FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 11, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-142
Petitioner	:	A. C. No. 15-17587-03572
v.	:	
	:	
OHIO COUNTY COAL COMPANY,	:	
Respondent	:	Freedom Mine

DECISION

Appearances: Arthur J. Parks, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Madisonville, Kentucky, and J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
Flem Gordon, Esq., Gordon & Gordon, P.S.C., Madisonville, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994), the "Act" charging the Ohio County Coal Company (Ohio County) with three violations of mandatory standards and proposing civil penalties of $423.00 for those violations. The general issue before me is whether Ohio County violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7645093 alleges a violation of the standard at 30 C.F.R. § 75.1725(a) and charges that "[t]he belt was running into the framing and was hot to the touch in the following locations along the No. 4 belt entry at spad number 3+30, 4+90, 13+30, 14+00, 19+60, 23+10 and crosscut No. 17 the company removed from service immediately." The cited standard, 30 C.F.R. § 75.1725(a), provides that "[m]obile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Inspector Charles Jones of the Department of Labor's Mine Safety and Health Administration (MSHA), has been a coal mine inspector since September 1999. He has 21 years underground coal mine experience and for 14 of those years he served as a safety committeeman.

Jones testified that on October 19, 2000, he was inspecting the No. 4 belt entry accompanied by miner's representative Chris Johnson. He found that at seven locations the belt was running into and cutting into the bottom of the metal belt framing. At those locations the frame was too hot to hold. While Jones opined that the violation was not "significant and substantial" and that injuries and illnesses were unlikely, he nevertheless believed that if the belt would cut further into the frame there was a possibility of coal spillage and, because of the heat generated by belt friction, there could be fire or smoke from burning coal. He believed that the described hazard was unlikely, however, because the area had been rock dusted and there was no loose coal. Based on the credible testimony of Inspector Jones, I find that indeed, there was a violation of the cited standard of low to moderate gravity.

Inspector Jones found moderate negligence basing his conclusion on the fact that none of the seven violative conditions had been reported in the belt examiner's book. He noted however that the belt had cut about one inch into the steel framing so he concluded that the belt had been misaligned for at least a week. Jones also opined that there had been at least two previous belt examinations during which the violative condition should have been observed. Indeed, the belt had already cut through the support bracket and had already cut into the frame itself about one inch at the time of its discovery. Under these circumstances I agree that the operator is chargeable with moderate negligence.

In reaching these conclusions I have not disregarded the testimony of mine superintendent Ricky Brown. However, for the reasons stated below, I find his testimony to be entitled to but little weight. Brown was not present at the time the citations were issued and only later appeared at the scene to realign the belt. Brown did not deny that the belt was cutting into the metal frame as described by Inspector Jones and testified only that he did not notice it. Brown readjusted the belt with "cowhide" gloves and did not, with such gloved hands, find the frame to be hot at the locations he held it. This qualified testimony accordingly does not negate the affirmative testimony of Inspector Jones.

Citation No. 7645100 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Loose coal and float coal dust 0 to 1 ft. deep, 5 ft. wide, and for a distance of 8 ft. was allowed to accumulate under the takeup located at the No. 6 header. The belt and header was [*sic*] energized and this mine deliberates [*sic*] 19,634 cubic feet of methane in a 24 hours [*sic*].

The cited standard, 30 C.F.R. § 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

On October 30, 2001, Inspector Jones, accompanied by Andy Schultz, a miner's

representative and belt examiner, observed loose coal and float coal dust under the take-up located at the No. 6 header. Coal and float coal dust was, according to Jones, 1 foot deep and 5 feet wide for a distance of 8 feet. He measured the accumulation with a measuring stick. The condition was particularly hazardous according to Jones because the belt was running in the coal dust and indeed, the dust at that location had begun to crystallize. The material was black in color. The take-up was also kicking up dust and coal dust was being suspended in the air. Jones noted on the face of the citation that "injury or illness" was "reasonably likely" and could reasonably be expected to cause "lost workdays or restricted duty." He opined at hearing that the belt running against the coal accumulation with sufficient heat to cause crystallization, could result in smoke and fire. Jones opined that even should the accumulation have been wet it would have made no difference under the circumstances presumably because the heat generated would have dried the coal. He further opined that one person would likely have been affected. He opined that the carbon monoxide monitor would trigger an alarm outside and that a person would enter the mine to locate the cause thereby becoming exposed to the smoke. Within this framework of evidence I find that indeed the violation has been proven as charged and was "significant and substantial" and of high gravity.

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 safety 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 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.

