

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
May 22, 1997

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. KENT 96-292 |
| Petitioner | : | A. C. No. 15-07475-03534 |
| v. | : | |
| | : | Docket No. KENT 96-330 |
| SOLID ENERGY MINING CO., | : | A. C. No. 15-07475-03535 |
| Respondent | : | |
| | : | Docket No. KENT 96-335 |
| | : | A. C. No. 15-07475-03536 |
| | : | |
| | : | Mine #1 |

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Solid Energy Mining Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petitions allege eleven violations of the Secretary's mandatory health and safety standards and seek penalties of \$4,879,00. For the reasons set forth below, I affirm all of the citations and assess penalties of \$3,331.00.

A hearing was held on March 4, 1997, in Pikeville, Kentucky. In addition, the parties submitted post-hearing briefs in these matters.

Docket No. KENT 96-292

This docket consists of three citations. At the hearing the Respondent's counsel stated that the company was not contesting Citation Nos. 4508988 and 4235513 and would pay the penalties assessed. (Tr. 40.) Accordingly, evidence was only presented on Citation No. 4585909.

That citation alleges a violation of section 75.370(a)(1) of the Regulations, 30 C.F.R. ' 75.370(a)(1), because:

Operator failed to follow the approved ventilation plan. The bleeder

entries serving the No. 3 panel, located adjacent to the 1st right submains, was [sic] not being maintained free of roof falls. A roof fall was present in the No. 5 entry which prohibits travel to a bleeder evaluation point serving the No. 3 pillared area. Also permanent stoppings (1) crushed out [sic] and two (2) permanent stoppings, in by S.S. 2034, had not been constructed. The approved ventilation supplement date [sic] 9-12-1995 references A Evaluation points as shown on mine map.@ The evaluation point is not accessible and stoppings not maintained/constructed [sic] per mine map.

(Govt. Ex. 6.)

Section 75.370(a)(1) provides, as pertinent to this case, that A[t]he operator shall develop and follow a ventilation plan approved by the district manager. . . . The ventilation plan shall consist of two parts, the plan content . . . and the ventilation map@ The September 12, 1995, supplement to Solid Energy's ventilation plan states the following with respect to evaluations of bleeder entries¹:

1. The following methods are used to maintain all bleeder entries free from obstructions such as water or roof falls:

Bleeder entries or bleeder systems will be adequately maintained and free of water. A permissible sump pump may be installed through the bore hole to de-water the gob area.

Coal will be extracted in a manner that will not interfere with the integrity of the bleeder systems.

2. The following means are used to determine the effectiveness of bleeder entries:

¹ Bleeder entries Aare panel entries driven on a perimeter of block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways. They are maintained, after mining is completed, . . . in preference to sealing the completed workings.@ Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 112 (1968).

At least every seven (7) days, a certified person designated by the operator shall evaluate the effectiveness of the bleeder systems by determining the volume and proper flow of air, concentration of oxygen and methane as shown on the mine map.

3. The alternative method of evaluating worked-out areas will be as follows:

Evaluation point as shown on mine map.

(Govt. Ex. 7, p.3.)

The parties agree that a roof fall had occurred in the entry serving the No. 3 Panel in an area of the mine that had previously mined and pillared and that the fall prevented access to an evaluation point indicated on the ventilation plan map. They also agree that a stopping had been crushed out and two stoppings had not been constructed. They disagree as to whether any of this constituted a failure to follow the ventilation plan.

As set out in the supplement, the bleeder entries are supposed to be examined on a weekly basis. According to Inspector Williams, the results of these examinations are required to be recorded by the operator. He further testified that he did not know when the roof fall occurred and admitted that it was possible that it had occurred within the seven day period between inspections. It is the company's position that this is exactly what happened with the roof fall and the crushed out stopping. Therefore, Solid Energy argues that the ventilation plan was not violated by these occurrences.

Although the book recording the results of the examinations was not entered into evidence, and the person charged with conducting the weekly examinations did not testify, the evidence supports the company's position. Inspector Williams testified that he checked the examination book, and that as a result of this he issued a citation for failing to record the results of the examinations of Evaluation Points 2A, 3A and 14. Since the evaluation point in question is 4A, and since the company was not cited for failing to record the results of the examinations at that point, it can be inferred that the required examinations were being conducted with respect to 4A.

The Secretary did not show any of the following: (1) when the fall and the crushed stopping occurred, (2) that the company was not conducting the required weekly examinations with respect to Evaluation Point 4A or the crushed stopping, (3) that the company was required to conduct examinations more frequently than every seven days, or (4) that the company knew or should have known about those occurrences. All that the Secretary has shown is that a roof fall had occurred and a stopping had been crushed. Without more, this is not enough to establish a violation of the regulation.

