FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 21, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-45
Petitioner	:	A.C. No. 15-07082-03719
v.	:	
	:	
FREEDOM ENERGY MINING CO.,	:	
Respondent	:	Mine No. 1

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee and Wallie McMasters, Conference and Litigation Representative, Nashville, Tennessee, on behalf of the Petitioner;
William Miller, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," to challenge nine citations issued by the Secretary of Labor to Freedom Energy Mining Company (Freedom Energy) and the civil penalties proposed for the violations charged therein. The general issue before me is whether Freedom Energy violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under the Section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearing, the parties agreed to settle the violation charged in Citation No. 4225596 and Respondent agreed to pay the proposed penalty of $309.00, in full. The settlement was accepted at hearing and that determination is here confirmed. Remaining at issue are eight "Section 104(a)" citations. At hearing, Respondent admitted that, with the exception of Citations No. 4229803 and 4229804, the violations existed as charged (Tr. 6-7).[1] Respondent has challenged the "significant and substantial" findings associated with all of the

[1] This admission at hearings constituted a knowing waiver of the right to dispute the violations. Respondent=s subsequent attempt in its post-hearing brief to retract its admission comes too late and is accordingly disregarded. Once the Secretary had completed her case and the evidentiary record was closed, such a waiver becomes irrevocable and, absent fraud or other compelling circumstances warranting a new trial, cannot be retracted. See Rule 60(b), Federal Rules of Civil Procedure.

citations.

Citation Nos. 4225600 and 4229801

Citation No. 4225600 alleges a "significant and substantial" violation of the operator=s ventilation plan and charges as follows:

> Operator failed to follow the approved ventilation plan in the No. 4 entry of the 003-0 mmu where the continuous mining machine was operating. The air quantity when measured near the inby end of the exhausting line curtain using an approved Calibrated Anemometer was 1,584 CFM. The approved ventilation plan, date 4-18-96, requires a minimum 6,500 CFM to be maintained at faces where coal is being mined, cut, loaded or drilled for blasting.

It is not disputed that the operator=s ventilation plan required 6,500 cubic feet of air per minute as noted in the citation. Respondent has admitted the existence of the violation but maintains that it was duplicative of Citation No. 4229801 and should therefore be dismissed. I do not find that Respondent has waived his right to raise this issue by its admission that both violations had occurred (Tr. 6-7).

Citation No. 4229801 alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 75.326, and charges as follows:

> Operator failed to maintain a minimum mean entry velocity of 60 FPM, in the No. 4 entry of the 003-0 mmu, where the continuous mining machine was operating. The air quantity, when measured near the inby end of the exhausting line curtain using an approved calibrated Anemometer, was calculated to be 15.64 FPM.

The cited standard, 30 C.F.R. ' 75.326, provides as follows:

> In exhausting face ventilation systems, the mean entry air velocity shall be at least 60 feet per minute reaching each working face where coal is being cut, mined, drilled for blasting, or loaded, and to any other working places as required in the approved ventilation plan. A lower mean entry air velocity may be approved in the ventilation plan if the lower velocity will maintain methane and respirable dust concentrations in accordance with the applicable levels. Mean entry air velocity shall be determined at or near the inby end of the line curtain, ventilation tubing, or other face ventilation control devices.

The relevant ventilation plan provides that "the minimum mean-entry air velocity in

working places where coal is being cut, mined, loaded, or drilled for blasting shall be: 60 fpm when exhausting, N/A where blowing."

According to MSHA Inspector Roger Williams, the mean-entry air velocity is a measurement of the "air velocity which is taken up the broad side of the entry to contain dust in the face area and remove the dust from the face behind the exhausting line curtain." (Tr. 40). Mean-entry air is calculated by "utilizing the quantity of air in cubic feet per minute divided by the square foot of the area which is on the broad side of the curtain." (Tr. 40-41). The mean-entry air velocity cited herein is therefore, a function of the same quantity of air which was the subject of the prior citation (Citation No. 4225600). It is undisputed that both violations were based upon the same air reading, in the same location and at the same time.

Under the unique facts of this case, wherein the identical air reading provided the basis for both violations and there is a direct correlation between the quantity of air and velocity of air, I find that the violation charged in Citation No. 4225600 merges into Citation No. 4229801, as a lesser included violation and the former citation must be vacated. The charges are duplicative as the duties imposed under the cited provisions of the ventilation plan are effectively the same. *Secretary v. Cypress Tonapah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Accordingly, Citation No. 4225600, is vacated and dismissed.

The violation charged in Citation No. 4229801 was however, also "significant and substantial." 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'g* 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).

