FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

June 8, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-34
Petitioner	:	A.C. No. 15-07201-10885
v.	:	
	:	
HARLAN CUMBERLAND COAL CO,	:	
Respondent.	:	Mine: C-2

DECISION

Appearances: Michael Finney, CLR, U.S. Department of Labor, MSHA, Madisonville, KY, and Ronnie Brock, CLR, U.S. Department of Labor, MSHA, Barbourville, KY, and Marybeth Bernui, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for the Secretary;
H. Kent Hendrickson, Esq., Rice & Hendrickson, Harlan, KY, for the Respondent.

Before: Judge Avram Weisberger

Statement of the Case

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, ("Secretary") seeking the imposition of a civil penalty against Harlan Cumberland Coal Company, ("Harlan Cumberland"), based on the latter's alleged violation of certain mandatory safety standards, set forth in Title 30, Code of Federal Regulations. A hearing was held in Knoxville, Tennessee, on May 5, 2004. At the close of the hearing, after the parties presented oral arguments, a bench decision was issued, which, aside from correction of matters not of substance is set forth below:

1. Citation No. 7538234

Citation No. 7538234 alleges a violation of 30 C.F.R. §75.400, which 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.'

The inspector testified that he observed a spillage 'pretty much' along the entire 4,000 length of the belt; and that the accumulation was black in color, which indicated the presence of float coal dust. He also observed that loose coal was six inches deep, and extended the entire length of the belt, from the head to

the tail, with the exception of approximately 100 feet that had been cleaned. This testimony was not contradicted by Respondent's witness, nor was it impeached.

Respondent argues that inasmuch as 30 C.F.R. §75.400-1(a) and (b), define coal dust and float coal dust as particles of coal that can pass through a 20 sieve and 200 sieve, respectively, since the inspector conceded that he did not pass the accumulations through a sieve he thus did not establish the presence of float or coal dust.

I do not find the inspector's failure to pass the items through a sieve as being fatal to establishing a violation. In *Old Ben*, 1 FMSHRC, 1954, 1956, December 12, 1979, the Commission analyzed the purpose of Section 304(a) of the 1969 Act, whose language is repeated in Section 75.400, supra. The Commission held, that the legislative history and purposes of the Act "... point to a holding that the standard is violated when an accumulation of combustible materials exists." Thus, I find that Section 75.400 near does not require that the accumulated materials be passed through a sieve to establish a violation of that Section.

Respondent further argues that the inspector did not conduct any study with regard to the amount of combustible material present. Section 75.400, supra, does not require, to establish a violation, that the presence of a specific percentage of combustible material be set forth in order to establish a violation. It merely provides that any combustible material, including loose coal dust, shall be cleaned up.

Based upon the inspector's testimony regarding the accumulations of coal and their extent, I find that Section 75.400 supra, was violated.

I take cognizance of the holding of the Commission *Mathies Coal Co.*, 6 FMSHRC 1, January 1984, that for a violation to be considered significant and substantial, the Secretary must establish the following elements: an underlying violation of a safety standard, a discreet safety hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to would result in an injury, and a reasonable likelihood that the injury in question would be of a reasonably serious nature. I have already found that there was a violation of a mandatory safety hazard. The inspector testified, with regard to the second element, that should the belt catch on fire, the accumulations would lead to production of a smoke, which he said was extremely hazardous. This testimony was not contradicted, and it was not specifically impeached. I find that the second element has been met.

With regard to the third element, the Secretary must establish that it was

reasonably likely for a fire to have occurred. In this connection, the inspector testified that there was oxygen present, that there was loose coal present which was combustible, that the belt runs 8 to 12 hours a day, and that because sixty rollers were stuck in coal, movement of the belt across these rollers would lead to friction, which could cause bearings to heat up leading to a fire. However, I find it significant that there wasn't any evidence adduced that any of the rollers were hot or warm to the touch. Nor was any testimony that any of them appeared to be red, which would indicate they were hot.

The inspector indicated that he had been told by other inspectors that stuck rollers have caused fires. Not much weight is accorded this hearsay testimony. There were no specifics referred to in this testimony. There is an absence of evidence that the specific conditions herein, that the inspector testified to, have led to mine fires at other mines.

Therefore, I find that the Secretary has not established the third element of *Mathies*, supra, i.e., that there was a reasonable likelihood that the accumulations present would have contributed to an injury-producing event, in this case, a fire.

Regarding a penalty, I find that Respondent's negligence was of a moderate degree, as the record indicated that Respondent had started to clean the accumulations and had, in fact, cleaned 100 feet. The gravity of the violation was moderately high, as it could have caused injuries due to smoke inhalation. Taking into account the remaining factors set forth in Section 110(i) of the Act as stipulated to, I find a penalty of $100.00 is appropriate.

2. Citation No. 7538233

Citation No. 7538233 alleges a violation of 30 C.F.R. § 1722(b), which provides that guards at conveyor head pulleys "... shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley."

The inspector testified that, regarding the Number 3 belt, there was a section of guarding missing at the head roller exposing an eight-foot section along the walk-side of the belt. He opined that without the guard a miner in the area could get caught in the roller. He said that anybody cleaning would be within an arm's length of the roller. This testimony, in essence, was not contradicted or impeached. Based on this testimony, I find that Respondent did violate Section 1722, supra.

With regard to the significant and substantial aspect of the violation, the inspector testified that because the belt examiner who had been cleaning the area

was wearing loose clothing, it was reasonably likely that he would have gotten caught in the unguarded pulley. However, the belt was not in operation at the time, and was not in operation when it was cited. There was not any evidence adduced setting forth the spatial relationship between a miner cleaning in the area, and the location of any hazardous parts that were unguarded. Under these conditions, I find that the third element set forth in *Mathies*, supra, has not been established. Thus, I find that the violation was not significant and substantial.

With regard to a penalty, the inspector testified that should an injury have occurred as a result of the violation, in all likelihood it would have been in the nature of broken limbs or possibly a fatality. Based upon this testimony, which was not contradicted or impeached, I find that the level of gravity was moderately high. Respondent's witness, Ray Alred, testified, regarding negligence, that it is necessary to remove the guard in order to shovel coal dust, and that the belt was off when this was done. This testimony was not contradicted. Indeed, the inspector testified that the belt examiner told him that he had removed the guard in order to clean, and had forgotten to put in back. Within this context, I find Respondent's negligence moderately high. Considering the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the parties, I find that a penalty of $100.00 is appropriate.

3. Citation No. 7538235

At the conclusion of the hearing, the Secretary made a motion to approve a settlement agreement entered into by the parties regarding Citation No. 7538235. A reduction in penalty from $153.00 to $60.00 is proposed. I have considered the representations, testimony, and documentation submitted regarding this citation, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Order

It is **Ordered** that Respondent pay a total civil penalty of **$260.00** within 30 days of this Decision.

Avram Weisberger
Administrative Law Judge

Distribution List:

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