**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 21, 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. KENT 94-528 |
| | : | A.C. No. 15-17272-03512 |
| v. | : | |
| | : | Docket No. KENT 94-992 |
| SEXTET MINING CORPORATION, Respondent | : | A.C. No. 15-17272-03515 |
| | : | |
| | : | West Hopkins No. 11 Mine |

**DECISION**

Appearances: Anne T. Knauff, Esq., and Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Flem Gordon, Esq., Gordon & Gordon, P.S.C., Madisonville, Kentucky for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.' 801 et. seq., the "Act," charging Sextet Mining Corporation (Sextet) with four violations of mandatory standards and seeking civil penalties of $17,000 for those violations. The issue before me is whether Sextet violated the standards as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Order No. 3547919, issued pursuant to Section 104(d)(1) of the Act,[1] alleges a "significant and substantial" violation of

[1] Section 104(d)(1) reads as follows:

If, upon any inspection of a coal or other mine, an authoriz that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such

Footnote 1 Continued

the standard at 30 C.F.R. ' 75.517 and charges as follows:

> The trailing cable supply[sic] power (300 VDC) to the 10 S/C shuttle car company number CA 10 being operated on the A1 Unit MMU IDOO1 had heat damage to approximately 30 feet of cable with 70 places that the outer jacket and inner insulation was damaged exposing the bare phase conductors. Three other damaged places were found with bare exposed conductors in the remaining cable.

The cited standard, 30 C.F.R. ' 75.517, provides in relevant part that "power wires and cables . . . shall be insulated adequately and fully protected."

Ted Smith, a field office supervisor for the Mine Safety and Health Administration (MSHA) who has 24 years experience in the mining industry and as a coal mine inspector, was conducting a

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violation to be caused by an unwarrantable failure of such operator Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

routine health and safety inspection at the West Hopkins No. 11 Mine on October 9, 1993, when he issued the subject order. According to Inspector Smith, the cited 300 volt DC cable was being used to provide power to the shuttle car. The shuttle car had been used to transport coal from the face to the loading point and, when cited, was located near the feeder. The shuttle car was not then being used, however, since production had been halted under a "Section 103(k)" order. The cable was connected to the power center and to the shuttle car at the time it was cited and no warnings had been posted regarding the damaged cable.

Smith described the trailing cable as oblong shaped, two inches wide, 3/4 inch thick and 550-600 feet long. It consisted of an outer jacket with two phase wires inside protected by additional insulation. As the shuttle car travels to the face, some two to five crosscuts away, the cable ordinarily trails behind the shuttle car on a spool. Thus the cable would ordinarily be spooled-off when the shuttle car is operating at the face.

The outer insulation along the cited 30 feet was "very brittle" and "inflexible" according to Smith and cracks were observed in the cable every five inches as it was reeled in. It was cracked down to the bare phase wires and the cracks were up to 1/4 inch wide. According to Smith, the inner insulation was also cracked and the bare conductive wires could be seen inside. There were actually 70 locations with this damage observed along the 30-foot section of cable. Smith concluded that this damage was caused by excess heat.

Smith also cited three areas on the trailing cable with cut and abrasion damage. At these locations the conductors were also exposed with the copper phase wires observed with a cap lamp. On the basis of the above evidence, it is clear that the violation has been proven as charged and, indeed, Respondent acknowledges the violation.

Smith also opined that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on 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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial

> under National Gypsum the Secretary 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.
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> See also Austin Power Co. v. Secretary 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (

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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Since the violation is undisputed, it is clear that the shuttle car had been operating with this seriously damaged power cable. It may reasonably be inferred that it would also have been returned to service when production resumed. With 300 volts of direct current flowing through these cables there was clearly a discrete safety hazard.[2]

Inspector Smith also noted that the mine floor in the area in which the cable was being utilized was damp and would contribute to the leakage of power along the outer jacket of the cable and to persons nearby. Miners also handle the cable in the normal course of mining. There was also evidence that the defective cable could cause the frame of the shuttle car to become a shock hazard. As noted by the Secretary, there was ample power to cause heart fibrillation and serious injuries to a miner who would contact the defective cables or energized shuttle car. Under the circumstances and relying upon the credible testimony of Inspector Smith, I find that the violation was clearly "significant and substantial" and of high gravity.

