

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 17, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-214
Petitioner	:	A.C. No. 15-03178-03789
v.	:	
	:	Ohio 11 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Hodgdon

On January 30, 1998, the Commission issued a decision in this case reversing my conclusion that an escape of methane from a cut-through core drill hole into a crosscut being mined between the No. 5 and 6 entries on the 004 section did not constitute an unplanned inundation of gas requiring the immediate reporting of the accident to the Secretary's Mine Safety and Health Administration (MSHA). *Island Creek Coal Co.*, 20 FMSHRC 14 (January 1998). Finding that Island Creek did violate section 50.10, 30 C.F.R. ' 50.10, by not reporting the accident, the case was remanded to me for assessment of an appropriate civil penalty. @ *Id.* at 26.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$1,000.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that payment of the proposed penalty would not affect Island Creek's ability to remain in business. (Tr. 33.) The file indicates that while the mine is small to medium sized, its controlling entity is a very large company. The file also indicates that Island Creek's history of prior violations is good. There is no evidence that the company did not abate this violation in good faith, so, to the extent it is relevant for a reporting violation, I find that Island Creek demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

The next criterion to be considered is the gravity of the violation. The inspector found the violation to be a significant and substantial one, affecting one person with the reasonable likelihood of suffering an injury that would result in lost workdays or restricted duty. Notwithstanding the inspector's characterization of the violation as significant and substantial, there has been no finding on that issue in this case. Since resolution of the issue affects a determination on the gravity of the violation, I find the violation to have been significant and substantial for the reasons set forth below.

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector's testimony concerning this issue was as follows:

THE COURT: Mr. Coburn, how did the failure to immediately report this accident make this violation significant and substantial?

A. Because by the time we arrived at the mine was fourteen hours later. We had no idea what was coming out of the bore holes, what the people were that were exposed and what they were exposed to, what controls had been done on the section and everything

THE COURT: Well, what would have happened if they had reported it immediately?

A. We would have issued a (k) order and followed the steps about removing the miners or whatever was necessary. They would have to have plans about what they were going to do about removing the miner and other people.

. . . .

I would not have allowed the miner to be removed under its own power.

(Tr. 111-12.)

The Commission has held in this case, although not in connection with this issue, that MSHA needs to know immediately about intrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life. Notification is one of the necessary first steps following an accident that enables MSHA to take appropriate action. @ *Island Creek* at 22. In view of the inspector's testimony and this statement, I conclude that the failure to immediately report the accident made it reasonably likely that a reasonably serious injury would result from the accident. Therefore, I conclude that the violation was significant and substantial. @ For the same reasons, I conclude that the gravity of the violation was serious.

The final penalty factor to be considered is negligence. The inspector described the level of negligence as moderate. @ The Commission held, albeit not on this issue, that the conditions in the mine presented a safety hazard that should have alerted Island Creek to the necessity of immediately reporting the incident as an accident to MSHA. @ *Id.* at 24. It also held that the actions and stated views of Island Creek representatives support the notion that Island Creek should have been aware that the core drill hole cut-through was not a routine methane release, but rather an incident that needed to be reported under section 50.10. @ *Id.* at 25. Accordingly, I conclude that Island Creek was moderately negligent in not immediately reporting this incident.

Taking all of these factors into consideration, I conclude that the \$1,000.00 penalty proposed by the Secretary for Citation No. 3859779 is appropriate.

ORDER

Accordingly, Island Creek Coal Company is **ORDERED TO PAY** a civil penalty of **\$1,000.00** for the violation of section 50.10 set out in Citation No. 3859779 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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