FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 29, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 96-171
	:	A. C. No. 15-17487-03525
v.	:	
	:	No. 3 Mine
BLACK STAR MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tenneesee, and James C. Hager, Conference and Litigation Representive, Mine Safety and Health Administration, Phelps, Kentucky, for the Petitioner;
Milford Compton, Owner, Black Star Mining Company, Inc., Phelps, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Black Star Mining Company, Inc., (Respondent) of various mandatory safety standards. Pursuant to notice, the case was heard in Paintsville, Kentucky on June 27, 1996.

Findings of Fact and Discussion

I. Citation No. 4234310.

At the hearing, a motion was made to approve the settlement that the parties had reached regarding this citation. Respondent has agreed to pay $50, the full amount of the proposed penalty.

Based upon the documentation in the file, and the assertions of the Secretary, I conclude that the proposed settlement is appropriate considering the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (Athe Act@). Accordingly, the settlement is approved, and the motion is granted.

II. Citation No. 4506332.

At the hearing, a motion was made to approve a settlement that the parties had agreed to regarding this citation. Initially, the Secretary had sought a penalty of $690. The parties have agreed to settle this matter for $363. I have considered the representations made at the hearing in support of the motion, as well as the documentation in the file of this case. I conclude that the settlement is appropriate within the terms of the Act, and accordingly the motion is granted.

III. Citation No. 4006727.

A. Violation of 30 C.F.R. ' 202(a)

On January 26, 1996, MSHA inspector Larry Little inspected the No. 5 entry at Respondent=s No. 3 Mine. At a point approximately sixty-five feet inby survey spad No. 563, Little inserted a stratascope up into the roof of the mine through a one inch diameter test hole that had been bored up into the mine roof. Utilizing the mirrors of the stratascope, Little observed horizontal cracks, or separations, at three different levels. He indicated that a crack twelve inches above the bottom surface of the roof was a quarter inch wide. Another crack twenty-five inches above the bottom surface of the roof was between an eighth and a quarter inch wide. A crack seventy-two inches above the bottom surface of the roof was approximately one inch wide.

The only roof support in the area was a series of seventy-two inch resin bolts that were on four foot centers. Little opined that there was inadequate support to support the cracks that were located seventy-two inches above the bottom of the roof. He indicated that the separations that he saw have a tendency to cause the roof to fall. In this connection, he noted that on January 12, 1996 and on January 16, 1996, roof falls had occurred in two areas approximately 200 to 300 feet outby the area in question.

Little issued a citation alleging a violation of 30 C.F.R. ' 75.211(c). At the hearing, Petitioner moved to amend the citation to allege a violation instead of 30 C.F.R. ' 75.202(a). This motion was not objected to by Respondent, and accordingly

was granted.

30 C.F.R. ' 75.202(a) provides as follows: AThe roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.@

Little conceded that Respondent provided for more roof support in the area in question than called for in its roof control plan.[1] Specifically, Little indicated although the roof control plan allows the entries to be twenty feet wide in the area in question, Respondent narrowed the entries[2] which resulted in a larger area of coal pillars providing additional support. The same result was obtained by lengthening the distance between the centers of crosscuts to one-hundred feet. Also, Respondent had initially bolted the area with forty-two inch rods, but then provided additional support with the use of seventy-two inch resin bolts. In general, these bolts bond the levels of strata in the roof to form a beam which strengthens roof support. Also, the resin in the bolts seeps into any cracks in the roof to provide further binding of the strata.

Respondent did not impeach or contradict the testimony of Little regarding the presence of cracks at three different levels in the roof. Although the seventy-two inch bolts would likely bind the strata between the bottom of the roof up into the roof to a point seventy-two inches above the bottom of the roof, it would appear not to have any binding affect on roof strata more than seventy-two inches above the bottom of the roof. Little opined that there was inadequate support for the crack that was located at a point seventy-two inches above the bottom of the roof. This opinion was not specifically contradicted by Compton. Also, although there were no visible signs of problems with the roof in the cited area such as pressure on the plates of the bolts, ribs falling off, floor heaving, or the roof flaking, Respondent did not specifically impeach or contradict Little=s testimony that the separations or cracks that he saw do have a tendency to cause the roof to fall. In this connection, I note

[1]The roof control plan would be the best evidence of its various provisions, but it was not offered in evidence.

[2]I accept the uncontradicted testimony of Milford Compton, Respondent=s President, that the entries in the area in question were seventeen feet wide. Compton indicated, in support of this testimony, that he had measured these entries the day after the citation was issued.

that two weeks prior to the date at issue a roof fall had occurred, and another roof fall had occurred ten days prior to the date in question. Both of these roof falls were located approximately 250 to 300 feet from the cited area.

Based on all the above, I conclude that it has been established that the roof in question was not sufficiently controlled to protect persons from hazards related to falls of the roof. I find, based upon the uncontradicted testimony of Little, that persons work in the area cited. I thus find that it has been established that Respondent did violate Section 75.202(a), supra.

B. Significant and Substantial

According to Little, the violation at issue was 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 C.F.R. ' 814(d)(1). 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 822, 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, 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).

In essence, as discussed above, the first two elements set forth in Mathies, supra, have been met. Petitioner must now establish the third element of Mathies, supra, i.e., the reasonable likelihood of an injury producing event. Specifically, Petitioner must establish that a roof fall was reasonably likely to have occurred. Respondent had experienced two roof falls in a two week period prior to the date at issue, in areas approximately four crosscuts outby the cited area. However, the areas that experienced the two roof falls were supported by only forty-two inch rods, whereas the cited area was supported by seventy-two inch resin bolts. Also, the areas that experienced the roof falls were significantly closer to the weakest area of the roof, ie., the area under the thinnest portion of overburden or the center of a hollow. In contrast, the cited area was located under overburden that was approximately 300 feet thick. Petitioner did not introduce the testimony of any eyewitnesses who had observed the previous roof falls and resulting cavities in the roof. Nor did Petitioner introduce the testimony of any persons who investigated these falls. Instead, Petitioner relied upon the reports of these falls (Plaintiff=s Exhibits No. 3 and No. 4), but did not proffer the testimony of the persons who prepared these reports. I thus assign very little probative weight to the factual statements in these reports concerning the Athickness@ of the roof falls.

In further analyzing the likelihood of a roof fall, I note, as set forth above, the lack of visible signs of problems with the roof, the use of seventy-two inch resin bolts, the high ratio of solid roof to cracks, and the presence of additional support provided by increased areas of coal pillars resulting from narrower entries, and increased distance between crosscut centers. Within the context of this evidence, I find that it has not been established that an injury producing event, i.e., a roof fall was reasonably likely to have occurred. I thus conclude that the violation was not significant and substantial.

C. Civil Penalty

Accordingly to Little, Respondent=s foreman had informed him on the date in issue that it had planned to install eight foot bolts on the third shift in the area cited. However, this person was not called by Petitioner to testify.

The cracks noted by Little could only have been observed with the use of a stratascope. There is no evidence that Respondent had knowledge of these cracks, or had seen them prior to the issuance of the citation. Since there were no visible signs of problems with the roof, there is no evidence that Respondent reasonably should have known of the presence of such cracks or separations. I thus find that it has not been established that Respondent was negligent regarding the violative conditions. Although a roof fall is a serious condition, any penalty to be assessed should be mitigated by the lack of any negligence on the part of Respondent. Considering the remaining factors in Section 110(i) of the Act, as stipulated to by the parties, I find that a penalty of $50 is appropriate for this violation.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay $463 as a total civil penalty.

Avram Weisberger
Administrative Law Judge

Distribution:

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