FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 23, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 96-20
	:	A.C. No. 15-07201-03671
v.	:	
	:	Docket No. KENT 96-64
HARLAN CUMBERLAND COAL CO., Respondent	:	A.C. No. 15-07201-03672
	:	
	:	Docket No. KENT 96-70
	:	A.C. No. 15-07201-03673
	:	
	:	Docket No. KENT 96-77
	:	A.C. No. 15-07201-03674
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 96-50
	:	A.C. No. 15-08414-03634
	:	
	:	H-1 Mine

DECISION

Appearances: Marybeth Bernui, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, Charles H. Grace, Mine Safety Health Administration, Barbourville, Kentucky, and Ronnie Russell, Mine Safety and Health Administration, Gray, Kentucky for the Petitioner; William A. Rice, Esq., and H. Kent Hendrickson, Esq., (on Brief) Rice and Hendrickson, Harlan, Kentucky for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging violations by Harland Cumberland Coal

Company (Respondent) of various mandatory safety standards set forth in title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held on May 29, 1996, in Johnson City, Tennessee.

I. Docket Nos. KENT 96-20 and KENT 96-50

Subsequent to the hearing, Petitioner filed a joint motion to approve settlement regarding these docket numbers. A reduction in penalty from $3,303 to $2,282 is proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

II. Docket No. KENT 96-64

A. Citation No. 4578060.

1. Violation of 30 C.F.R. § 75.202(a)

On August 21, 1995, Larry Bush an MSHA Roof and Ventilation Specialist, inspected the No. 1 entry at Respondent's C-2 Mine. This entry was ventilated by intake air and was traveled daily by miners going to and from the working face. He observed stresses and fractures in the roof in the area between crosscuts forty-one and forty-two. In addition, he observed cutters, or breaks, in the roof that extended along both ribs parallel to the length of the entry. Looking inby, the cutters on the right rib extended approximately 116 feet from crosscut forty-one to crosscut forty-two. The cutters on the left rib extended from crosscut forty-two outby beyond crosscut forty-one. Respondent's only witness, its Superintendent, Jeremy Madon, did not rebut this testimony regarding the condition of the roof and ribs. Nor did Respondent impeach this testimony. Accordingly, I accept Bush's testimony regarding his observations of the conditions of the roof.

According to Bush, the roof was supported by a series of roof bolts that were four feet apart, and located within four feet of the ribs. According to Madon, additional support was provided by thirteen straps that were thirteen feet long, and ten inches wide. The straps were placed approximately four feet apart, perpendicular to the ribs in the area between crosscuts forty-one and forty-two. Cribs had been stacked from the floor to the ceiling, at crosscut forty-one at the corner of pillar forty in the adjacent No. 2 entry, which was separated from the entry at issue by a sixty foot wide block of coal. Seven foot

long double shuck bolts had been placed in the ceiling of the No. 2 entry. Madon opined that the area in question was well supported, and that the placement of additional cribs would restrict the width of the eighteen foot wide entry by approximately three and a half feet. According to Madon, the restriction in the width of the entry might result in a vehicle coming in contact with the cribs, causing them to fall.

Bush indicated that on July 4, 1995, a rock fall occurred at Break forty-one in the No. 2 entry. He noted that the roof of the No. 2 entry, and the entry at issue contain the same strata, i.e., banded sandstone and slate, which he described as being "especially really slick" (Tr. 18). Bush indicated, in essence, that the cutters that ran "along both ribs" (Tr. 20), were four feet from the ribs. He explained that the bolts were insufficient as follows:

> The cutters along both ribs is an indication of failure of the roof, and a cutter will if not supported, continue to cut or break above that bolt, the rising anchorage of the bolt pattern. Once it breaks above that bolt length or above the four foot at that point, then the slick and sided slate with the banded sandstone layers will separate causing the roof to fail. A cutter along one rib is a bad condition, but both ribs, when it cuts along both ribs then it's -- you know, potential for failure is a lot greater. (sic) (Tr. 20-21).

