

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 13, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-321
Petitioner	:	A. C. No. 15-02263-03539
v.	:	
	:	Docket No. KENT 98-9
LONE MOUNTAIN PROCESSING, INC.,	:	A. C. No. 15-02263-03540
Respondent	:	
	:	Darby Fork No. 1 Mine

DECISION

Appearances: Mary Sue Taylor, Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Frenchette C. Potter, Esq., Arch Mineral Corporation, Saint Louis, Missouri, for the Respondent.

Before: Judge Weisberger

These cases, consolidated for hearing, are before me based on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Lone Mountain Processing, Inc. (Respondent) of mandatory safety regulations set forth in Title 30 of the Code of Federal Regulations. Pursuant to a notice, these cases were heard in Johnson City, Tennessee, on January 14, 1998. Petitioner and Respondent each filed proposed findings of fact and a brief on February 20, 1998.

FINDINGS OF FACT AND DISCUSSION

I. Docket No. KENT 97-321

A. Citation No. 4074103

At the hearing, Petitioner indicated that Citation No. 4074103 was vacated and moved to withdraw the citation. Based on Petitioner's assertions at the hearing, the motion was granted directing that citation be dismissed.

B. Citation No. 4581438

1. Violation of 30 CFR ' 75.370(a)

Lawrence Rigney, an MSHA inspector and health specialist, inspected Respondent's Darby Fork No. 1 underground coal mine on June 11, 1997. Upon his arrival at the mine at the beginning of the day shift, he placed dust pumps on the miner operator, two roof bolters, and the scoop operator. Rigney then rode inby to the working section with these miners and the remaining crew. The men traveled in a rubber-tired diesel-powered mantrip inby in the roadway entry. The entry was ventilated by air which coursed in the entry inby, but exited the entry through a regulator at a point outby the face.

According to Rigney, as the mantrip commenced to travel inby he noticed the roadway was "rather dusty," (Tr. 20). It was Rigney's testimony that as the mantrip proceeded further inby the mantrip's wheels stirred up dust, and dust hung over the mantrip. Rigney then put on a dust respirator. Rigney also saw dust in the beam of his cap light. According to Rigney, the roadway was not damp and was "extremely dry and dusty" (Tr. 23). He indicated that the roadway, up to four to five brakes outby the face was "okay," but further outby at that point it became dusty. Rigney indicated that there was an area of dust in the air that commenced 15 to 20 crosscuts from the face and continued 10 to 15 crosscuts.¹ He estimated that it took 8 to 10 minutes for the mantrip to travel through the area of dust. Rigney issued a citation that initially alleged a violation of 30 C.F.R. ' 75.360(a)(1), but was subsequently amended to allege a violation of 30 C.F.R. ' 75.370(a)(1), which requires the operator to follow its ventilation plan. The ventilation plan provides, as pertinent, as follows: "Dust will be controlled at the following locations by: * * * [r]oadways and travelways where equipment is operated [c]leanup, [r]ock dusting and water to dampen" (sic) (Jt. Ex. 6, P 6-22).

John Richardson, the mine superintendent, traveled inby along the same roadway as the inspector but 15 minutes after the inspector, and in another mantrip. Richardson indicated that he did not see any dust in the roadway and that Rigney did not tell him that he was going to issue any citation, nor did Rigney tell him that he saw any dust. According to Richardson, commencing at the face and running outby approximately three quarters of the roadway distance, the condition of the roadway was real muddy, and there was standing water present. He said that the balance of the roadway was damp. Richardson explained that the roadway floor in the area that he described as being real muddy, had been cut lower than the rest of the roadway, and that water accumulates there. He noted that approximately one month prior to June 11, 1997, underground water pipes had broken, and on one day there were seven breaks. According to Richardson, the roadway was damp, rock dusted, and had been cleaned.

¹ The crosscuts were at 80 foot centers.

Michael Ray Ellis, Jr., the day shift section foreman, operated the mantrip the inspector traveled in on June 11. According to Ellis, the inspector sat directly behind him facing inby. Ellis described the roadway as being Adamp to extremely wet, muddy@ (Tr. 123), and referred to the same area as noted by Richardson. He opined that the roadway was clean, rock dusted, at least damp, and Amuddy in most areas@ (Tr. 127). He did not note any dust settling on his clothing, or on the mantrip which was white in color. He also testified that Rigney did not have his respirator in place. In essence, according to Ellis, the only dust that he noted while traveling inby occurred in a damp area, when the mantrip was stopped to retrieve equipment that had fallen from the mantrip. According to Ellis, a small amount of dust appeared and remained in the area for 2 to 5 seconds.

Tommy Shackelford II, a section repairman, traveled in the mantrip sitting next to Ellis. Shackelford corroborated Ellis= testimony regarding the dust that arose when the mantrip was stopped to retrieve an article of equipment. He was asked to describe the quantity of dust that arose in the air, and he said it was Avery little@ and something like the dust that kicks up when a player slides into a home plate. He described the roadway as being damp, with water holes, and that the entire roadway was Amore or less sloppy mud@ (Tr. 150). However, the areas outby were not as muddy. He did not see any dust settle on any clothes of those persons in the mantrip.

I observed Rigney=s demeanor and found his testimony credible regarding the dust in the air that he observed. There is no evidence in the record to impeach this testimony on the basis of bias or any other improper motive. Further, I find the testimony of Respondent=s witnesses regarding their observations to be of insufficient weight to rebut or outweigh the inspector=s testimony. Richardson traveled in another mantrip 15 minutes after the inspector, and thus was not in a position to negate the testimony of the inspector as to what was observed by him at the specific time of his observation. Further, upon cross examination, it became apparent that the degree of attention to which Richardson paid the condition of the roadway was not the same as the inspector. In this connection, I note the following testimony of Richardson:

Q. So is it possible you weren=t paying the kind of attention to the roadways you would have been if you had noticed that somebody thought that they were dusty going in?