That does not mean, however, that the company did not violate the regulation. The testimony of Kenneth Deskins, Mine Foreman, clearly verifies that the company violated section

75.370(a)(1) by not constructing stoppings required by the plan and shown on the ventilation map. Deskins testified as follows:

Q. Mr. Deskins, the stopping that had not been constructed was required to be constructed by the plan, is that correct?

A. Correct.

Q. You actually had the block sitting there on pallets waiting to be installed, did you not?

A. There were two pallets blocked [*sic*].

Q. How long had those pallets been there?

A. Approximately probably a month.

....

Q. Mr. Deskins, did the weekly examiner record in the weekly examination book that the stopping had not been constructed that was supposed to have been constructed?

A. I did not read it had it recorded.

Q. Pardon me?

A. I didn't read it in the exam book.

Q. Do you countersign the exam book?

A. Yes.

Q. He had never recorded that the stopping had not been constructed?

A. Correct.

Q. That would have been for at least three or four weekly exams; is that correct?

A. That's correct.

(Tr. 76, 80.) Based on this, I conclude that Solid Energy violated section 75.370(a)(1). Because the blocks to construct the stopping had been present for at least a month and the foreman apparently made no effort to determine whether it had been constructed, I further conclude that the operator's degree of negligence for this violation was **Ahigh.**@

Docket No. KENT 96-330

This docket consists of seven citations, Citation Nos. 4025271- 4025277, however, only Citation No. 4025272 was contested by the Respondent. (Tr. 83.) That citation alleges a violation of section 75.507-1(a), 30 C.F.R. ' 75.507-1(a), in that:

A non-permissible battery charger was observed charging a Fairchild scoop in the return air course of the 003-0 working section. The charger was located approximately 40 feet outby the last open crosscut of the No. 2 entry on the return side of the return stopping line.

Methane concentrations of 0.4% were found at the No. 4 face, on this day's inspection.

(Govt. Ex. 10.)

Section 75.507-1(a) requires that A[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . . @ Section 75.301 sets out the definition of Areturn air.@ As pertinent to this violation it states: AFor the purposes of ' 75.507-1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air.@

In its brief, the company states: AAlthough Respondent concedes the existence of the violation, the facts in this matter do not support a finding that the violation was significant and substantial.@ (Resp. Br. at 7.) Consequently, I conclude that Solid Energy violated section 75.507-1(a).

Significant and Substantial

The Inspector found this violation to be Asignificant and substantial.@ 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).

As is generally the case, Solid Energy argues that the third *Mathies* criterion, whether there was a reasonable likelihood that the hazard contributed to will result in any injury, is not present. The company asserts that the absence of explosive quantities of methane² and the fact that ventilation in the area was characterized by the inspector as good indicates that an injury would not likely result.

This argument, however, overlooks the guidance of *U.S. Steel, supra*, that analysis of the *Mathies* criteria should be made in terms of continued normal mining operations. Inspector Justice testified that the mine, at the time the citation was issued, was liberating over 200,000 cubic feet of methane per day and that it now liberates 500,000 cubic feet of methane per day. Thus, the fact that at the precise time of the violation an explosive concentration of methane was not present does not mean that under continued normal mining operations an explosive concentration could not accumulate. Indeed in the inspector's opinion that is precisely what could have happened.

Inspector Justice described the situation succinctly when he testified: "We have an arcing potential. . . . We have a mine which is clearly shown to liberate methane. We have a charger that is sitting in an area where methane can be carried over top of or accumulate in this area. We have a timer which can be set and no one even be around the charger and it kick off causing an ignition" (Tr. 102.) Based on this evidence, I find that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury from a methane ignition. Accordingly, I conclude that the violation was significant and substantial.

Docket No. KENT 96-335

This docket consists of Citation No. 4225514, which was contested. It alleges a violation of section 77.204, 30 C.F.R. ' 77.204, because: "The fence was detached from the side of the elevator head frame, leaving an open space that persons could travel to the top of the elevator shaft [*sic*] that was not provided with railings barriers [*sic*] to prevent falling into the shaft, where persons are regular [*sic*] working in this area." Section 77.204 provides that: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices."

The facts surrounding this citation are not in dispute. The cement collar of an elevator shaft extended about 18 inches above the ground. The shaft, which was about 22 feet in diameter, was not covered and no railings, barriers or other protective devices existed on or around the collar. There was, however, a fence around the shaft, located some six to eight feet from it. The fence was normally attached to a steel head frame, although at the time of the inspection, it was partially detached at the top.

² Methane is explosive in concentrations of between five and fifteen percent. (Tr. 103.)

A mine employee regularly cuts the grass in the space between the fence and the shaft, entering the area through a gate in the fence. The only other people entering the fenced area are employees of the elevator company under contract with the operator to perform maintenance on the elevator or shaft. When performing this work the elevator employees wear safety belts.