Based upon the uncontested existence of stresses and fractures in the roof, as well as extensive cutters along both ribs, and the fact there was a rock fall at crosscut forty-one in the adjacent entry less than two months prior to August 21, I find that the roof and ribs of the area in question were not supported or controlled to protect the miners who travel the area from hazards related to rock falls from the roof and ribs. Accordingly, I find that Petitioner has established that Respondent violated 30 C.F.R. § 75.202(a) as alleged by Bush in a section 104(a) citation that he had issued on August 21, 1995.[1]

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[1] 30 C.F.R § 75.202(a), as pertinent, provides as follows "the roof, . . . 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."

2. Significant and Substantial

Bush characterized the violation he cited as 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).

I find that because there was no specific support for the extensive cutters, that the hazard of a roof fall was contributed to by the instant violation. Further, due to the extensive cutters on both ribs, the fact that there was a recent rock fall in the area of the forty-one crosscut in the adjacent entry, I find that it was reasonably likely that the violation would have resulted in an injury producing event. Madon opined that the roof was well supported, and that there was no likelihood of injury. However, he did not provide the specific basis in any detail for these opinions. They thus are not accorded much weight. Further, since persons regularly travel in the area, I find that it was reasonably likely that any injury sustained as a result of the violation herein would have been of a reasonably serious nature. I thus find that it has been established that the violation was significant and substantial.

3. Penalty

Although the violative conditions were of a moderately high level of gravity as they could have caused a serious injury, I find that a penalty to be assessed should be mitigated by the lack of proof that Respondent was negligent to more than a slight degree. Specifically there is no evidence as to how long the roof conditions, as observed by Bush, had existed. There is no evidence that these conditions were in existence when last examined. I find that a penalty of $700 is appropriate for this violation.

B. Citation No. 4253261.

On August 15, 1995, MSHA Inspector, William R. Johnson, instructed the operator of a scoop located at Respondent's C-2 mine, to deenergize the scoop by touching the panic bar. According to Johnson, if the panic bar is depressed, the electric system on the scoop should become deenergized, and the hydraulic break system should cause the vehicle to stop. Johnson observed that the operator touched the panic bar, but did not place his foot on the foot brake. The scoop's engine and lights were deenergized. According to Johnson, the terrain upon which the scoop was facing was on a one percent decline. According to Johnson, the scoop kept rolling for about ten feet and then "[j]ust coasted to a stop" (Tr. 61). According to Johnson if the scoop was left parked on the grade and unattended it could roll and strike someone. He also indicated that if ". . . something happens to the electrical system and contactor's stick, this scoop would be a runaway. And this has happened numerous times in mining. The panic bar would de-energize this machine but it would still keep going" (Tr. 62). Madon, who was present,

testified that the scoop traveled about ten feet after the panic bar was pressed,and then "kind of abruptly stopped" (Tr. 75).

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.523-3(b)(1) which provides as follows "automatic emergency-parking breaks shall-(1) be activated immediately by the emergency deenergization device required by 30 C.F.R. § 75.523-1 75.523-2:" (Emphasis added).

There is no evidence that the parking brakes were not immediately activited by the depression of the panic bar.[2] There is no evidence that there was any defect in any connection that had to be made between depression of the panic bar, and the operation of the parking brakes. At most, the evidence establishes that the parking brakes engaged after the scoop had rolled 10 feet subsequent to the depression of the panic bar. In this connection, I note that section 75.523-3(b)(2) provides that the automatic emergency parking brakes shall "engage automatically within 5.0 seconds when the equipment is deenergized;" (Emphasis added). Hence, it would appear that the regulatory scheme contemplates a two-step procedure. First the automatic parking brakes are to be "activated immediately", and then they must automatically engage within five seconds after the panic bar is depressed. The regulatory scheme is consistent with the common meaning of the term "activate". Webster's Third New International Dictionary (1979 Edition), ("Websters") defines "activate" as "to make active", whereas "engage", is defined in Webster's as "1(e) to come in contact or interlock with . . . also: to cause (parts) to engage."

For the above reasons, I find that the evidence fails to establish that the parking brakes were not immediately activated by the depression of the panic bar. I thus find that it has not been established that Respondent violated section 75.523-3(b)(1) supra, as alleged. Therefore Citation No. 4253261 is to be dismissed.

