

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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September 23, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2003-167
Petitioner	:	A.C. No. 15-17165-03541
	:	
v.	:	
	:	
STILLHOUSE MINING, LLC,	:	
Respondent	:	Mine No. 1

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Mr. Monroe L. West, Safety Agent, Stillhouse Mining, LLC, Benham, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Stillhouse Mining, LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary’s mandatory health and safety standards and seeks a penalty of \$1,957.00. A hearing was held in Big Stone Gap, Virginia. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of \$575.00.

Background

Stillhouse Mining, LLC, operates an underground coal mine, known as Mine No. 1, in Harlan County, Kentucky. Stillhouse is owned by Black Mountain Resources, LLC, a division of Cumberland Resources, LLC. The mine has been in operation since 1999 and has two production shifts and one maintenance shift.

On March 13, 2002, MSHA Inspector William Clark, was at the mine to perform a regular quarterly inspection. When he went underground and arrived at the working section, he discovered during his “danger run” that there were no deflector curtains in the numbers six and seven entries.¹ Believing this to be a violation of the company’s ventilation control plan, Clark

¹ Clark testified that a “danger run” is “a check performed each time along the working section of the face areas” for hazardous conditions which could be an imminent danger. (Tr. 12.)

issued Citation No. 7532251. It alleges a violation of section 75.370(a)(1) of the Secretary's health and safety regulations, 30 C.F.R. § 75.370(a)(1), because: "The approved ventilation plan that requires deflector curtains to be maintained within 40 feet of the face is not being complied with on 002 MMU. There are no deflector curtains installed in the #6 and #7 entries that have been driven approximately 120 feet in by the last open crosscut."² (Govt. Ex. 5.)

Section 75.370(a)(1) requires, in pertinent part, that: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." With regard to the citation, Stillhouse's Mine Ventilation Plan provided that:

Deflector curtains will be installed in all other entries of the working section [except those where coal is being cut] and maintained to within 40 feet of the face. These curtains may be lifted for cleanup purposes. Upon completion of scooping operations the curtain will be put back into its proper position. The deflector curtains will extend out by the crosscut a minimum of four (4) feet.

(Govt. Ex. 6 at 1.)

Findings of Fact and Conclusions of Law

Stillhouse "concedes that technically the Plan was not followed." (Resp. Br. at 7.) The company contests, however, the gravity and negligence cited in the violation as well as the amount of the proposed penalty. As discussed below, I find that the company has the better position on these issues.

The inspector testified that as he worked his way across the section, he did not see deflector curtains in either the number six or the number seven entry. (Tr. 18-20.)³ He stated that the entries had already been cleaned and that the scoop that would normally be used to clean the entries was parked in the number six entry, two crosscuts out by the face. (Tr. 25-26.) Inspector Clark further testified that he took methane readings in the two entries with his

² As originally written, the citation alleged that an injury was "highly likely" to result from the violation. At the hearing, counsel for the Secretary moved to modify it to "reasonably likely." The motion was granted without objection. (Tr. 27-28.)

³ The transcript is replete with errors. For instance, it has Inspector Clark stating: "I noticed there were some curtains in the number six entry." (Tr. 18.) In fact, he testified: "I noticed there were no curtains in the number six entry." Where important to the decision, corrections in the transcript will be noted; otherwise no attempt will be made to correct the many mistakes.

methane detector and obtained a reading of .3 percent methane near the face in the number six entry. (Tr. 19.) He also said that he detected methane bubbling up through a water hole in the floor of the number six entry. (Tr. 34.)

Inspector Clark related that when he told Brown that he was issuing a citation for the violation, Brown told him that the curtains had been removed for cleaning and that he had realized, just shortly before Clark approached him, that he had no ventilation in the entries and had sent out to the surface for new curtains. (Tr. 20, 39, 70-71.) Clark testified that at the time he issued the citation he did not see new curtains anywhere on the section, although he may have seen a old curtain that could have been re-hung. (Tr. 20, 27, 39, 63-65.)

Brown did not dispute at the hearing that the deflector curtains were missing from the numbers six and seven entries when Clark informed him that he was issuing a citation. (Tr. 101, 134-35.) He testified that the curtains had been removed because they had become covered with mud and water and had started pulling down from the roof bolts. (Tr. 100.) He claimed, however, that at the time the inspector informed him of the citation, the number six entry had been scooped and the scoop operator was moving the scoop to the number seven entry to begin scooping it. He further contended that he was getting ready to hang new curtains in the number six entry and that the new curtains were present on the section, one on the scoop and the other on the ground in front of him. (Tr. 135-37.)

