FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-188
Petitioner	:	A.C. No. 15-17360-03523
v.	:	
	:	
PREMIER ELKHORN COAL CO.,	:	
Respondent	:	PE Southern Pike County

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Billy R. Sheldon, Esq., Baird, Baird, Baird & Jones, Lexington, Kentucky for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging violations by Premier Elkhorn Coal Company (Premier) of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held in Louisa, Kentucky on December 13, 2000. On February 20, 2001, the parties filed post hearing briefs. On March 1, 2001, Premier filed a reply brief.

Findings of Fact

1. Introduction

Nicholas Rasnick, an MSHA electrical inspector, testified that on January 24, 2000, he traveled along a roadway, that commenced at its intersection with highway Ky 3414, and extended until it intersected with another road known as the Green Road. According to Rasnick, the initial section of the road, from its intersection with Ky 3414 until the entrance to the Garrett Mine, a distance of approximately 1 ½ miles, was covered with snow and ice, and was very slick. He issued a citation alleging a significant and substantial violation of 30 C.F.R. Section 77.205(d) which provides as follows: "[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable."

Premier does not contest the observations of Rasnick regarding the conditions of the surface of the travelway. It is, in essence ,the position of Premier that it was improperly cited, as its employees did not contribute to the violation, nor were they exposed to its hazards. In contrast, in essence, the Secretary argues that the cited travelway was owned by Premier, and under its control.

2. Premier was Properly Cited

Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. Section 814(a) provides that if upon inspection of a mine, the Secretary identifies a violation of the Act or of a health or safety standard promulgated under it, he is required to issue a citation "to the operator," (Emphasis added.) The Act defines the term "operator" as "any owner, lessee, or other person who operates, controls, or supervises a ... mine ... ." 30 U.S.C. Section 802(d). Section 3h(1) of the Act defines a mine as follows: ... "(A) an area of land from which minerals are extracted ... (B) private ways and roads appurtenant to such area, ..."

As stipulated to by the parties, Premier is an operator subject to the jurisdiction of the Act, and has a valid MSHA mine identification number for a coal pit, (job 21) located in part, immediately adjacent to the roadway at issue which was included within Premier's surface mining permit.[1] Also, one of Premier settling ponds is located adjacent to the travelway. It thus is clear that the cited travelway is appurtenant to areas considered mines, and thus it fits within the definition of a mine set forth in Section 3H(1) of the Act, supra.

Premier argues, in essence, that it was an abuse of discretion for the Secretary to have cited it since (1) their employees did not cause or contribute to the violation, (2) their employees were not exposed to the hazards sited in the violation, (3) independent contractor were contractually obligated to maintain the cited road, (4) Premier had not performed maintenance on the road for two years and, (5) Premier provided alternate access to the contractor's mines by way of a road it maintained.[2]

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[1]The pit, formerly had been assigned mine ID. No. 15-17360. At the date cited there were no ongoing coal removal operations at the site. When employees and equipment from Premier's Burke Branch tipple, I.D. No. 15-16470, were assigned to job 21 site, to perform mine reclamation work, that site was included under mine ID No. 15-16470. On January 8, 1999, Premier notified MSHA that it was abandoning pit 21.

[2]Since Premier sets forth in its reply brief that it is not asserting that it was improperly cited based on the fact that the cited road was a county road, it is not necessary to evaluate the evidence regarding whether, in fact the road is a county road. In this connection I note that Premier's witnesses testified that the roadway is a county road. However, no weight was accorded their testimony in the absence of a foundation to establish their personal knowledge of this fact. Premier also relies on a map, Premier Exhibit No. 5, which depicts a line under which

I have considered Premier assertions, but find, assuming these assertions are factually correct, that there is not any binding authority mandating a decision that the Secretary abused her discretion in citing Premier given these condition.

It is clear that the Secretary has "broad discretion" to cite either the operator or the independent contractor for violations committed at a mine (see, W. P. Coal Co., 16 FMSHRC 1407, at 1411 (July 1994)). In evaluating whether the Secretary abused her discretion in citing Premier, as an operator, I place most weight upon evidence in the record of Premier's involvement with the cited road, which is appurtenant to its pit and pond.

John David Blankenship, the director of safety and environmental affairs for TECO Coal Corporation, Premier's parent, testified that No Trespassing and Permit signs located on the road on question contain Premier's name, phone number, address and permit number. Further, two years ago, when the job 21 site was active and producing coal, Premier maintained, widened, and placed asphalt on the road in question. On the date cited, Premier was not longer removing coal from the pit at job 21, and had notified MSHA that it was abandoning the pit. However, when reclamation is required at that site it is performed by Premier's employees. In such an event, its certified personnel ensure that proper inspections are performed, and that the site is safe for employees. Further, once a quarter, Premier's employees access the pond appurtenant to the cited road to obtain samples.