The testimony of inspector Williams on this issue is undisputed. Visible dust was present

in the No. 4 entry when the citation was issued and indeed, according to the inspector, the dust was "rolling back" over the continuous miner and shuttle cars. Four miners were working in the No. 4 entry, including the continuous miner operator, two shuttle car operators and a person conducting a time study. None of these employees were wearing a respirator. Williams opined that the failure to maintain adequate ventilation therefore posed a health hazard namely, black lung and other respiratory ailments, to these miners. It may also be inferred that such a quantity of dust affected visibility thereby posing an independent hazard of accident with such mobile equipment.

Inspector Williams also noted that the subject mine had a history of liberating large amounts of methane, i.e., 576,928 cubic feet of methane during a 24-hour period. The mine therefore, was on a "spot inspection cycle" mandated by Section 103(i) of the Act. Williams noted that it is possible to hit bleeders of high methane anytime at the face leading to explosive levels. Within this framework of evidence alone it may reasonably be inferred that the violation was indeed "significant and substantial," and of high gravity. Operator negligence may also be inferred since the dust was so visible.

Citation No. 4229802

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.206(b), and charges as follows:

> The conventional roof support materials (wood timber) being installed on the 001-0 mmu, did not meet the minimum cross-sectional area of wooden posts. Timbers installed as breaker posts, roadway posts, and two posts averaged a cross-sectional area of 4.7425 sq. inches. The mining height on the 001-0 measured 90 inches.

The cited standard, 30 C.F.R. Section 75.206(b), provides in relevant part that the minimum cross-sectional area of wooden posts between 84 inches and 108 inches longer, is 28 square inches. As previously noted, the operator admitted that the violation existed as charged and challenged only the Secretary=s finding that the violation was "significant and substantial" (Tr. 6-7).

According to the undisputed testimony of Inspector Williams, using wooden timbers during retreat mining provides warning of an impending roof fall and protects miners from dry rock in the existing shale roof. Williams noted that the shale roof in the cited area was not of good quality and was subject to falling-out between the bolts. Six or seven miners were working on the section who could have been exposed to a roof fall hazard including those installing timbers, the shuttle car operators, the miner operator, the section foreman and the section mechanics. Sufficient evidence exists from which a "significant and substantial" and serious violation may be inferred.

The Secretary offers no theory, however, to support a negligence finding. I note that

Inspector Williams opined at hearing that the mine foreman or mine superintendent should have observed even on the surface that the timbers were inadequate. However, since the violation was in fact abated by clustering timbers, the dimension of the timbers alone apparently would not provide warning of their inadequacy. The fact that the timbers, as they were actually installed, were obviously inadequate according to the undisputed testimony of the issuing inspector suggests however that the operator is chargeable with at least moderate negligence.

Citations No. 4229803 and 4229804

The captioned citations both allege violations of the standard at 30 C.F.R. ' 75.203(e). That standard provides as follows:

> Additional roof support shall be installed where - - (1) the width of the opening specified in the roof control plan is exceeded by more than 12 inches; and, (2) the distance over which the excessive width exists is more than 5 feet.

Citation No. 4229803 alleges a "significant and substantial" violation of the above standard and charges as follows:

> [e]xcessive width, measuring 21 ft. to 36 ft. over a distance of 19 ft., is present in the track entry where the track serving the mantrip station junctions with the main line track. No additional roof support was installed in the area."

Citation No. 4229804 alleges a "significant and substantial" violation of the above standard and charges as follows:

> [e]xcessive widths, measuring 21 ft. to 44 ft. over a distance of 35 feet is present in the track entry where the track serving the slope junctions with the main line track. No additional support was installed in the area.

According to Inspector Williams, the two cited areas were "pretty much the same, just different locations." (Tr. 124-125). While the Respondent does not deny that the relevant roof control plan provides for a maximum entry width of 20 feet and that there were areas in excess of 20 feet, it nevertheless argues that, contrary to the allegations, additional roof support had in fact been installed as required. Inspector Williams himself conceded that both areas had "additional roof support in the form of resin bolts" (Tr. 90, 92, 104). He also acknowledged that the additional spot roof bolts exceeded what is required in the normal pattern and that, indeed, the bolting was "fairly extensive."

Inspector Williams also testified, however, that it was recognized in the mining industry that timbers and not additional roof bolts are to be used to provide the requisite additional support when the width of an entry is exceeded. Respondent provided no contrary evidence. I equate the inspector=s testimony to that of the reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry. *See Alabama By-Products Corp.*, 4 FMSHRC 2128 (December 1982). Under

the circumstances, I find that both violations are proven as charged.

I do not, however, find that the violations were "significant and substantial" or serious. While the operator did not provide additional roof support in the form of timbers, it did provide extra resin grouted roof bolts beyond what was required. Additional expert testimony would be required to determine whether the additional support provided by extra roof bolts was inadequate and the extent of the inadequacy. In addition, Inspector Williams testified in support of his findings only that "I think it is reasonably likely that should a roof failure occur, that quite possibly would affect everyone on the mantrip." This testimony is not sufficient to sustain a "significant and substantial" finding. Under the circumstances, the Secretary has failed to sustain her burden of proving that the violation was either "significant and substantial" or of high gravity. In addition, in light of the additional roof bolt support provided in this case, I find that operator negligence is somewhat reduced.

