FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 23, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-292
Petitioner	:	A.C. No. 15-17715-03504
v.	:	
	:	Bubba Branch
DIAMOND MAY MINING,	:	
Respondent	:	

DECISION

Appearances: Susan Foster, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C. , Lexington, Kentucky, for the Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (AMSHA@), against Diamond May Mining (ADiamond May@), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, (Athe Act@), 30 U.S.C. '815. The petition seeks a civil penalty of $1,855.00 for an alleged violation of section 77.1006(a), 30 U.S.C. '77.1006(a).

A hearing was held in Prestonsburg, Kentucky. The parties= post-hearing briefs are of record. For all the reasons set forth below, the citation shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977.

2. Respondent and its Bubba Branch Mine have an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

3. Respondent and its Bubba Branch Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and, thus, the administrative law judge has the authority to hear this case and issue a decision.

4. Mine size is as stated on the proposed assessment dated July 1, 1997; *i.e.*, 676,242 production tons per year for respondent and 411,574 production tons per year for the subject mine.

5. Payment of a reasonable penalty will not have an adverse effect on the ability of the respondent to continue in business.

6. Order No. 4472213 and Citation No. 4472214 were served properly on Respondent.

7. There is no procedural defect in this case which affects the validity of this proceeding.

8. Respondent=s history of prior violations for its Bubba Branch Mine is as indicated on the R-17, Assessed Violation History Report. The parties agree that the R-17 may be admitted into evidence without objection.

II. Factual Background

On March 18, 1997, MSHA Inspector Denver Ritchie, unaccompanied by a representative of the operator or the union, visited Diamond May=s Bubba Branch, a surface coal mine, in order to conduct a spot inspection of its haulage roads and a Triple A inspection of its contract highwall mining operation (Tr. 14-15). Upon arriving at the No. 7 coal pit, the inspector observed a 992C Caterpillar front-end loader loading out blasted overburden material into Caterpillar rock trucks, in a manner that he concluded posed an imminent danger to the operator (Tr. 15-19). Accordingly, pursuant to section 107(a) of the Act, Inspector Ritchie immediately issued Imminent Danger Order No. 4472213 at 9:05 a.m., to mine superintendent Roger Pigman, who removed the front-end loader and the operator from the site (Tr. 42-43). Order No. 4472213 describes the dangerous condition as follows:

> Safe work procedures and practices were not being followed in the No. 7 coal pit where a 992C Caterpillar front end loader was in the process of trying to shack [sic] down a loose, fractured over hanging high wall approximately 65 foot [sic] in height which had been drilled, blasted and was in the process of being loaded out in order to uncover the coal bed. The underlying cause is that management failed to safely break down the materials for safe loading. 30 CFR. 70-1006a. Citation No. 4472214 will be issued under 30 CFR 1006a for this practice

(Gov=t Ex. 3). Inspector Ritchie also issued section 104(a) Citation No. 4472214 at the same time, alleging a significant and substantial violation of 30 C.F.R. '77.1006(a), describing the condition as follows:

> A safe work area was not provided for the operator of the 992C Caterpillar front end loader which was observed trying to breack [sic] down a loose, fractured over hanging high wall which had been blasted and was in the process of being loaded out in order to uncover the No. 7 coal seam. The highwall was approximately 65 foot [sic] in height. This condition and practice was the factor that constituted the issuance of Imminent Danger Order No. 4472213 dated 3-28-97 there for [sic] no abatement time was set

(Gov=t Ex. 4). Later that day, a dozer was placed on top of the pile, and the material was pushed down to form a more gradual slope and a toe, from which a front-end loader could remove the material (Tr. 47-48, 116, 154).

III. Findings of Fact and Conclusions of Law

A. Order No. 4472213

It is undisputed that Diamond May did not file a notice of contest respecting Imminent Danger Order No 4472213. The Secretary takes the position that failure to timely contest the order under section 107(e)(1) of the Act, 30 U.S.C. ' 817(e)(1), and section 2700.22 of the Regulations, 29 C.F.R. ' 2700.22, renders the order final and, therefore, not at issue in this proceeding (Tr. 6-7; Sec. Br. at 10-12). Diamond May takes the contrary view that the validity of the order is properly before me, based on inconsistency between the wording of the Act and the Regulation, and because Diamond May included contest of the order in its contest of the civil penalty associated with the 104(a) citation (Tr. 7-9; Resp. Br. at 6). I am not persuaded by Diamond May=s rationale, and for the reasons set forth below, I find that Imminent Danger Order No. 4472213 is FINAL.

Section 107(a) of the Act, 30 U.S.C. ' 817(a), authorizes an inspector to issue an order requiring the operator to remove all affected persons from an area whenever, in the inspector=s judgment, the condition in the area poses an imminent danger. Section 107(e)(1) of the Act, 30 U.S.C. ' 817(e)(1), in pertinent part, sets forth the requirements for contesting an imminent danger order as follows:

> Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order.

Similarly, section 2700.22(a) of the Regulations provides the following:

> A notice of contest of a withdrawal order issued under section 107 of the Act, 30 U.S.C. 817, or any modification or termination of the order, shall be filed with the Commission by the

> contesting party within 30 days of receipt of the order or any modification or termination of the order.

