjamin Ortiz, the maintenance planner for the mine, testified that he had never seen the type of idler roller used at the mine drop away from the belt in his 37 years of mining experience. (Tr. 157, 169). He told the court that miners inspect the idlers and pulleys at least once per shift and that more significant maintenance upon the system is performed quarterly. (Tr. 159). Further, he testified that the cited idlers are "the finest quality you can buy" because they utilize heavy-duty shafting, cans, and bearings. (Tr. 160). Therefore, he testified that idler failure is "not a very frequent occurrence" and that when they do fail, "it's a very slow failure" taking days or weeks. (Tr. 162-64, 175). Peabody would replace failing idler before it would fall.

Summary of the Parties' Arguments

The Secretary argues that the cited condition violates the safe access requirement enumerated in section 77.205(a). He argues that the idlers, which are mounted above the travelway, could fall to the floor because they were unguarded. (Tr. 12). The Secretary produced a picture from another mine, demonstrating how malfunctioning idlers present a falling hazard. (GX-20; Tr. 48). The Secretary also notes that idlers are guarded at other locations at the mine. (Tr. 47).

Peabody argues that the citation was issued upon a purely speculative theory that is unlikely to occur. (Tr. 190). Peabody notes that an idler would not drop unless both bearings suffered a catastrophic failure that was undiscovered for a long period of time. (Tr. 190). The roller would have to "heat to such a degree and for such a prolonged period of time that it would melt the medal rod that runs through the center of the roller. . . ." (Tr. 190). Even if such a failure occurred, Peabody argues that the resulting sights, sounds, smells, and vibrations would be obvious and it would remedy the condition before an idler could fall. (Tr. 190). Citing Ortiz's testimony, Peabody asserts that the high quality idlers used at this mine can operate for decades without the type of bearing failure that could present a falling hazard. (Tr. 191-92).

Discussion and Analysis

I find that the Secretary failed to fulfill his burden to show that Respondent violated section 77.205 and therefore I vacate Citation 8475971. At least one miner walks under the conveyor belt to a working place during most shifts, but the Secretary did not establish that safe

access was not provided and maintained by Peabody. I credit the testimony of Ortiz and Myers with respect to this citation. In their 72 years of combined experience, they never observed a return idler that fell at the mine. The theory proposed by the Secretary is too speculative to establish a failure to provide safe access.

I find that a reasonably prudent person would conclude that safe access was provided. The Commission has held that in interpreting a broadly worded standard "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted).

In *Big Sky Coal Co.*, Commission Judge Barbour noted that proof that an accident "*could*" occur "falls short of establishing [that] a reasonable person would have expected it. . . ." 20 FMSHRC 582, 587 (Jun. 1998) (ALJ) (emphasis in original). Similarly here, though I recognize that it is remotely possible that one of the three return idlers could fail and then fall, I hold that a reasonably prudent person would conclude that it was unlikely and that Peabody provided the safe access to the working place on the top of the silo.

The Secretary did not show that a return idler was likely to fail and fall onto the walkway. I find that the evidence establishes that such an event was virtually impossible due to the roller design and Peabody's examination and maintenance protocol. The photographs taken by the inspector demonstrate that the rollers were of substantial construction, properly installed, and in excellent condition. (Exs. G-12 – G-19). I find that Peabody provided safe access to the working places in the cited area.[3] I therefore **VACATE** Citation No. 8475971.

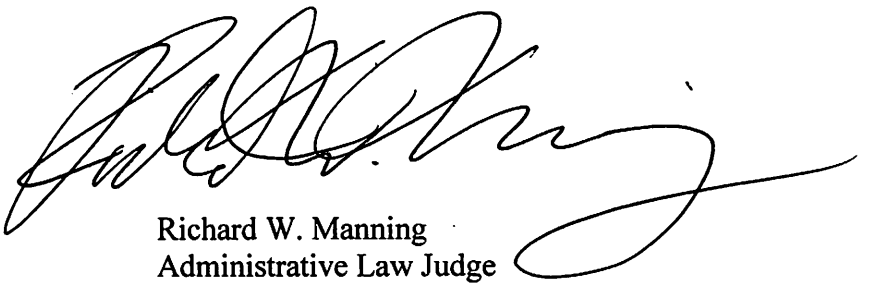
II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered Peabody's history of previous violations as presented in the Assessed Violation History Report. (Ex. G-24). At all pertinent times, Peabody Caballo Mining, LLC, was a large mine operator and its parent company, Peabody Energy Corporation, was also large. The violations were abated in good faith. The penalty assessed in this decision will not have an adverse effect upon the ability of Peabody Caballo Mining, LLC, to continue in business. The gravity and negligence findings are set forth above.

[3] The citation did not allege that miners could be injured by material falling from the belt because the belt transported clean coal that has been processed into "very fine coal." (Tr. 56).

III. ORDER

For the reasons set forth above, I **VACATE** Citation No. 8475971 and I **MODIFY** Citation No. 8475874. Peabody Caballo Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of $500.00 within 30 days of the date of this decision.[4]



Richard W. Manning
Administrative Law Judge

Distribution:

Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708. (Certified Mail)

Meredith A. Kapushion, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958. (Certified Mail)

[4] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.