It is the Respondent's position that the fence satisfies the requirements of the regulation. The Secretary maintains that because employees can go inside the fence, the shaft itself must be protected.³ Since the fence would not prevent the grass cutter from falling into the shaft, I find that section 77.204 required a railing, barrier, cover or other protective device on the shaft collar.⁴ Consequently, I conclude that the company violated the regulation.

Significant and Substantial

The inspector found this violation to be significant and substantial because the grass cutter and the elevator examiner⁵ would be subjected to the hazard of falling down the shaft. I do not concur with his, or the Secretary's, assessment.

I find that the only person subject to this hazard was the grass cutter. It is clear from the testimony that the elevator examiner conducts his examination from inside the shaft by climbing to the top of the elevator. Therefore, he would have no reason to enter the area inside the fence. In addition, I do not find that the elevator company employees would be exposed to the hazard since they would routinely be inside any railing, barrier, cover or protective device to perform their work and they wear safety belts.

While I find that the grass cutter would be vulnerable to falling into the shaft, I do not view such a happening as very likely. As a mine employee he would be aware of the presence of the open shaft and his duties would not require him to go near to the shaft because the length of weed eater that he uses to cut the grass would be between him and the shaft. Thus, the chance of him inadvertently falling would be minimal. Accordingly, I find that the third *Mathies* criterion is not met and conclude that the violation was not significant and substantial. Moreover, because I find that the Respondent may reasonably have believed that the fence did comply with the regulation, I will reduce the level of negligence to Allow.

Civil Penalty Assessment

The Secretary has proposed civil penalties of \$4,879.00 for all of the violations in these

³ There was some indication at the hearing that the inspector believed that the regulation was violated by the gap at the top of the fence. The Secretary has wisely not pursued this line of reasoning in her brief.

⁴ Solid Energy abated the violation by installing a hand railing around the top of the shaft.

⁵ Section 75.1400-3, 30 C.F.R. § 75.1400-3, requires that elevators be inspected daily.

cases. However, it is the judges 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 those criteria, the parties have stipulated that: (1) The proposed penalties are appropriate to the size of the operator's business and will not affect the operator's ability to remain in business; (2) The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations; and, (3) The Solid Energy No. 1 mine produced 1,110,210 tons of coal in the twelve months preceding these violations and during the same period the company's controlling entity, Fluor Corporation, produced 21,675,626 tons of coal. (Tr. 5-7.) In addition, I find that the company's history of violations falls in the average range. (Govt. Exs. 1A and 1B.)

Based on the penalty criteria, I will assess the penalties proposed by the Secretary on the uncontested citations. With regard to Citation No. 4585909 in Docket No. KENT 96-292, the Secretary has proposed a penalty of \$900.00. While I find the degree of negligence involved in this violation to be high, I find the gravity to be lower than determined by the inspector because the company failed to follow the ventilation plan in only one of the three ways alleged by the inspector. Furthermore, the evidence was that despite this violation the bleeder entries still appeared to be performing their function. Therefore, I will reduce the penalty to \$450.00.

The Secretary has proposed a penalty of \$1,019.00 for Citation No. 4025272 in Docket No. KENT 96-330. Like the Secretary, I find the gravity of this violation to be serious and the negligence to be moderate. Based on the penalty criteria, I assess a penalty of \$1,019.00.

The Secretary has proposed a penalty of \$1,298.00 for Citation No. 4235514 in Docket No. KENT 96-335. I find the gravity of this violation to be considerably less serious than the Secretary and the degree of negligence to be low rather than moderate. Consequently, based on the penalty criteria, I assess a penalty of \$200.00.

The penalties assessed for each citation are:

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| <u>Citation No.</u> | <u>Penalty</u> |
|---------------------|----------------|
| 4058988 | \$ 400.00 |
| 4585909 | \$ 450.00 |
| 4235513 | \$ 50.00 |

Docket No. KENT 96-330

| | |
|---------|------------|
| 4025271 | \$ 50.00 |
| 4025272 | \$1,019.00 |
| 4025273 | \$ 506.00 |

| | |
|---------|-----------|
| 4025274 | \$ 50.00 |
| 4025275 | \$ 50.00 |
| 4025276 | \$ 50.00 |
| 4025277 | \$ 506.00 |

Docket No. KENT 96-335

| | |
|---------|------------------|
| 4235514 | <u>\$ 200.00</u> |
| Total | \$3,331.00 |

ORDER

Accordingly, Citation Nos. 4508988, 4585909 and 4235513 in Docket No. KENT 96-292 are **AFFIRMED**; Citation Nos. 4025271, 4025272, 4025273, 4025274, 4025275, 4025276 and 4025277 in Docket No. KENT 96-330 are **AFFIRMED**; and Citation No. 4235514 in Docket No. KENT 96-335 is **MODIFIED** by deleting the **significant and substantial** designation and reducing the degree of negligence from **moderate** to **low** and is **AFFIRMED** as modified. Solid Energy Mining Company is **ORDERED TO PAY** civil penalties of **3,331.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

William C. Miller, II, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

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