FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 27, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-1312
	:	A.C. No. 15-16666-03523
v.	:	
	:	Mine No. 3
WILLIAMS BROTHERS COAL CO., INC., Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, and James C. Hager, Conference and Litigation Representative, Phelps, Kentucky, for Petitioner; Hufford Williams, Vice-President, Williams Brothers Coal Company, Inc., Pro Se, for Respondent.

Before: Judge Amchan

This case involves eight citations with total proposed civil penalties of $733, arising out of inspections of Respondent's No. 3 Mine in Eastern Kentucky in the fall of 1993 and spring of 1994. A hearing in this matter was held on May 4, 1995, in Prestonsburg, Kentucky. As discussed below, I affirm six citations as non-significant and substantial (S&S) violations and assess civil penalties in the amount of $300. Two citations and the corresponding proposed penalties are vacated.

Citation No. 4004328: Inadequate Number of Boreholes Drilled into Previously Mined Area

In early October 1994, several days prior to the issuance of Citation No. 4004328, Respondent encountered adverse roof conditions in the area designated as section 1 of its mine (Tr. 51-52, Exh. R-1). It decided to move from one side of the hill it was mining to another, and drilled new holes into the mine from the outside. Fifteen to 45 feet behind the new holes was an area, designated as section 3, which Respondent had mined and sealed 6 to 12 months previously, prior to moving to section 1 (Tr. 23, 52-53).

Respondent drilled one borehole into the side of the hill with a hand held hydraulic drill (Tr. 54-60). This borehole penetrated a crosscut of section 3. Williams Brothers then used a remote-controlled continuous mining machine to cut a hole 16 feet wide and 15 feet deep in the area in which it had drilled (Tr. 60-61).

Respondent let the opening air out overnight and the next morning sampled in the crosscut for methane and oxygen. Williams Brothers did not drill any more boreholes in this area but instead commenced mining in the entry into which it had originally drilled and three entries immediately to the right of this entry (Tr. 61-65, Exh. R-1).

On October 12, 1994, MSHA Inspector Gary Gibson issued Respondent Citation No. 4004328 alleging a S&S violation of 30 C.F.R. '75.388(c). Section 75.388(a) requires that boreholes be drilled when the working place approaches to within 50 feet of any area shown on surveys of the mine unless the area has been preshifted. Subsection 75.388(c) requires that boreholes be drilled in at least one rib at an angle of 45 degrees to the direction of advance, at least 20 feet in depth, and at intervals not to exceed 8 feet.

This regulation was promulgated to prevent explosions or inundations that might occur when mining proceeds into inaccessible areas that have not been subjected to a pre-shift examination. Such areas may contain dangerous accumulations of gases or water, 57 Fed. Reg. 20909 (May 15, 1992).

Respondent concedes that it did not comply with the letter of the regulation, but argues that its procedure fully accomplished the preventative purposes of the regulation. Williams Brothers submits that since it drilled into an area shown clearly on its mine map, once it penetrated the crosscut it was able to determine whether gas or water lay behind the other entries it intended to mine (Tr. 56-59).

I conclude that Respondent violated the regulation as alleged. Section 75.388(g) allows the use of alternative borehole patterns that provide equivalent protection to those specified in the cited regulation, if used under a plan approved by the MSHA District Manager. Since Williams Brothers did not get prior approval for its deviation from the standard's requirements, a violation is established.

Moreover, section 75.388(d) requires that when a borehole penetrates an area that cannot be examined, the operator must determine the concentrations of carbon monoxide and carbon

dioxide, as well as the concentrations of methane and oxygen. Since Respondent concedes that it did not test for these two gases (Tr. 70), its precautionary measures prior to mining in section 3 were obviously not equivalent to the precautions required by the standard.

On the other hand, I find that the Secretary has not met his burden of proving that the violation was "S&S." The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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.

Respondent's evidence indicates that it was not reasonably likely that an injury would occur from its failure to adhere to the requirements of section 75.388(c). Its contention that it could determine that there were no dangerous gases or accumulations of water behind the entries to the right of its borehole were not rebutted by the Secretary. I therefore affirm the citation as a non-S&S violation and assess a $50 civil penalty pursuant to the six criteria in section 110(i) of the Act, rather than the $75 proposed by the Secretary.

Citation No. 4218395: Inadequate Pre-Shift Examination Records

On April 25, 1994, MSHA representative Roger Williams examined Respondent's pre-shift examination book and determined that beginning on March 11, 1994, it did not indicate where methane measurements had been taken (Tr. 83-88). The book contained one daily entry stating that no methane had been detected (Tr. 88, Exh. R-2, page 1).