Citation No. 4225590

This citation alleges a violation of the standard at 30 C.F.R. Section 75.1722(a) and charges that "the discharge roller, serving the No. 10 belt conveyor was not provided with a mechanical guard, on the left side (facing outby), to prevent accidental contact with the live roller." At hearing, the Respondent admitted to the existence of the violation (Tr. 6-7). According to Inspector Williams, the discharge roller is some 4 feet long and 15 inches in diameter. When he issued the citation, the conveyors were operating and the roller was moving. He noted that a guard had not been provided and the unguarded area was 3 feet by 46 inches. He also noted that the mine floor in the area was wet and slick. The area of the violation would be periodically visited by cleanup crews and supervisory personnel as well as weekly electrical examiners. Chief Electrician Blackburn was in fact observed working only 10-12 inches from the pinch point. Inspector Williams opined that fatal injuries or dismemberment could result from the hazard.

The cited standard, 30 C.F.R. Section 75.1722, provides that "[g]ears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

I agree with the assessment of Inspector Williams that the violation was "significant and substantial" and serious. I also conclude that the violation was the result of high operator negligence in light of the fact that the operator=s agent was working only 10-12 inches from the exposed condition.

Citation No. 4225592

The above citation also alleges a violation of the standard at 30 C.F.R. Section

75.1722(a). It charges that a "mechanical guard was not provided for the pump motor coupling serving the Stampler coal feeder located on the 003-0 mmu."

The violation was not disputed by Respondent at hearing (Tr. 6-7). Inspector Williams noted that the Stampler coal feeder distributes coal to the conveyor. It is 15 feet wide, has a conveyor chain and crushes large rock. It is in operation whenever coal is being dumped on the conveyor. The coupler is located on the left side of the feeder 5 to 6 feet from the discharge end and rotates at 1750 RPM. Williams testified that the metal guard that was furnished was not present leaving an opening 7 inches high, 3 **2** inches wide and about 30 inches above floor level.

I find that the coupling at issue was one that "may be contacted by persons and which may cause injury to persons" and was not guarded as required by the standard. I find, however, that the exposed opening was so small, i.e., 3 **2** inches wide, that it is unlikely for there to have been any injury. Indeed, the inspector himself testified only that it was "conceivable" that someone could stumble and fall and stick his hand through the opening (Tr. 162). Under the circumstances, I find that the violation was not "significant and substantial" nor of high gravity.

The Secretary does not cite any evidence or theory of negligence in regard to this violation and indeed, because of the small size of the exposed opening, I find that the operator is chargeable with but little negligence in regard to this violation.

Citation No. 4225593

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.604(b), and charges as follows:

> [a] permanent type splice, located in the energized trailing cable serving the light side, continuous mining machine on the 003-0 mmu, is not effectively insulated and sealed so as to exclude moisture. The cutter jacket was damaged so as to expose the base ground and insulated conductors."

The cited standard, 30 C.F.R. Section 75.604(b), provides that "when permanent splices in trailing cables are made, they shall be: . . . (b) effectively insulated and sealed so as to exclude moisture . . . .

The violation is not disputed (Tr. 6-7). The subject trailing cable is between 500-650 ft. long and provides 995 volts to the continuous miner. It has an outer jacket and insulated copper wires inside. The outer jacket is about one 1/8 of an inch to 3/16 of an inch thick. Williams found the splice to be defective because of the general wear and damage to the outer jacket. There was only "wrap type" insulation over the splice and, although the conductor wires were insulated, you could see the copper ground wire exposed inside. Williams noted that the cable may be lifted by hand to hang it or move it from exposure to other equipment. Williams further observed that the ground was wet and water is a good conductor. He opined that at some point, the condition could have resulted in a fatality by electrocution. He felt that the violation should have been known because the cable is required to be examined on a weekly basis. Williams subsequently opined that the violation could have existed as briefly as one shift.

Clearly, the violation was "significant and substantial" and serious. The Secretary in her brief again failed to address the issue of negligence so her theories are unknown. Since the issuing inspector conceded however, that the cited condition could have existed for as briefly as one shift, I do not find that the Secretary established significant negligence.

ORDER

Citation No. 4229801 is vacated. Considering all of the criteria under Section 110(i) of the Act, I find the following civil penalties appropriate and must be paid within 30 days of the date of this decision: Citation No. 4225596-$309.00; Citation No. 4225600-$1,100.00; Citation No. 4229802-$200.00; Citation No. 4229803-$400.00; Citation No. 4229804-$400.00; Citation No. 4225590-$300.00; Citation No. 4225592-$75.00; Citation No. 4225593-$500.00.

Gary Melick
Administrative Law Judge
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