[2] It is further noted that imminent danger withdrawal order No. 3547918, issued under Section 107(a) of the Act, was issued for the same conditions cited in the order at bar. That order has therefore become final and the assertions and the imminent danger findings therein may accordingly be accepted as true.

In reaching this conclusion I have not disregarded the testimony of Sextet's Safety Director Glenn Lutz that every person on the section had been issued rubber gloves. However, the usage of such gloves and their insulating ability remains at issue. In addition, such gloves would not necessarily protect persons leaning against an energized shuttle car.

Smith further concluded that the violation was the result of the operator's "unwarrantable failure" and high negligence. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987).

The Secretary seems to argue that since the heat damage to the cable was obvious and extensive, the condition had existed for a long period and should have been discovered and corrected. Smith also based his unwarrantability findings upon the fact that he had discussed with the mine superintendent and the chief electrician the previous May a number of similar defects in their trailing cables and about their cable maintenance program. The record also shows that Sextet committed 17 violations of the standard at issue within the two years preceding this violation. This evidence shows a serious disregard in the maintenance and/or replacement of its power cables. At a minimum this history and the specific prior warnings given by Inspector Smith placed Sextet on notice that greater care was needed with its power cables. Within this framework of credible expert evidence I conclude that, indeed, the violation was the result of aggravated negligence and "unwarrantable failure."

In reaching this conclusion I have not disregarded the testimony of Sextet witness and former coal mine inspector George Siri. Siri testified that he personally would have been unable to determine how long it would have taken for the amount of heat damage found on the cited cable. Given the credible expert testimony of Inspector Smith, however, I give this self-serving statement but little weight. I note, moreover, that even Siri agreed that the cited cable was compromised and should have been replaced. Siri also acknowledged that trailing cables are especially prone to heat damage on DC power and in particular where there is a significant amount of cable on the reel. He further agreed that when the cable loses flexibility and becomes brittle it should be replaced. I have also considered the testimony of Glenn Lutz that the entire trailing cable is visually examined during the weekly inspections. However, under the circumstances of this case, it may reasonably be inferred that such inspection had not been performed or had been performed

negligently.

Order No. 3547914, also issued pursuant to Section 104(d)(1) of the Act, similarly charges a violation of the standard at 30 C.F.R. ' 75.517 and alleges as follows:

> The trailing cable supplying 300 VDC to the CA 2 10SC shuttle car being operated on the No. 1 Unit MMU ID001 had 7 places with damage to the inner and outer insulation with the power conductors bare and exposed.

Sextet also admits to this violation but maintains that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure." According to Inspector Smith the cable cited in this order was connected to the cited shuttle car and the power center at the time of his inspection. There was no evidence that the car or cable had been tagged-out or that warnings were posted that the cable was defective. The damage to this cable was not the result of heat damage as in the previous violations, but rather from abrasions. Smith observed seven torn areas in the cable exposing both power conductors. Smith concluded that it was highly likely for serious injuries to result from this damage for the reasons previously stated regarding the prior violation charged in Order No. 3547919.

Smith also concluded that the violation was the result of "unwarrantable failure" because the damage was "very obvious." According to Smith the areas had been scalped away and anyone on the section could see the damage. Smith acknowledged, however, that this damage could very well have occurred since the previous required weekly electrical examination. Even considering the prior history, without establishing the length of time the damage had existed, I have difficulty finding the requisite aggravated conduct or ommission sufficient to support a finding of unwarrantability and high negligence. The order must accordingly be modified to a citation under Section 104(a) of the Act.

Citation No. 3856829, amended from an order issued pursuant to Section 104(d)(1) of the Act to a citation with reduced negligence under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 75.400 and charges as follows:

> Accumulation of combustible materials consisting of coal dust and loose coal ranging in depth of 1/2 inch to 3 inches in depth had been allowed to accumulate in entry on the 001-O MMU. Starting approximately 180 feet Entries outby th

connecting crosscuts to the last open crosscut. Accumulations were measured with a wooden folden [sic] ruler.

The cited standard requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Sextet acknowledges this violation but maintains that it was not "significant and substantial." The factual allegations in the citation establishing a violation are, therefore, accepted as true. MSHA Coal Mine Inspector Donald Milburn described the cited coal dust as black in color and concluded, therefore, that it was combustible. According to Milburn it was 1/2 inch to 3 inches deep in all nine entries and there was no rock dust on the mine floor. Milburn opined that the accumulations resulted from the overloading of haulage cars and that it had taken three production shifts to accumulate to that extent. He based this conclusion on an estimate that mining had advanced 50 feet per shift and, with 180 feet of accumulations, it would, therefore, have taken about three shifts.

