

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 96-254
Petitioner	:	A.C. No. 15-07201-03681
	:	
v.	:	Docket No. KENT 96-320
	:	A.C. No. 15-07201-03683
	:	
HARLAN CUMBERLAND COAL CO.,	:	Docket No. KENT 96-321
Respondent	:	A.C. No. 15-07201-03684
	:	
	:	Docket No. KENT 96-322
	:	A.C. No. 15-07201-03685
	:	
	:	Docket No. KENT 96-333
	:	A.C. No. 15-07201-03686
	:	
	:	C-2 Mine

DECISION ON REMAND

Before: Judge Barbour

The Commission has remanded this matter (Harlan Cumberland Coal Co., 20 FMSHRC ____, Docket No. KENT 96-254, etc. (December 10, 1998)) and directed me to reassess a civil penalty for a violation of section 30 C.F.R. ' 75.1106-3(a) (2), a mandatory safety standard for underground coal mines requiring in part that A[l]iquified and non liquified compressed gas cylinders stored in an underground coal mine . . . be . . . [p]laced securely in storage areas designated by the operator for such purpose, and where the height of the coal bed permits in an upright position, preferably in specially designated racks, or otherwise secured against being accidentally tipped over.@

The violation was one of several that I found occurred at Harlan Cumberland's C-2 Mine, an underground coal mine located in Harlan County, Kentucky (19 FMSHRC 911 (May 1997)). The violation was cited by MSHA Inspector Robert Clay when he observed two compressed gas tanks, one for oxygen and one for acetylene, leaning against the rib of a coal pillar, in an active roadway. The roadway was used by large equipment, such as scoops and personnel carriers. The inspector explained that the scoops and personnel carriers provided their operators with very limited visibility (Tr. 103), and that tracks on the mine floor indicated the equipment had come within 12 inches of the tanks (Tr 105). Because the tanks were not stored securely in an upright

position, the inspector cited Harlan Cumberland for a violation of the standard. In addition, he found the condition was a significant and substantial contribution to a mine safety hazard (S&S).

The inspector testified that if either tank had been hit and punctured, either could have exploded violently (Tr. 101, 102), and that if both tanks had been hit and the oxygen and acetylene had mixed, the resulting explosion could have been even more violent (Tr. 103). Clay believed the violation subjected miners in the active roadway, including those operating or riding on the equipment, to the danger of severe burns or death. Clay described an incident in which a tank similar to those cited had been punctured and A[A] miner was literally blown to bits@ (Tr. 103). Clay candidly admitted, however, that he did not know if the tanks contained gas (Tr. 104).

In ruling on the merits of the violation I found that section 75.1106-3(a)(2) makes no distinction between full or empty cylinders, and I concluded the standard had been violated. I also found, based upon Clay's testimony C including the fact that mining equipment driven by operators whose vision was restricted, passed within one foot of the tanks C that it was reasonably likely as mining continued that the tanks would have been hit and punctured and that a resulting explosion and fire would have injured seriously one or more miners. Therefore, I concluded the violation was S&S (19 FMSHRC at 925-926).

Further, I found the violation was serious. I noted what could have happened if the tanks were ruptured. I stated, AThe inspector compellingly testified ... [that] if the unsecured tanks were knocked over and punctured[,] [t]he explosion and fire ... could have been catastrophic to those in the immediate vicinity of the tanks@(19 FMSHRC at 926 (transcript citation omitted)). In addition, I found the violation was the result of Harlan Cumberland's negligence (19 FMSHRC at 926). The Secretary and Harlan Cumberland stipulated to all other applicable civil penalty criteria (Tr. 912), and based upon my findings regarding gravity and negligence and upon the stipulations, I assessed a civil penalty of \$288 for the violation.

Harlan Cumberland sought and was granted review. It argued the violation was not S&S since the Secretary produced no proof that the tanks contained gas. The Commission agreed that the presence of fuel in the tanks was a prerequisite for a S&S finding and that the burden was on the Secretary to prove the tanks contained oxygen and/or acetylene. Because the inspector did not know what the tanks contained, because the Secretary produced no evidence regarding the contents of the tanks, and because a reasonable inference could not be drawn regarding their contents, the Commission held that Athe Secretary failed to carry her burden of proof as to the critical element of a fuel source, [and that] substantial evidence [did] not support the . . . S&S determination@(Harlan Cumberland, slip op. 10). Accordingly, the Commission reversed the S&S finding and remanded the matter for reassessment of the civil penalty.

The essential question on remand is how the Commission's reversal of the S&S finding affects the gravity of the violation. The focus of the civil penalty gravity criterion is not necessarily on the reasonable likelihood of serious injury, but rather on the effect of the hazard if it

occurs (Consolidation Coal Company, 18 FMSHRC 1541, 1550 (September 1996); citing to Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987) (Agravity@penalty criterion and special finding of S&S not identical although frequently based on same or similar factual circumstances)). Nevertheless, I read the Commission's decision as implying that the lack of any evidence regarding fuel in the tanks (or regarding the likelihood of residual explosive fuel vapors) makes it impossible to assess the presence of a hazard. Therefore, I find the violation was not serious, and considering all of the other civil penalty criteria set forth previously, reassess a civil penalty of \$50.

Accordingly, within 30 days of this remand decision Harlan Cumberland is **ORDERED** to pay the reassessed penalty of \$50 for the violation of section 75.1106-3(a)(2) as alleged in Citation No. 4243726 (Docket No. KENT 96-254).

In addition, the company is **ORDERED** to pay all penalties previously assessed or modified by the Commission (see 19 FMSHRC at 956; Harland Cumberland, slip op.17). Finally, within the same 30 days the Secretary is **ORDERED** modify and vacate all relevant citations as previously instructed (see 19 FMSHRC at 956).

Upon payment of the penalties and modification and vacation of the citations, these proceedings are **DISMISSED**.

David Barbour
Administrative Law Judge

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