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

January 12, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-320
Petitioner	:	A. C. No. 15-02132-85547
v.	:	
	:	
WEBSTER COUNTY COAL, LLC,	:	Dotiki Mine
Respondent	:	

DECISION

Appearances: Christian Barber, Esq. and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Thomas C. Means, Esq., Crowell & Moring LLP, Washington, DC and Mark Evans, Director of Safety and Training, Webster County Coal, LLC, Nebo, Kentucky, on behalf of the 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 *et seq.*, the "Act," charging Webster County Coal, LLC, (Webster County) with one violation of the mandatory standard at 30 C.F.R. § 75.503 and proposing a civil penalty of $629.00 for the violation. The general issue before me is whether Webster County violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Also before me is the question of whether the Commission has jurisdiction in this case regarding the validity of a "section 104(b)" order. Additional specific issues are also addressed as noted.

Citation No. 7662703 alleges a violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

> The Long Airdox 488 scoop, Company No. 6239 on number 1 unit, MMU 031, was not being maintained in a permissible condition. The locking bar used to secure the top lid of the left side battery box was missing.

The cited standard, 30 C.F.R. § 75.503, provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine." There is no dispute that the cited scoop was required by the cited standard to be maintained in permissible

condition and that the scoop was not, at the time the citation in this case was issued on January 5, 2006, being maintained in the required permissible condition.[1] The Secretary's findings of low gravity and moderate negligence are also undisputed. What is disputed is the issuance on January 9, 2006, of "failure to abate" withdrawal Order No. 7662706 issued pursuant to section 104(b) of the Act on January 9, 2006, and the enhanced penalty resulting from the alleged failure to timely abate the violative condition.

For the following reasons, however, I find that this Commission does not have jurisdiction to entertain a challenge to that order. The Act provides two potential opportunities for an operator to contest before this Commission an order issued under section 104. Section 105(d) provides an operator a right to contest an order issued under section 104 within 30 days of receipt of the order. The order at bar was not contested in this manner. Alternatively, where a proposed civil penalty is assessed under section 110(a) for a cited violation, section 105(a) provides that an operator has a right to contest the alleged violation or the proposed assessment of penalty within 30 days of receipt of notice of the proposed assessment. In this case, however, no opportunity to contest the 104(b) order was provided under section 105(a) because there was no violation alleged in, and there was no proposed assessment of a penalty for, the 104(b) order. Section 104(b) orders, like the one at issue herein, typically do not allege a separate violation. Consequently, no civil penalty can be assessed for the order under the mandatory language of section 110(a) of the Act. Because no penalty was assessed for the 104(b) order, it may be inferred that the notation "104(a)/104(b)" on the assessment form refers only to the operator's lack of good faith in attempting to achieve rapid compliance after notification of the violation- -one of the factors that the Commission and its judges must consider in determining the amount of a civil penalty under section 110(i) of the Act.

Within the above framework it is clear that the validity of the 104(b) order is therefore not properly before me.[2] Nevertheless, the allegations in the order are relevant in determining an appropriate civil penalty under section 110(i) of the Act. In this regard the order alleges as follows:

> No apparent effort was made by the operator to repair the locking bar used to secure the top lid of the battery box on the Long Airdox Scoop company number 6239 on section no. 1, MMU 031. The top lids were not secured at the time of the inspection.

William Cook III, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified, without contradiction, that on January 5, 2006, he issued Citation No. 7662703 after observing that the locking bar to the battery box lid on the left side of the cited

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[1] Respondent's attempt, in its post-hearing brief, to now deny what was stipulated at hearing and to assert a defense not raised at hearing, is untimely. The attempted denial is rejected and the defense will be considered as waived.

[2] For the reasons subsequently set forth in this decision, however, I would, in any event, have found that the Secretary had proven the validity of the order by a preponderance of the evidence. See *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April, 1989).

scoop had been broken off. The Secretary's representation that Respondent stipulated that the scoop was accordingly not being maintained in a permissible condition, was not disputed. Cook explained that, without a secured lid over the battery box, a foreign object could contact the battery terminals causing a fire or explosion. He considered however, that injuries were unlikely as a result of the violation because there was no evidence of an explosive atmosphere. He found the violation to be of low gravity and the operator chargeable with moderate negligence. These findings are undisputed and accepted for purposes of a civil penalty assessment.