Milburn noted that there had been no mining because of a "Section 103(k)" withdrawal order that had been in effect since 5:00 p.m. two days before on October 7, 1993. Milburn further noted that there had been an MSHA inspection of the same area of the mine and that earlier inspection had taken place around 9:00 a.m. on October 7. The mine was not then cited for the accumulations Milburn found but Milburn concluded that there had been sufficient time from the 9:00 a.m. inspection until 5:00 p.m. that day, when the 103(k) order was issued, for the coal dust and loose coal to have accumulated as he found it on October 9, 1993.

Milburn concluded that the violation was the result of moderate negligence based upon his opinion that the condition had existed for several days before the "103(k)" order had been issued. This testimony is, however, inconsistent with Milburn's testimony that the same unit had been inspected by another MSHA inspector on the morning of October 7, 1993, and that no accumulations were cited at that time. I note, moreover, and credit the testimony of Glen Lutz, that MSHA Inspector Oglesby had entered the mine at 9:00 a.m. on October 7 and had remained until 1:30 p.m. to complete his inspection. Under the circumstances the accumulations discovered by Inspector Milburn would likely have been created between 1:30 p.m. on October 7 and 5:00 p.m. on October 7 when the Section 103(k) order was issued.

Accordingly I find Sextet to be chargeable with lower negligence.

However, based upon the existence of combustible accumulations of coal dust and loose coal and considering the electrical violations cited on the same date in the same mining section there can be no doubt that this violation was "significant and substantial."

Citation No. 3856828, also amended from an order issued pursuant to Section 104(d)(1) of the Act to a citation with reduced negligence under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 75.402 and charges as follows:

> Rock dust has not been adequately applied to the mine roof, ribs and mine bottom on the 001-0 MMU starting approximately 180 feet outby the 1 thru 9 faces and including the No. 10 intake room entry and then continuing inby to 40 feet of faces and including connecting crosscuts. Three rock dust spot samples were collected to substantiate this violation.

The cited standard provides as follows:

> All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

30 C.F.R. ' 75.403 sets forth the quantities of rock dust required

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum.

Inspector Milburn testified that although there was some rock dust on the roof and ribs in the cited area there was none

on the mine floor which was black in color. According to Milburn, the black color indicated inadequate rock dusting and that it was combustible, i.e. it would support a fire or explosion. If it had been properly rock dusted, it would be gray or white. Milburn collected three rock dust samples in the intake air courses at least 50 feet outby the face following the band sampling procedure. Two of the three samples showed low incombustible content at 26 and 22 percent. Milburn also observed that the cited area was generally dry and that such dry conditions would aggravate the fire hazard.

Milburn opined that the operator "should have known" of the violation because of the vast area involved, i.e. all of the entries Nos. 1 through 9. I note, however, the testimony of former MSHA Inspector George Siri, who observed many of the entries cited on October 9, 1993. According to Siri, these areas were not problematic. In addition, as previously noted, MSHA Inspector Oglesby had inspected the same area until 1:30 p.m. on October 7, 1993, and found no violations. Moreover, from 5:30 p.m. on that date until the time of the inspection by Milburn, there had been no production. Under the circumstances I find lesser negligence for the violation.

For the same reasons previously noted with respect to Citation No. 3856829, I find that this condition did, however, constitute a "significant and substantial" violation. The same hazards existed and were reasonably likely to cause serious injuries.

Considering the criteria under Section 110(i) of the Act I find that the following civil penalties are appropriate:

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| Order No. 3547919 | $8,500 |
| Citation No. 3547914 | $500 |
| Citation No. 3856829 | $500 |
| Citation No. 3856828 | $500 |

## ORDER

Order No. 3547914 is hereby modified to a Citation under Section 104(a) of the Act and is **AFFIRMED** as modified. Order No. 3547919 and Citation Nos. 3856829 and 3856828 are **AFFIRMED** and Sextet Mining Corporation is hereby directed to pay civil penalties totalling $10,000 within 30 days of the date of this

decision.

Gary Melick
Administrative Law Judge

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