The regulation cited, 30 C.F.R. '75.360(g), clearly requires that the location and results of air and methane measurements be recorded in the preshift book. While I credit Respondent's assertion that other inspectors had accepted its method of maintaining the examination book, this does not negate the violation. Prior failure to enforce the standard does not preclude the

Secretary from enforcing its terms in the instant case.

While the records of methane testing were not properly recorded, there is no indication that such tests were not made. I therefore conclude that the gravity of this violation is sufficiently low that a $25 civil penalty is warranted, rather than the $50 proposed by the Secretary.

Citation No. 4016435: Inadequate Lighting

At approximately 5:30 a.m., on April 13, 1994, MSHA representative Jerry Abshire observed a miner loading a coal truck with a front-end loader. It was still dark and the only artificial light in the area was that provided by the front-end loader. The light was insufficient for the miner to see anyone behind or to the side of him (Tr. 118-121).

Respondent contends that other sources of light were available to the miner if he felt the lighting in this area was inadequate (Tr. 133-34). I credit the testimony of Inspector Abshire and find a violation. However, since the only work that normally would be performed in the cited area is the loading of

one truck by one miner, I concluded that it was not reasonably likely that an injury would result from the inadequate lighting (Tr. 130).

I affirm the citation as a non-S&S violation of the Act and assess a $25 civil penalty, rather than the $88 penalty proposed. The lower penalty is warranted because Respondent provided additional lighting (Tr. 133) that the miner could have used without difficulty. Therefore, I deem Respondent's negligence with regard to this citation to be extremely low.

Citation No. 4016438: Absence of Insulation Mats at the Pumping Station

On April 13, Inspector Abshire found no insulation mat or wooden platform in front of the power switch for Respondent's water pumping station (Tr. 139-41). The ground in front of the switch was wet (Tr. 140-41, 144).

Williams Brothers contends that it normally keeps a wooden pallet in front of the switch, but that someone had moved it (Tr. 150). Respondent immediately replaced the pallet when Abshire issued Citation No. 4016438.

I find a violation of 30 C.F.R. '77.513, as alleged by the Secretary. This regulation requires the use of insulation mats or wooden pallets in front of switches where shock hazards exist. Since the area in front of the water pump switch was wet, I conclude such a hazard was presented by the absence of the pallet.

The Secretary alleges a "S&S" violation and proposes a $147 civil penalty. However, I find that the evidence does not show that there was a reasonable likelihood of injury due to the violation. Therefore, I affirm the citation as a non-S&S violation.

There is no showing that the switch was not properly grounded. Proper grounding would cause the circuit breaker to cut off power to the switch if it becomes energized (Tr. 149). Furthermore, exposure to this switch was limited to the miner

who turned it on and off once on a daily basis (Tr. 141). However, given the seriousness of an injury should one occur, I assess a $100 civil penalty.

Citation No. 4016440: Accumulated Float Coal Dust and Oil on Front-End Loader

Inspector Abshire also observed a front-end loader on April 13, which had accumulations of float coal dust, oil and silicone dust on its center, hinged portion (Tr. 158). Electrical wiring in this part of the loader could ignite the dust and oil (Tr. 186)[1].

I therefore find a violation of 30 C.F.R. '77.1104, as alleged by the Secretary. However, I do not find that the Secretary has shown a reasonable likelihood of an ignition and fire and therefore affirm the citation as a non-S&S violation. I assess a $50 civil penalty, rather than the $88 proposed.

Citation No. 4018041: Unsecured Ladder without back guards

Respondent maintains a storage shed at its mine that is about 40 feet long and 12 feet high. At one end of the shed are two offices with ceilings about 8 feet off the ground. Above the offices is 4 feet of storage space (Tr. 208-09).

On April 13, Inspector Abshire observed an aluminum ladder 10 feet 4 inches long, resting at an angle against the top of the door frame of one of the offices. This door frame was approximately 6 feet 10 inches above the floor (Tr. 207-210). This ladder was used about once a week to gain access to the storage area (Tr. 216).

Abshire issued Respondent Citation No. 4018042 alleging a violation of 30 C.F.R. '77.206(c). This regulation requires that steep or vertical ladders which are used regularly at fixed locations be anchored securely and provided with backguards. It is uncontroverted that the ladder in question was not secured at either the top or bottom, although it did have rubber skid-

[1]I credit the testimony of the Secretary's witnesses, Abshire and Harris, over that of Respondent's Hufford Williams, on this issue (Tr. 162, 165, 168-70, 182-86).

proof feet (Tr. 210). The ladder also did not have backguards.