C. Citation No. 4253300

1. Violation of 30 C.F.R § 75.517

On August 15, 1995, Johnson inspected a cable on a shuttle car that was in operation. He observed that there were two cuts

[2]Johnson indicated that the brake calipers had mud and water on them. Madon indicated tht to abate the citation, the calipers on the disc were tightened to make them collapse quicker. However, there is no evidence that these conditions could have caused the brakes not to activate upon depression of the panic bar.

in the outer jacket of the cable. Each cut was approximately one and a half inches long, and one eighth of an inch wide. He indicated that one inner insulated lead was exposed. According to Johnson the cable was designed to be handled, and if there were to be a defect in one of the inner leads, stray current could escape and injure the person who was handling the cable.

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.517 which provides as follows: "Power wires and cables, . . . shall be insulated adequately and fully protected."

On cross-examination, Respondent elicited from Johnson that the trailing cable at issue is normally handled only when the power is off, and that its inner cables were well insulated.

I reject Respondent's defense. I find that in order for Section 75.517, supra, to be complied with, a cable must both adequately insulated, and fully protected. Since Respondent did not impeach or contradict Johnson's testimony that there were two cuts, each one more than an inch long and an eighth of an inch wide, I find that the cable was not adequately insulated and fully protected. I thus find that Respondent violated Section 75.517, supra.

2. Significant and Substantial

According to Johnson, the floor of the mine was wet. He opined that a person handling the 480 volt cable, and standing in a wet or muddy floor, could suffer an electrical shock or burn should stray current escape from one of the inner leads. He indicated that this could occur should there be a pinhole in one of the inner cables. He said that there is no way to know if the inner cables were damaged.

There is no evidence that there were any defects in any of the inner cables. Nor is there any evidence that there was any condition in existence which would have made it reasonably likely that an inner cable defect would have occurred. For these reasons, I find that it has not been established that an injury producing event was reasonably likely to have occurred as a result of this violation. I thus find that it has not been established that the violation was significant and substantial.

3. Penalty

There is no evidence as to how long the violative condition existed. Johnson opined that since he found the condition at 8:00 a.m., it had existed for at least since the start of the

shift at 6:00 a.m., and that someone should have known of the condition. Respondent did not rebut or impeach this opinion. I find that Respondent's negligence was only moderate. Considering the remaining factors as set forth in section 110(i) of the Act, I find that a penalty of $200 is appropriate.

D. Citation No. 4253297

1. Violation of 30 C.F.R. § 75.202(a)

a. Johnson's Testimony

On August 15, 1995, at approximately 6:30 a.m., Johnson observed "loose draw rock" (Tr. 105) approximately three feet by three feet by four inches thick in the center of the roof of the return entry on the 004 unit. The draw rock, which was located three crosscuts outby the face, was not attached to the roof. According to Johnson, an area at one end of the rock, approximately five inches by five inches, was supported by a strap. Johnson testified that the straps were located on four foot centers, and that there was another strap that was located near the other end of the rock, but was not supporting it.

Johnson issued a citation alleging a violation of Section 75.202(a), supra.

b. Respondent's Evidence

Respondent's witnesses, Eddie Sargent, the Safety Director, and Madon, who were present with Johnson, indicated that the draw rock was somewhat larger than testified to by Johnson, and was supported by two straps, one on either end of the rock. Both Sargent and Madon maintained, in essence, that the rock would not have fallen because it was supported by the straps. Madon indicated that in his opinion it was more of a danger to take the rock down than to have left it in position.

c. Discussion

Neither Madon nor Sargent rebutted Johnson's testimony that men were required to travel in the area below the cited draw rock. The evidence is in conflict as to whether the draw rock was resting on one or two straps. However, it is not necessary to resolve this conflict. All witnesses agree that the rock was not attached to the roof, and that there was a gap between the rock and the roof. Further there is basic agreement as to the

approximate size of the rock. None of the witnesses could establish the supporting capacity of the straps. However, it is significant that there was no evidence that the straps were designed to support draw rock. Indeed, Madon indicated that the main reason for using straps is to bond the roof together. [3]

Further, the potential instability of the draw rock might be inferred by the fact that when Madon removed the draw rock to abate the citation he indicated that he used a pry bar to "[k]ind of pushed it" (Tr. 129). There is no evidence that he had to use an inordinate amount of pressure to pry the rock loose or that it took a significant time to push it loose.

