

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

July 11, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-114
Petitioner	:	A.C. No. 15-07475-128085 -01
v.	:	
	:	
SOLID ENERGY MINING COMPANY,	:	Mine #1
Respondent	:	

DECISION

Appearances: Donna E Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Anthony Burke, Conference and Litigation Representative, U.S. Department of Labor, Pikeville, Kentucky, and Rodney Ingram, Conference and Litigation Representative, U.S. Department of Labor, Pikeville, Kentucky, on behalf of the Petitioner;
Carol Ann Marunich, Esq, Dinsmore and Shohl, LLC, Morgantown, West Virginia, 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 Solid Energy Mining, (Solid Energy) with two violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Solid Energy violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation Number 6645303

This citation, issued August 14, 2007, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Combustible float coal dust is present in the 3-B coal conveyor belt entry from #3 belt drive thru break #8. The combustible float coal dust is present on the mine floor, belt structure, waterline and coal ribs. The combustible float coal dust is dark to black in color on previously rock dusted surfaces and float coal dust is dry.

The cited standard 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.”

Roger Workman, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) testified that he observed float coal dust “black and dark in color” in the 3-B coal conveyor belt entry from the number 3 belt drive through break number 8. He noted that the float coal dust was “dry textured” and that the mine was under a “Section 103(i)” 15 day spot inspection required of mines liberating more than 250,000 cubic feet per minute of methane in a 24-hour period. He found that the float coal dust was deposited on the mine floor, on the belt structure and on the water lines and extended over approximately 642 feet.¹ Workman observed that there were omega block seals in the area sealing off mined-out areas in which he surmised methane was present. He testified that such seals “could possibly” collapse in the event of an explosion behind the seals. Workman speculated that if there was an intake of methane and an explosion occurred such an explosion could be further propagated by the suspension of the coal dust with burns and smoke inhalation and “possible entrapment” resulting. Workman further observed that only a mine examiner once each shift would be in the exposed area. He therefore opined that only one person would be affected by any explosion but concluded that if an injury occurred it would likely be serious. Workman concluded that the condition had existed several shifts “based on my experience”.

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 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 injury in question will be of a reasonably serious nature.

See also Austin Power Co. 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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12

¹ The transcript incorrectly reads that the coal dust was on “wire lines” rather than on “waterlines”.

(January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

While I find that the Secretary has sustained her burden of proving the existence of the violation I do not find that she has met her burden of proving the violation was either “significant and substantial” or of high gravity. The Secretary presented nothing more than speculative testimony regarding any possible ignition source for the cited coal dust. Workman first acknowledged that there was no loose coal found and that the float coal dust was paper thin in depth. He did not test for combustibility and based his conclusion regarding the explosive nature of the dust only upon its color. Workman further acknowledged that he observed no ignition sources in the vicinity of the coal dust and had been told that the area had been rock dusted earlier in the shift. He found no methane outside the sealed area and did not know the methane level behind the seals as of the date of the alleged violation. Moreover, the issuing inspector failed to provide a responsive answer to establishing the third element of the *Mathies* formula i.e. whether there was a reasonable likelihood that the hazard would result in an event in which there was an injury (Tr. 24, lines 16-20).

In addition, mine foreman David Jude testified that he accompanied Inspector Workman on the inspection at issue. According to Jude, they traveled the entire length of the 3,500-foot 3-B belt. Jude felt that overall the belt was pretty good and the area cited by Workman had only about 1/16 of an inch of coal dust. Jude testified that the belt is dusted regularly and that the mine had about six to eight miles of beltline to maintain. According to Jude, they tried to rock dust every night on the third shift and they had fire bosses who walked the belt line and had authority to order rock dusting where needed. In Jude’s expert opinion, the dust cited by Workman was unlikely to have been combustible. He also noted that the belt at issue was fire retardant and should not burn. Furthermore, Jude noted that the mine had no history of ignitions. Under all the circumstances, then, I do not find that the Secretary has met her burden of proving that the violation was “significant and substantial” or of significant gravity. I find, however, that the Secretary has established that the violative condition was the result of Solid Energy’s moderate negligence. It may reasonably be inferred- -from the fact that over four shifts (beginning with the first shift on August 13, 2007, through the second shift on August 14, 2007), it was reported by a mine examiner that the cited 3-B belt needed additional rock dusting and that no corrective action was reported to have been taken- -that the operator knew or should have known of the existence of the cited condition (Gov’t Exh. No. 7).

Citation Number 6645306

This citation, issued on August 20, 2008, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

The Fairchild scoop (Serial No. T339-128) located at the 3-B coal conveyor belt drive, in the track entry is not being maintained in a safe condition. The breaker on the scoop could not be reset from the operating compartment as required. When the breaker was reset with the pump motor in the on position the scoop would tram without turning the

controls to the off position first. The operator immediately removed the scoop from service.

The cited standard provides that “[mobile] and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

It is undisputed that the cited scoop had been designed to have a lever in its cab which was connected mechanically by a cable to the circuit breaker. Inspector Workman was of the belief that the cable was either broken or disconnected but was told that a new cable had been utilized to abate the condition. According to Workman, the circuit breaker on the scoop could not be reset from the operator’s compartment but the breaker had to be reset outside the compartment and with the pump motor in the “on” position the scoop would tram without first turning the controls to the “off” position. According to Workman, the scoop could therefore run over a person or trap a person in its path. He felt the violation was “significant and substantial” because he believed there was a likelihood of a person being struck by the trammed scoop to suffer broken bones, crushing injuries and death. According to Workman, only one person, i.e. the machine operator, would be affected by the alleged defect. Workman charged the operator with moderate negligence because the equipment is required to be examined on a weekly basis. He admitted however that he did not know whether anyone knew of the alleged defect.

Mine foremen David Jude testified that the cited scoop was an “outby” scoop used only if something broke down and for miscellaneous work. It was used not on a regular basis. When the citation was issued, the scoop was being charged. He admitted that the cable was broken from the breaker switch and could not be reset from the cab but only from the outside. Jude testified, however, that the tram motor and the pump motor are separate on this equipment and that the breaker controlled only the pump motor. Therefore, according to Jude, the scoop could not move if the breaker was switched “on” unless someone was in the operator’s compartment pressing the peddle that would tram the equipment.

Considering Jude’s greater familiarity with the cited equipment, I give his testimony the greater weight and find that the cited defect presented only a minimal hazard and not the hazard described by Inspector Workman. It is apparent that while someone might be resetting the breaker switch outside the operator’s compartment, the operator could inadvertently begin trampling the scoop before that person was clear of the scoop thereby possibly sustaining injuries. Under the circumstances, I find that the violation is proven as charged but is of minimal gravity and lessened negligence. The violation certainly does not meet the criteria for a “significant and substantial” violation since, based on the credible expert testimony of mine Foreman Jude, the scoop could only have been trammed with its operator in the compartment. I find that injuries to the scoop operator were not reasonably likely since he would, of necessity, be in the operator’s compartment when the scoop would tram.

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 the subject mine is a large mine and has a significant history of violations. The record indicates that the violative conditions herein were abated in a timely manner. There is no evidence that the penalties imposed herein would affect the operators ability to continue in business. The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of \$500.00 for Citation Number 6645303 and \$100.00 for Citation Number 6645306 are appropriate.

ORDER

Citation numbers 6645303 and 6645306 are affirmed but without "significant and substantial" findings. Solid Energy Mining Company is hereby directed to pay civil penalties of \$500.00 and \$100.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
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Distribution: (Certified Mail)

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