FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-65
Petitioner	:	A. C. No. 15-17587-03571
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, 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 a 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 (1994) *et seq.*, the "Act," charging the Ohio County Coal Company (Ohio County) with six violations of mandatory standards and proposing civil penalties of $330.00 for those violations.

At hearings the Secretary vacated two citations, Citations No. 7644854 and 7644856, and Ohio County agreed to pay the proposed penalty of $55.00 in settlement of Citation No. 7644863. I have considered the representations and documentation submitted with the respect to the latter citation and I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision. The general issue before me with respect to the remaining three citations 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. 7644862 alleges a violation of the standard at 30 C.F.R. § 75.342(a)(4) and charges as follows:

> The methane monitor installed on the left side Joy miner, Company No. M-1 was not maintained in proper operating condition. The monitor would only go up to 2.2% when checked with 2.5% methane.

The cited standard, 30 C.F.R. § 75.342(a)(4), provides in relevant part that "methane monitors shall be maintained in permissible and proper operating condition." Archie Colburn, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified that on August 1, 2000, he was performing a regular inspection of the Freedom Mine accompanied by another MSHA employee and James Nichols, Ohio County's Safety Director. In testing the methane monitor installed on the left side of the Joy miner with a 2.5% methane sample, the monitor registered only 2.2%. The test was performed at least twice and Ohio County acknowledges that indeed, the methane monitor registered only 2.2% when tested with a known sample of 2.5% methane. Under the circumstances the violation is proven as charged.

The Secretary alleges that the violation was the result of moderate operator negligence. It is noted in this regard that although the cited standard requires the calibration of methane monitors at least once every 31 days the record herein shows that Ohio County was recalibrating its methane monitors on almost a weekly basis. The most recent testing on the monitor at issue was performed only four days before the violation herein. Nichols acknowledged that the monitors must be checked regularly because they are not reliable. Under the circumstances I accept the Secretary's assessment of moderate negligence.

Inspector Colburn found that "injury or illness" was "unlikely" and that any such "injury or illness" would not reasonably be expected to involve any lost workdays. These findings of low gravity by the Secretary are not disputed and are accepted for purposes of assessing a civil penalty.

Citation No. 7644864 was issued by Inspector Colburn on the following day, August 2, 2000, and charges as follows:

> The approved ventilation, methane and dust control plan in effect at this time was not being complied with on the OO1-O MMU. The required 5,000 cfm was not present behind the line curtain in the No. 3 room where the miner was loading coal. Only 3,910 cfm could be measured.

Inspector Colburn testified that, as he approached the No. 3 room where the continuous miner was loading coal, the miner operator suddenly shouted to shut down the miner and the miner was shut down. Colburn, intending to take air readings, requested that brattice curtains not be hung before he performed his testing. In spite of this request the miner operator rehung the brattice curtains that had been lying on the mine floor. Nichols also began hanging brattice curtains. Colburn nevertheless took his air readings after these additional curtains had been hung and found only 3910 cfm behind the line curtain in the No. 3 room where the miner had been loading coal.

The cited standard, 30 C.F.R. § 75.370(a)(1), requires that the mine operator follow its approved ventilation methane and dust control plan, "Plan." See *Zeigler Coal Co. V. Kleppe,* 536 F.2d 398 (D.C. Cir. 1976). The Plan then in effect provided that "in entries or rooms, there shall be a minimum of 5,000 cfm or [*sic*] air reaching each working face where coal is being mined by continuous mining machine" (Gov't Exh. No. 3, Pg. 3, Par. 2). Respondent argues, based on this portion of the Plan, that there was no violation because at the time Inspector Colburn took his air measurement the continuous miner had shut down and was not mining coal.

The approved plan, however, also provides as follows:

> Before this cut is started, a measurement of the volume of air passing by the proposed cut shall be made. The volume of air shall be 5,000 cfm or greater. After the cut has progressed to 20 feet and the line brattice has been installed, the volume of air at the inby end of the line brattice shall be maintained to at least 5,000 cfm. While the scrubber is in operation, 6,000 cfm shall be maintained at the end of the line brattice.