Hence, I find that even if the draw rock was resting on two straps, that it was not supported to protect miners traveling below the rock from the hazard related to a possible fall of this rock. I thus find that it has been established that Respondent did violation Section 75.202(a), supra.

2. Significant and Substantial

According to Johnson, and not contradicted or impeached by Respondent's witnesses, three or four pieces of draw rock, approximately, ten inches by ten inches by one inch, were lying on the floor in the area. Since there was no contradiction of Johnson's testimony that these items were pieces of draw rock, it might reasonably be inferred that they had fallen from the roof. Further, since the straps, upon which the draw rock in question was lying, were not designed to support loose unattached draw rock, I find that, over time, it was reasonably likely that the violation herein would have contributed to the hazard of a rock fall. Further, since miners regularly travel in the area, I find support for Johnson's testimony that it was reasonablely likely that miners would suffer reasonably serious injuries to their head or limbs, as a result of the violative condition. I thus find that it has been established that the violation was significant and substantial.

[3]After indicating that the main reason for the use of straps was to bond the roof together he was asked "[n]ot for loose material?" He answered as follows" [t]hat what we're trying to hold is draw rock when you use straps" (sic.) (Tr. 134).

3. Penalty

Respondent's witnesses noted the fact the draw rock was loose and not attached to the roof, and was resting on two straps. They did not contradict Johnson's testimony that this condition was obvious. Nor did they contradict or impeach his testimony that because there were a number of pieces of draw rock lying on the floor in the area, that the condition of the loose unattached draw rock "probably didn't just happen" (Tr. 113). I thus conclude that Respondent's negligence was more than moderate. I find that a penalty $500 is accordingly appropriate for this violation.

E. Citation No. 4253298.

1. Violation of 30 C.F.R § 75.516

On August 15, 1995, Johnson cited Respondent for violating 30 C.F.R. § 75.516, which provides that power wires " . . . shall be supported on well - insulated insulators . . . ." 30 C.F.R § 75.516-1 provides that "well-insulated-insulators is interpreted to mean well-installed insulators . . . ." At the hearing, Respondent admitted this violation. According to Johnson's testimony, a 480 volt cable attached to an energized charger was not hung on insulated hangers. Based on this testimony and Respondent's admission I find that Respondent violated 30 C.F.R § 75.516 supra.

2. Significant and Substantial

Madon indicated that "normally" the power center which contains the subject charger is moved every other day. He also indicated that the cable was in good condition. He opined that there was no danger to miners occasioned by the cable lying on the ground.

On the other hand, Johnson testified that although there was no draw rock in the area, the mine does have a history of draw rock being found in the roof. He also indicated that the floor was muddy, and the cable was lying in the floor. According to Johnson, miners travel in the entry at issue which serves as the travelway to the working face and also as the primary escapeway.

Within the above framework I find the violation was not significant and substantial. Specifically, it has not been established that there was a reasonably likelihood of an injury producing event (c.f., U.S. Steel, supra). In the case at bar,

in order for there to be an injury producing event, there must be some defect in the insulation of the cable. There is no evidence that the cable was not well insulated. There is no evidence of any defect in the outer insulation of the cable. Also, the record does not establish that there was a reasonable likelihood of the occurrence of an event which would have had a reasonable likelihood of breaking the insulation of the cable. Although there was a history of draw rock in the roof, Johnson indicated there was no draw rock in the area. Also, there was no evidence that the roof in the area at issue was not in good condition. Also Madon's testimony that under normal mining conditions the power center containing the charger at issue would be moved every other day, hence limiting exposure of the cable, was not contradicted, or rebutted, or impeached. I thus find that it has not been established that the violation was significant and substantial.