Based on Brown's admission that there were no deflector curtains in the numbers six and seven entries as well as the Respondent's previously note concession in its brief, it is apparent that the company was not in compliance with its ventilation plan. Consequently, I conclude that Stillhouse violated section 75.370(a)(1) as alleged.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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." A violation is properly designated S&S "if, based upon 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 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts

surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Here, the first requirement, an underlying violation of a safety standard, has already been found. Next, the parties are in agreement that the ventilation plan's provision for deflector curtains is to prevent the accumulation of methane, which could result in an ignition or explosion, in the non-working sections. (Tr. 13-14, 23-24, 110.) Thus, the second requirement is met in that the failure to have the curtains up contributed to the danger of methane accumulation and explosion.

As is frequently the case, however, whether this violation is S&S turns on the third criterion. For this violation, the Secretary has failed to prove that there was a reasonable likelihood that the hazard contributed to would result in an injury. The Inspector testified that he detected .3 percent methane in the number six entry and found methane seeping from a water hole. He did not detect any methane in the number seven entry. (Tr. 57.) He also testified that records indicated that Mine No. 1 liberated 122,000 cubic feet of methane during a 24 hour period, that there had been at least two previous ignitions in the mine, that the mine was part of the Harlan coal seam in which there had been methane ignitions in an Arch of Kentucky mine and that there had been fatal methane explosions in other coal mines. (Tr. 28-33, 81-83.) Finally, Inspector Clark testified that methane becomes explosive at a concentration of five percent. (Tr. 33.)

All of this evidence would be relevant to the third element if the Secretary had established that the methane was approaching explosive levels and that there was some means of igniting it. Clearly, .3 percent is nowhere near an explosive level. Unfortunately, there is no evidence to indicate how long it would take for the methane to reach a dangerous level. The inspector did not know. (Tr. 47, 80.) Since the evidence shows that the required preshift and on-shift inspections were being performed, the number six and seven entries would presumably have been checked for methane accumulation at least every eight hours even if the curtains remained down. (Resp. Ex. E.)

More significant than the failure to establish explosive levels of methane, however, is that there is no evidence of ignition sources. Since the two entries were idle, it was incumbent on the Secretary to show how the methane would be ignited if it did reach a dangerous level. The Commission has held that "in order for ignitions or explosions to occur, there must be a confluence of factors, including a sufficient amount of methane in the atmosphere . . . and ignition sources." *Texasgulf, Inc.*, 10 FMSHRC at 501. The Secretary has shown neither.

Accordingly, I conclude that the violation was not “significant and substantial.” The citation will be modified appropriately.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$1,957.00 for this violation.⁴ However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalty will not adversely impact the company’s ability to continue in business and that the operator demonstrated good faith in abating the violation. (Tr. 8.) Therefore, I make the same findings. They also stipulated that the controlling entity produced 4,209,630 tons of coal and that Mine No. 1 produced 568,365 tons of coal during the 12 months preceding the issuance of the citation. (Tr. 9.) From this I find that the mine is a large mine and the operator is a medium sized operator.

From the Assessed Violation History Report and the Proposed Assessment Data Sheet, I find that Stillhouse has an average history of previous violations. (Govt. Exs. 2 & 3.) In accordance with my conclusion that the violation was not S&S, I find that the gravity of this violation was not great.

Finally, with regard to the operator’s negligence, I do not agree with the inspector that it was “high.” Inspector Clark believed that the company was highly negligent because he assumed that the section foreman had been informed that Clark was at the mine to perform an inspection prior to Clark’s arriving on the section. Therefore, since the foreman had not corrected the situation after being informed that an inspection was taking place, Clark rated the foreman’s negligence as “high.” (Tr. 40-45.)

The inspector’s theory of negligence, which the Secretary has adopted in her brief, is incorrect as a matter of law. “Negligence is committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risk of harm.” 30 C.F.R. § 100.3(d). Thus, the negligence in this case occurred with the failure to have curtains in the entries. Whether the foreman knew that an inspector was present and did not correct the situation before the inspector arrived on the section, has no bearing on that determination.

Here the evidence shows that the curtains had become wet and muddy and had to be replaced. The company was negligent in not having the replacement curtains on the section

⁴ This penalty was obviously proposed prior to the modification of the citation at the hearing.

when the old curtains were removed.⁵ However, the fact that the curtains had to be replaced rather than lifted as provided in the ventilation plan is a mitigating factor. Therefore, I find that the operator was “moderately” negligent in connection with this violation.

Taking all of these factors into consideration, I conclude that a penalty of \$575.00 is appropriate for this violation.

Order

In view of the above, Citation No. 7532251 is **MODIFIED** by deleting the “significant and substantial” designation and by reducing the level of negligence from “high” to “moderate” and is **AFFIRMED** as modified. Stillhouse Mining LLC is **ORDERED TO PAY** a civil penalty of **\$575.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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/hs

⁵ In this regard, I credit Inspector Clark’s testimony on this fact over Brown’s. I do not find it credible that, if the curtains were on site, Brown would not have pointed that fact out to the inspector.