According to the undisputed testimony of Inspector Cook, both Foreman Jimmy Ray and Section Mechanic James Chappell were present when he issued the citation. At that time, he told them that they could wrap a chain over the subject lid tightened with a "boomer" as a temporary measure to permit continued operations. He testified that he also told them, however, that such a temporary measure would not be sufficient to terminate the citation. Cook issued the citation with a termination due date of January 6, 2006, at 8:00 a.m., nearly 24 hours from the issuance of the citation. According to the credible testimony of Inspector Cook, he also told Mark Evans, Respondent's director of safety and training and Gary Lewis, the chief electrician, that the chain wrap would provide only a temporary fix for the problem.

Inspector Cook returned to the mine on January 9, 2006, and found the cited scoop without even the temporary chain and with no other means of securing the battery lid. At this time Cook issued the "section 104 (b)" withdrawal order. He terminated the order after the Respondent welded a chain onto the scoop and secured the chain on top of the battery box with a bolt and nut. Cook explained that the loose chain permitted as a temporary fix on January 5th was inadequate because the chain could fall off or be easily removed whereas the chain welded onto the scoop on January 9th would not fall off and was secured with a nut and bolt. Cook nevertheless told Mine Foreman Larry Mitchell that they still needed to replace the locking bar.

Webster County argues in its post-hearing brief that the citation should have been terminated on January 5, 2006, when it "took immediate action to 'secure' and thus abate the violative condition". As previously noted, however, Inspector Cook credibly testified that the temporary use of a loose chain wrapped around the battery lid did not provide a secure closure because it could readily fall off or be removed for other uses. Indeed, when he returned on January 9, 2006, the chain was no longer present and the lid to the battery compartment was unsecured. Moreover, at the time he issued the citation, Inspector Cook informed the Respondent's foreman, its section mechanic, its director of safety and training and its chief electrician of the necessity to provide more secure repairs and they were advised that the citation would not be terminated until such repairs were made. The inspector's assessment of the required abatement was certainly reasonable under the circumstances.

In reaching these conclusions, I note that Webster County presented no testimony at hearing and submitted as evidence only the "out-of-court" statements of Section Mechanic, James Chappell and Scoop Operator, Anthony Yates (Exh. R-1 and R-2 respectively). While such statements are admissible in Commission proceedings the witnesses could not be subjected to the scrutiny of cross examination and therefore the statements cannot be given the same weight as testimony at hearing.

In addition, without any evidence of the experience and expertise of these gentlemen, I find that neither statement is sufficient to negate the credible expert testimony of Inspector Cook, that the temporary method of utilizing a loose chain to secure the battery lids was inadequate and was indeed permitted only as a temporary fix insufficient to abate the violative condition. Cook had 19 years experience in the safety department of Peabody Coal Company and was familiar with underground mining equipment and the safety issues relating to such equipment. He also had two years experience as a coal mine inspector for MSHA and attended the 26 week training program at the MSHA academy in Beckley, West Virginia.

Under all the circumstances, I therefore find that the Secretary has proven by a preponderance of the evidence that the violation charged in Citation No. 7662703 was not abated in a timely or good faith manner.

Civil Penalties

Under section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that Webster County is a large size mine and has a modest history of violations (0.3 to 0.5 violations per inspection day). The gravity and negligence findings have previously been discussed in the instant decision. As previously noted, the violation was not abated in a timely and good faith manner. There is no evidence that the penalty would affect the operator's ability to continue in business. Under the circumstances, I find that the Secretary's proposed penalty of $629.00, is appropriate for the violation charged herein.

ORDER

Citation No. 7662703 is affirmed and Webster County Coal, LLC, is directed to pay a civil penalty of $629.00 for the violation charged in the citation within 40 days of the date of this decision. Order No. 7662706 is affirmed as it became final at the expiration of 30 days after its issuance.

Gary Melick
Administrative Law Judge
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