3. Penalty

Johnson opined that the cable lying on the floor was a "pretty obvious violation" (Tr. 149). He indicated that the foreman would have made a on shift examination of the area an hour prior to the issuance of the citation at 7:30 a.m.. He also indicated that men regularly work and travel in the area.

According to Madon only about thirty feet of the 200 foot cable was not hanging. He also indicated that the cable was in good condition, and that it gets knocked down inadvertently on occasion. I find that the condition was obvious, and that Respondent's negligence was more than moderate. I find that a penalty of $200 is appropriate.

F. Citation Nos. 4253258, 4253260, 4578055, 4578057, 4578058, 4253267, and 4253270

Petitioner filed a motion to approve a settlement agreement regarding these citations. A reduction in penalty from $3,018 to $1,835 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

III. KENT 96-70

A. Citation No. 4578562.

1. Violation of 30 C.F.R § 75.340(a)(1)

According to Johnson, when he inspected the 005 unit, he observed that a 480 volt scoop battery charger was located in an intake airway leading to the working face. He indicated that there was nothing in place to divert the air ventilating the charger from the face. Specifically he said that there were no curtains or brattices in place.

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.340(a)(1) which provides, as pertinent, that battery charging stations shall be " . . . [v]entilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places: . . ."

According to Madon, the charger at issue was located at the mouth of the No. 5 right entry. He said that he was present when the station was placed at that location, and that at the same time a brattice was built adjacent to the charger. A two by four inch hole was left at the top of the brattice between the top of the brattice and the roof of the mine, to allow air in the area of the charger to be ventilated to a return entry. Madon indicated that from the return entry the air was pulled outside the mine by way of a fan.

According to Madon, Johnson stated that the hole in the brattice should be made bigger to ventilate the charger. Madon said that in response, he enlarged the hole at the top brattice to a six inch square.

I observed the witnesses' demeanor and I find Madon to be more credible regarding the location of the charger. Further, Madon's testimony provided more detail. Johnson's contemporaneous notes indicate that the charger was in intake air, was not being ventilated into the return airway, and that air was moving across the unit. However, the notes do not indicate the presence or absence of any ventilation controls such as a curtain or brattice. For these reasons, I accept Madon's testimony regarding the location of the charger when cited by Johnson, i.e., at the mouth of the No. 5 entry. Given this location, the Secretary must establish that, when cited, the hole in the brattice was too small to allow air coming across the charger to be ventilated to the return, and that instead it was being ventilated down the intake airway to the face. I find that the Secretary has failed to meet this burden. Johnson did not present any testimony to establish the inadequency the hole in the brattice to ventilate gases from the charger to the return. I thus find that the Secretary has failed to establish that the air that ventilated the charger was not being coursed to the return. I thus find that this citation should be dismissed, as

Petitioner has not established that Respondent violated Section 75.341, supra.

B. Citation No. 4578564.

1. Violation 30 C.F.R. § 75.370(a)(1)

On September 21, 1995, while inspecting the 005 unit, Johnson observed that the miners in on the section did not have any self contained, self-rescue ("SCSR") equipment, and emergency sources of oxygen. Johnson indicated that the SCSRs were located in a storage area approximately 200 feet from these miners. He issued a citation alleging a violation of 30 C.F.R. § 75.370(a)(1) which, in essence, requires Respondent to develop and follow an approved ventilation plan. The pertinent supplement to the ventilation plan provides that "SCSRs" will be maintained at all times, within twenty-five feet of all persons working within the two entry setup" (sic) (Government Exh. 9, p. 7).

Johnson indicated that the area in question was a two entry setup. Respondent did not contradict or impeach this testimony, and accordingly it is accepted. I thus find that inasmuch as the SCSRs were not within twenty-five feet of the persons working within the two entry setup, that Respondent was not in compliance with its ventilation plan, and accordingly violated Section 75.370(a)(1) supra.