What has not been clearly established is whether the ladder was sufficiently "steep" to make the regulation applicable. As the cited standard does not define "steep," the issue becomes whether a reasonably prudent mine operator familiar with the protective purposes of the standard would have recognized that the ladder in this case violated its requirements, Ideal Cement Company, Inc., 12 FMSHRC 2409 (November 1990). I conclude that this has not been established. I therefore find that the Secretary has not established that the ladder in question was steep and I vacate the citation and the proposed penalty.

Citation No. 4018042: Failure to test the torque on a sufficient number of roof bolts

On April 13, 1994, Inspector Abshire looked at Respondent's records and determined that on the previous day it had checked the torque (tightness) of 14 roof bolts (Tr. 224-25). He then issued Williams Brothers Citation No. 4018042, which alleges a violation of 30 C.F.R. '75.204(f)(5). The cited regulation provides:

> In working places from which coal is produced during any portion of a 24-hour period, the actual torque or tension on at least one out of every ten previously installed mechanically anchored tensioned roof bolts shall be measured from the outby corner of the last open crosscut to the face in each advancing section.

Abshire calculated that Respondent would have had to check the torque on 88 roof bolts to satisfy the standard (Tr. 230-31). This calculation was based on the fact that Williams Brothers was mining in 11 entries at the time of his inspection.

Respondent contends that Abshire miscalculated the number of bolts it had to check because it only mined in four entries in the 24 hours prior to instant violation (Tr. 246). Moreover, it argues that it did not advance 60 feet in each of these entries within that 24-hour period, thus suggesting that checking the torque on 14 bolts may have satisfied the standard.

I conclude that Respondent did violate the regulation. The standard requires checking the torque in all working places from which coal has been produced in the past 24 hours[2]. Thus, even

[2]Working place is defined in '75.2 as the area of a coal mine inby the last open crosscut.

if some of the four entries in which Respondent had mined had been developed before this 24-hour period, the operator was required to check the torque of one-tenth of the bolts in these entries, not simply the portion of the entries in which it had advanced in the last 24 hours.

I credit Abshire's testimony that each entry was 80 feet in length from the outby corner of the last open crosscut (Tr. 227-28). As each entry would have had about 80 roof bolts, Respondent would have had to check the torque on approximately 32 to comply with the standard (80 bolts x 4 entries = 320 bolts; one-tenth of 320 bolts = 32)(Tr. 228-31).

Abshire's testimony is also supported by the fact that the 14 bolts checked on April 12 were an unusually low number. On the days just prior to that, Respondent checked 40 to 60 bolts (Tr. 226). As there is no indication that production was unusually low on April 11-12, 1994, this indicates that an inadequate number of bolts were checked for torque on April 12.

This violation was cited as a non-S&S violation of the Act and a $50 penalty was proposed. Applying the criteria in section 110(i), I conclude $50 is an appropriate penalty and I assess a civil penalty in this amount.

Citation No. 4218395: Use of Blowing Ventilation in Contravention of Respondent's Ventilation Plan

On April 13, Inspector Abshire examined the No. 10 entry being mined by Respondent. He found the line brattice on the right side of the entry, leading him to conclude that Williams Brothers had used blowing face ventilation when mining in this entry, rather than exhausting face ventilation as required by Respondent's approved ventilation plan (Tr. 256-258, Exh. G-9).

When using exhausting face ventilation, the line brattice is placed on the left hand side of the entry (Tr. 260, Exh. G-9, p. 2).

When Abshire inspected entry No. 10, Respondent's continuous mining machine was extracting coal in entry No. 7. It had mined in entry No. 10 the day previously (Tr. 279). Line curtains are sometimes moved after coal extraction, however, there is no substantial evidence as to why the curtain in entry No. 10 was hung on the right side (Tr. 279-84).

I conclude that the evidence in the record is insufficient to establish that Respondent used blowing face ventilation when cutting coal in entry No. 10. Therefore, I vacate Citation No. 4018044 and the corresponding proposed penalty.

ORDER

The following citations are affirmed as non-S&S violations of the Act. The following civil penalties are assessed:

Citation No. 4004328	$ 50
Citation No. 4016435	$ 25
Citation No. 4016438	$100
Citation No. 4016440	$ 50
Citation No. 4018042	$ 50
Citation No. 4018395	$ 25

Citation Nos. 4018041 and 4018044 and the corresponding proposed penalties are vacated. Respondent shall pay the $300 in total penalties within 30 days of this decision. Upon such payment this case is dismissed.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Susan E. Foster, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

James C. Hager, Conference and Litigation Representative,
Mine Safety and Health Administration, 100 Ratliff Creek Road,
Pikeville, Kentucky 41501 (Certified Mail)

Hufford Williams, Vice-President, Williams Brothers Coal
Co., Inc., 415 Card Mountain Road, Mouthcard, KY 41548
(Certified Mail)

/lh