I note the testimony of Blankenship that Premier entered into contracts with two non-related mines in the area, Garrett Mine and Ember Mining Company, who deliver their coal to Premier's preparation plant, requiring these corporations to clean and maintain the roads at issue.[3] The contractual obligation of these corporations are best evidenced by the specific language in the contracts. Neither of these contracts were proffered in evidence. Also, it is clear that an operator may not be relieved of its obligations under the Mine Act and regulations promulgated thereunder by virtue of any contract.

It also appears to be Premier's position that the regular means of access to job 21 is by way of approaching it by the road at issue from the opposition direction, thus avoiding the specific area cited. However, it is clear that the road which intersects with road KY 3414, provides

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contain the following two words are set forth "bucklick fork", which according to the testimony of David Wilder, Premier's manager of safety and environmental affairs, indicates the road at issue which is a county road. There is nothing to indicate that this map is an official publication of Pike County. Nor is there any legend on the map to indicate whether the lines on the map are meant to represent state roads, county roads, or private thoroughfares. The best evidence as to whether the road is a county road, are official records. However, none were adduced by either party.

[3]Inspector Resnick did not issue a citation to Ember or Garrett because his primary concern was to get the road condition corrected as soon as possible. He felt that Premier had the ability and equipment to clear the road.

access from that road to the pond, as well as to job 21.

Within the above context, I conclude that it has not been established that it was an abuse of discretion for the Secretary to cite Premier. I also find that since Premier did not rebut or impeach the inspector's testimony regarding the condition of the road, it has been established that the road had not been sanded or cleared of snow and ice. Further, the record establishes that on the date cited the road was open to traffic, as it was not blocked by signs or any physical barrier. Also, Premier did not rebut or contradict the inspector's testimony that snow had fallen the day before his inspection, and on the date of inspection he had observed car tracks in the snow on the roadway. I thus find that the road was regularly used. I conclude that it has been established that Premier did violate Section 77.205 supra.

2. 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 U.S.C. § 814(d)(l). 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 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 (August 1985), 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).

According to the inspector, the violation was significant and substantial. Premier did not rebut or contradict the inspector's testimony that the roadway was not straight, that portions of it were at an incline, that it was covered with ice and snow, and was "very slick", that he observed tire tracks at a right angle to the road and debris in a ditch, and that portions of the road were wide enough to accompany vehicles traveling in opposite directions. He opined that due to the road conditions and the presence of ice and snow, an accident was reasonably likely to have occurred involving a collision between two cars or one car going off the embankment, causing injuries. Within the context of this record, and considering the specific nature of the cited conditions, I conclude that it has been established that the existent conditions satisfy the requirements set forth in Mathis supra. Accordingly, I find that the violation was significant and substantial.

3. Penalty

I find that the level of gravity of this violation was relatively high. I have considered Premier's claim that the roadway was a county road, but find that it did not adduce any evidence of sufficient probative value to establish ownership of the road by the county and the county's responsibility to clear the road. However, the level of Premier's negligence is mitigated by the following, there is no evidence as to how long the hazardous ice and snow on the road had been in existence; there is no evidence that Premier had notice of these conditions prior to the inspection; there is no evidence regarding the last time, prior to the inspection, that Premier's employees were at the site; that Premier had notified MSHA that job 21 was abandoned; and that, according to Blankenship's uncontradicted testimony, the only time Premier had been asked by MSHA to perform on site inspections of the cited road was when it had "people that are exposed" (Tr. 60). Taking into account the remaining factors set forth in Section 110(i) of the Act I conclude that a penalty of **$150.00** is appropriate.

4. Citation Nos. 7366499 and 7366498

At the commencement of the hearing the parties agreed that should the decision relating to Citation No. 7366374 sustain the position of the Secretary, then Premier would no longer contest the remaining two citations, and would consent to a judgment in favor of the Secretary regarding these two citations. Based upon this agreement , I find that citation Nos. 7366499 and 7366498 shall be affirmed, and that Premier pay a penalty of **$55.00**, as assessed, for each of these violations.

Order

It is **ORDERED** that, within 30 days of this Decision, Premier shall pay a total civil penalty of **$260.00.**

Avram Weisberger
Administrative Law Judge

Distribution List: (Certified Mail)

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