A. If somebody would have told me or I would have notice it, yeah, I would have paid more attention, yes (Tr. 110).

It appears from further cross examination that Richardson=s testimony regarding the condition of the roadway on June 11 was predicated upon observations that he had made on June 12, rather than upon a specific examination or observation on June 11. The pertinent testimony is as follows:

Q. But you=re relying on what you saw on June the 12th for an assumption that it was like that on June the 11th?

A. I didn't see it June the 11th because I wasn't paying any attention to it.

THE COURT: Pardon?

THE WITNESS: I didn't pay any attention to it June the 11th. I didn't see anything.

BY MS. TAYLOR:

Q. But you're relying on what it was like on June the 11th based on your memory of June the 12th; is that correct?

A. Well, I went back and looked at it - I mean, I looked at it for sure on June the 12th, close (sic) (Tr. 115).

Although both Shackelford and Ellis, who traveled with the inspector, described the roadway as being at least damp and in many places real muddy, they both noted dust when the mantrip was stopped to retrieve a piece of equipment. Moreover, neither Ellis nor Shackelford rebutted the specific testimony of the inspector regarding the existence of dust in the air for a distance of approximately 10 to 15 crosscuts commencing at a point approximately 15 to 20 crosscuts outby from the face and continuing outby from that point.

I note that respiratory dust sampling of miners who traveled in the mantrip and were supposedly exposed to dust, failed to indicate that the quantity of respirable dust was not in compliance with the appropriate standard. According to the inspector, it took about 10 minutes for the mantrip containing the miners who wore dust pumps, to travel through the area of dust. Hence, their exposure to the dust was not for any significant period of time. Accordingly, I find the dust pumps they wore did not accurately sample the amount of dust exposure in the dusty area.

A pump located in an adjacent belt entry similarly did not indicate respirable dust accumulations not in compliance with the appropriate standard. Such evidence, by itself, is insufficient to negate the testimony of the inspector. This entry and the roadway entry at issue were in the same split of air, and there were no physical barriers between these two entries, thus allowing for air to travel between these two entries. However, it is significant to note, as indicated by Ellis in his cross examination, that, due to the placement of a regulator to the left of the roadway entry (looking inby), the path of the air travel from the roadway to the belt entry adjacent on the right is not the path of least resistance. Moreover, the area the inspector cited was located approximately 15 to 20 crosscuts and one entry removed from the pump. I thus find that the evidence of negative dust sampling results is not sufficient to negate the inspector's testimony.

For all the above reasons, I find that it has been established that there was dust in the air as observed by the inspector. According to the inspector, and not contradicted by Respondent's witnesses, dust is placed in the air by the action of the mantrip's tires grinding particles of dust material that had accumulated on the floor. Since there was dust in the air, I conclude that the roadway floor, in part, was not dampened sufficiently. I thus find that the ventilation plan was not complied with, and that Respondent did violate Section 75.370(a) supra as alleged.

2. Significant and Substantial

According to Rigney, he saw drawrock in the roof on June 11. He opined that small particles constantly fall from drawrock which he described as consisting of shale. He also indicated that previous testing had indicated excess silica in the roof. According to Rigney, exposure to silica can lead to silicosis. None of these assertions were impeached or contradicted by Respondent, and hence they are accepted.

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 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 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 injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Applying the criteria test set forth above, I find that, in the context of Rigney's uncontradicted testimony, it has been established that the violation was significant and substantial, considering the continuance of normal mining operations, which would have led to an increase in exposure time to the violative dust.

3. Penalty

Since the violation could have led to silicosis, I conclude that the gravity was of a relatively high level. There is no evidence as to how long the violative conditions of insufficient dampness had existed. In this connection, Rigney opined that it could not have gotten that way in a short period of time (Tr. 44). Respondent did not impeach or contradict this testimony, I thus find that Respondent's negligence was moderate. The violation was timely abated. I find that a penalty of \$595.00, is appropriate.

II. Docket No. KENT 98-9

A. Citation No. 4581439

Rigney testified that as he was traveling to the 003 section, he came to a point approximately 10 breaks from the face that, extending 10 to 12 breaks, was extremely dry. Also, he observed dusty conditions. He issued a citation alleging a violation of section 75.370(a)(1) supra.

Richardson, who traveled with Rigney to the 003 section, indicated that he did not notice any dust in the roadway. He described the condition of the outby roadway as being "just damp." Richardson testified that traveling outby from the section, he did not notice any dust on the roadway and the inspector did not say anything about a citation. In summary, he stated that the roadways were damp, rock dusted, and clean.

Herbert Kimberlin, Jr., the day shift production foreman, was with Rigney going to the 003 section. He said that the latter did not say anything regarding dust on the roadways. He described the roadway as wet to damp, clean and rock dusted. He specifically said that he did not see any dust on the roadway.

Essentially, the evidence presented regarding the conditions on the 003 section is the same as that presented regarding the 002 section. Hence, I find that, for the reasons stated above, I(B)(1)(2) supra, that Respondent did violate section 75.370(a), supra, and that the violation was significant and substantial. In the same fashion, for the reasons set forth above, I(B)(3) supra, I find that the violation was of a relatively high level of gravity, and Respondent's negligence was of a moderate level. I find that a penalty of \$595 is appropriate.

ORDER

It is **ORDERED** that Citation No. 4074103 be **DISMISSED**. It is further **ORDERED** that, within 30 days of this decision, Respondent shall pay a civil penalty of \$1,190.

Avram Weisberger
Administrative Law Judge

Distribution:

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