Since it is not disputed that the cut at issue had progressed to 20 feet and line brattice had been installed, it appears from the above language that the volume of air at the inby end of the line brattice must be maintained to at least 5,000 cfm whether or not the continuous miner is in operation. Accordingly, when Inspector Colburn obtained a reading of 3,910 cfm at that location, there was a violation of those Plan provisions. It may also reasonably be inferred, since Colburn obtained his air reading of only 3,910 cfm after the brattice had been reinstalled, that coal was being mined with less than 5,000 cfm just before the miner was shut down and with the brattice lying on the mine floor. A violation of the cited standard was accordingly also proven under this alternative theory.

Inspector Colburn found that the operator was only moderately negligent because he assumed that before the continuous miner had begun operating there was at least 5,000 cfm as required by the Plan. In this regard I note the testimony of the continuous miner operator that one of the brattice curtains only moments earlier had been torn down by a ram car. He explained that that was the reason he called for the shut down. It is also noted however that not only was that curtain rehung but another separate curtain was also hung to improve ventilation and Inspector Colburn was nevertheless able to obtain only 3,910 cfm.

Colburn also found with respect to the violation that "injury or illness" was "unlikely" and that if an "injury or illness" occurred it would not involve lost work days. These findings of low gravity are not disputed and are accepted for purposes of assessing a civil penalty.

Citation No. 7644873 alleges a violation of the standard at 30 C.F.R. § 75.523-3(b)(1) and charges that "the automatic emergency parking brake installed on the SNS 270 Tractor, Company No. S-7, would not set up the brakes immediately when tested." The cited standard,

30 C.F.R. § 75.523-3(b)(1), provides that "automatic emergency-parking brakes shall - (1) be activated immediately by the emergency deenergization device required by 30 C.F.R. §§ 75.523-1 and 75.523-2." Inspector Colburn testified that after at least three tests it was determined that once the panic bar (emergency deenergization device) was activated it required three seconds to "set up." However after adjustments were made to abate the citation it required only about one second to engage the brakes.

The maintenance coordinator for Ohio County, Barry Nelson, testified that they had intentionally delayed the brake activation mechanism to avoid injuries to persons from inadvertently hitting the panic bar. This delay was accomplished by widening the gap before the piston would engage the brake mechanism. Particularly in light of the fact that the operator was able to adjust the parking brake mechanism to activate within about one second, I conclude that a three second activation would not be "immediate" within the meaning of the cited standard. Accordingly, I find that the violation is proven as charged.

I accept the Secretary's findings of moderate negligence. The violation was caused by the coordinator's intentional adjustment. The inspector's findings that "injury or illness" was "unlikely" and that any such injury or illness would not involve lost work days is not disputed and is accepted as a finding of low gravity for purposes of assessing a civil penalty.

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 affect 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.

The gravity and negligence relating to each violation have previously been discussed. Respondent has a significant history of violations as shown by Gov't Exh. No. 5, however, only eight of those violations were designated as "significant and substantial." It has been stipulated that Ohio County produced 684,797 tons of coal in the year preceding the proposed assessment, thereby placing the mine in a moderately large category. It has also been stipulated that the penalties proposed by the Secretary are appropriate to the size of the operator's business. It has been further stipulated that the penalties would not affect the operator's ability to continue in business and that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

ORDER

Citations No. 7644854 and 7644856 are vacated. Citations No. 7644862, 7644863, 7644864 and 7644873 are hereby affirmed and the Ohio County Coal Company is hereby directed to pay the same $55.00 penalty as proposed by the Secretary for each such citation within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Arthur J. Parks, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Adm. (MSHA), 100 YMCA Drive, Madisonville, KY 42431

Flem Gordon, Esq., Gordon & Gordon, P.S.C., 1822 North Main Street, P.O. Box 1305, Madisonville, KY 42431-1305

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