2. Significant and Substantial

Johnson explained that the 005 unit was a two entry setup consisting of only an intake an a return entry. Hence, any smoke arising within the unit would contaminate both entries. Such a situation would contribute to the hazard of smoke inhalation. Johnson explained that should a fire or smoke be present in the unit, eight of the miners working there would not be able to escape into the smoke filled escapeway, as the SCSR equipment was not within twenty-five feet of where they were working. Based upon this analysis, Johnson concluded that the violation was significant and substantial. On the other hand, Macon opined that the violation was not significant and substantial, that there was no likelihood of injury, and that there were no hazards in the immediate area.

Within the above framework, I find that the Secretary has failed to adduce evidence of any condition which would have made an injury producing event, i.e., the creation of a smoke or a fire, reasonable likely to have occurred. I thus find the

violation was not significant and substantial.

3. Penalty

Johnson indicated "that it's an obvious violation . . . because it's sitting there in plain view" (Tr. 167). Respondent has not offered any evidence to mitigate its negligence. Taking this factor into account, I find that a penalty of $700 is appropriate for this violation.

C. Citation Nos. 4253271, 4253273, 4253274, 4253275, 4253276, 4253277, 4253278, 4253279, 4253280, 4578561, 4578565, 4253296, and 4253266

Petitioner has filed a motion to approve settlement agreement regarding these citations. A reduction in penalty from $5,178 to $3,423 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

IV. Docket No. KENT 96-77.

A. Citation No. 4253268

1. Violation of 30 C.F.R. § 75.325(b)

On September 5, 1995, Johnson indicated that there was no measurable air movement on the 004 unit. He issued a citation which was subsequently amended to allege a violation of 30 C.F.R. § 75.325(b) which, in essence, requires that the quantity of air reaching the last open crosscut be at least 9,000 cubit feet per minute. Respondent admitted this violation. Accordingly and based upon the testimony of Johnson, I find that respondent did violate 30 C.F.R. § 75.325(b).

2. Significant and Substantial

Madon opined that the violation was not significant and substantial. In this connection he noted that normally there are were only two people working in the "miner area" (Tr. 220). On the other hand, Johnson explained that in the absence of the movement of air in the face, coal dust and methane could accumulate creating a hazard of an explosion or a fire. Although he did not find any methane in his examination, he indicated that the mine is considered a gassy mine. Respondent did not rebut or impeach this testimony. Johnson further opined that with

continued mining, it would be reasonably likely to have an accumulation of methane present as there is methane present in the coal bed. Respondent did not impeach or contradict this testimony. Johnson further explained that it was reasonably likely that an accumulation of methane or dust, as a consequence of the lack of movement of air, would be reasonably likely to have resulted in a fire or explosion due to the presence of various ignition sources. In this connection he noted that an arc might be "encountered" with the operation of the mining coal or the bolter (Tr. 213). This testimony also was not contradicted or impeached. Johnson also indicated that should a fire or explosion occur serious injuries would be expected due to the fact that miners would suffer burns or possibly fatal injuries. Respondent did not impeach or contradict this testimony. Within the framework of this record, I find that the violation was significant and substantial.

3. Penalty

According to Johnson, the foreman had made an on shift examination prior to his (Johnson's) examination, and that foreman had been "all over this working area all" day (Tr. 217). Johnson indicated that it took an hour to abate the violation and restore the airflow to more than 9,000 cubit feet a minute. He indicated that the mine is more than four miles deep, and the ventilation fan that was present at the time was outdated. He indicated that in order to abate the violation curtains were adjusted.

On the other hand, Madon stated that he was present when a curtain was rehung in the No. 2 entry to abate the citation. He estimated it took 10 to 15 minutes to increase the airflow to more than 9,000 cubit feet a minute.

I find based upon observations of the witnesses' demeanor, that Madon's testimony was more credible. Further, I find, predicated upon Madon's testimony, which was in turn based upon his personal observation, that the violation was caused by the lack of a curtain which had to be rehung. There is no evidence as to when this curtain had to been originally installed, nor is there any evidence when and how it become lose or dislodged. Accordingly, I find that the level of Respondent's negligence to have been of a low degree. I find that a penalty of $500 is appropriate for this violation.

ORDER

It is ORDERED that, within 30 days of this decision,

Respondent pay a total civil penalty of $10,340.

It is further ORDERED that Citation Nos. 4253261 and 4578562 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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