See also Austin Power Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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, 916-17 (June 1991).

Jones opined that the violation was the result of only moderate negligence because the

condition had not been listed in the belt examiner's books as a hazard. Jones also opined however that the condition should have been discovered during a proper pre-shift examination, noting that the condition had existed for at least 48 hours - - sufficient time for the coal dust to become crystallized. Based on this credible evidence I agree that the operator is chargeable with moderate negligence.

In reaching these conclusions I have not disregarded the testimony of pre-shift and belt examiner Andrew Schultz who accompanied Jones on his inspection. Schultz had initially agreed with Jones that the materials cited were in fact coal and coal dust but testified that he later changed his mind after the inspector had departed and as he cleaned up the material. He then purportedly concluded that the material was not coal at all but only mud and fire clay. I find for several reasons however that this testimony is entitled to but little weight. First, I note that Schultz, as the belt examiner, was a person responsible for reporting violative conditions in the examination books. Since the violative condition alleged herein had not been reported, he would have been motivated not to find the cited condition to be violative. Second, it is undisputed that the take-up was "kicking up" coal dust and that coal dust was being placed in suspension. Schultz did not deny or otherwise account for this in his testimony. Third, Inspector Jones has 21 years of underground coal mining experience, 14 of which as a safety committeeman. Clearly he is well qualified to ascertain the identity of coal, crystallized coal and coal dust. His expert testimony in this regard is entitled to significant weight and I find in this case that it is controlling.

Citation No. 7645101 charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

> The No. 7 belt was not being maintained. The belt was rubbing and cutting into the wood timbers located at crosscut No. 19. These wood timbers were hot and there was loose coal and coal float dust 0 to 4 inch [*sic*] deep on top of rock dust surface in the immediate area. Company removed this belt from service immediately.

As previously noted, the cited standard requires that mobile and stationary machinery and equipment be maintained in safe operating condition and machinery or equipment in unsafe condition be removed from service immediately.

According to Inspector Jones, the No. 7 belt was in fact rubbing and cutting into wood timbers located at crosscut No. 19, where there was also loose coal and float coal dust. The top belt was cutting into several timbers when coal was off the belt and the timbers were scorched and hot to the touch. Inasmuch as there was up to 4 inches of loose coal in the vicinity, Inspector Jones concluded that should the timbers catch fire from the friction then coal nearby could also ignite resulting in smoke and fire. On the face of the citation he opined that "injury or illness was reasonably likely" and could reasonably be expected to result in "lost work days or restricted duties." He also concluded therefore

that the violation was "significant and substantial." I find that the credible evidence supports these findings and that the violation was of high gravity.

Jones opined that the violation was a result of moderate negligence because the hazardous condition was not listed on the belt examiner's report. Jones also opined that the condition had existed for at least two days and that the scorched timbers were obvious. Indeed, according to Jones, he smelled wood burning from the scorched timbers several crosscuts from the cited condition. Within this framework of credible evidence I conclude that the violation was the result of moderate negligence.

In reaching these conclusions I have not disregarded the testimony of belt examiner Schultz. Schultz maintains that Inspector Jones failed to mention to him that there were hot timbers and accumulations. Schultz admits however that there was in fact evidence that the belt had been rubbing on the timbers. Schultz claimed that he did not in fact remove the timbers and claimed that he did not know whether they were in fact ever removed. Inspector Jones credibly testified in rebuttal however that he observed Schultz himself remove the timbers and loose coal after Schultz was told that a citation would be issued. I also note that Schultz did not deny that the cited loose coal existed in proximity to the cited timbers. Under the circumstances I do not find reason to discount the inspector's testimony.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Gravity and negligence findings have been previously noted in this decision. Respondent has a significant history of violations but the great majority of those violations were not deemed "significant and substantial" and were subject to minimal $55.00 penalties. As a result I find that the operator had a moderate history of violations. It has been stipulated by the parties that the operator produced 684,797 tons of coal. Presumably this is the annual tonnage for a recent year and would place the operator in a medium to large size category. It has been further stipulated that the penalties proposed by the Secretary "are appropriate to the size of this operator's business and will not affect its ability to continue in business." It has also been stipulated that the operator "demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation." Under the circumstances the following civil penalties are found to be appropriate: Citation No. 7645093 - $55.00, Citation No. 7645100 - $200.00, Citation No. 7645101 - $200.00.

ORDER

Citations No. 7645093, 7645100 and 7645101 are hereby affirmed as written and the Ohio County Coal Company is directed to pay civil penalties of $455.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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