Turning to the facts of this case, 30 days from the March 18, 1997, issuance of the order, was April 17, 1997. Diamond May=s Answer to the Secretary=s Petition for Assessment of Penalty contests the validity of the citation and order, but was filed on September 22, 1997, some five months in excess of the statutory and regulatory requirement. It is noted that Diamond May has provided no precedent for the proposition that filing within 30 days is not a mandatory requirement and, indeed, has conceded that it is subject to the requirements of the Act. *See ICI Explosives USA, Inc. v. Secretary of Labor*, 16 FMSHRC 1794 (August 1992) (Chief ALJ=s dismissal of imminent danger contest, analogizing an application for review under section 107(e) to a notice of contest under 105(d), which the Commission has long required be filed within the statutorily prescribed period of 30 days). Diamond May has misread section 107(e) of the Act, however, by interpreting use of the word Amay@ to relate to when a contest must be filed. In the context of this section, it is clear that Amay@ references whether an operator desires to contest an imminent danger order, not when or how a contest is filed. Diamond May=s reading implies no time limitation on filing and, therefore, would render that portion of the provision meaningless. Consequently, Diamond May=s failure to timely contest the imminent danger order precludes review in this proceeding.

B. Citation No. 4472214

1. Fact of Violation

This citation charges a Asignificant and substantial@ (>S&S@) violation of 30 C.F.R. ' 77.1006(a), which provides as follows:

> Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks.

In resolving whether a violation of the standard had occurred, the parties contend that an initial determination must be made as to whether the cited area constituted a highwall.[1] The Secretary argues that the blasted/fractured sandstone cited constituted a highwall (Tr. 19-20, 25, 60; Sec. Br. at 12-13). Diamond May, on the other hand, contends that a highwall can only consist of solid, unblasted material and, therefore, argues that the cited condition was Ablasted overburden@ (Tr. 107, 166-167; Resp. Br. at 7-8).[2] While neither the Act nor the Regulations

[1]Highwall. The unexcavated face of exposed overburden and coal or ore in an open cast mine or the face or bank on the uphill side of a contour strip mine excavation. U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 543 (1968).

[2]Overburden. Used by geologists and engineers in several different senses. By some, it is

define the term, I need not decide whether the cited condition constituted a Afractured highwall,@ since the plain, unambiguous language of the standard encompasses Abanks,@ as well. The mining industry uses the term Abank@ in a number of instances, including Aa usually steeply sloping mass of any earthy or rock material rising above the digging level from which the soil or rock is to be dug from its natural or blasted position in an open-pit mine or quarry.@ U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 77 (1968). Based on this definition, I conclude that the blasted overburden, cited by the inspector as the violative condition, comes within the ambit of the standard. Having so concluded, the next determination to be made is whether the condition was dangerous.

Inspector Ritchie testified that the overburden in the No. 7 coal pit consisted of fractured sandstone in stacked, loose components that ranged from granular size to eight-by-eight foot pieces, weighing between eight and ten tons (Tr. 20-21). He estimated the pile to reach 65 feet in height, 50 or 60 feet in depth, and with the toe removed where the end-loader was operating, to constitute a vertical wall of approximately 90 degrees (Tr. 20, 22-24, 61-63, 78-79, 81-82, 89-90, 98; Gov=t Ex. 5). According to Inspector Ritchie, a crack of one to two feet in width, located eight feet back from the face and extending from top to bottom, separated the blasted overburden into two sections (Tr. 34-35, 67-69). He described a large, flat piece of sandstone or chimney-like structure on the top of the pile, which he estimated to be six to eight feet wide, extending beyond the rest of the loosely stacked material by five to six feet (Tr. 25-28, 74-76; Gov=t Ex. 5). This chimney-like structure, Inspector Ritchie testified, was loose and difficult to get down, and from his standing position on the No. 7 coal seam, approximately 100 feet away from the wall, he observed the operator backing up and ramming the wall with the bucket of the front-end loader, in the inspector=s opinion, to shake down the blasted material for loading (Tr.16, 28, 32, 65). According to the inspector, Aevery time he would hit the wall, due to this crack that=s in it and separations, the front part of the chimney portion of the wall would move back and forth@ (Tr. 33-34, 36-37). Inspector Ritchie stated that, in his judgment, based on the movement of the wall that he had observed over the course of the few minutes it took to reach the front-end loader, the wall could collapse at any moment (Tr. 35-36, 42). Inspector Ritchie also testified that material falling at an angle some 40 feet above the loader could invade the windshield, irrespective of whether it is glass or Plexiglas, and cause fatal injury to the operator (Tr. 32, 40-42, 71-73, 91-92). Furthermore, the inspector testified that approximately one hour after the instant order and citation had been issued, on or about 10:00 a.m., he observed the top two blocks, eight to ten feet in size, fall onto the area where the front-end loader had previously been operating, without anyone being around or on the area (Tr. 43-45, 69-70, 91-92).

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used to designate material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials, ores, or coal, especially those deposits that are mined from the surface by open cuts. *Id.* at 780.

According to Inspector Ritchie, the highwall miner operator also saw the collapse of the top portion of the wall (Tr. 70).

Diamond May disputes that the vertical face of the fractured overburden was as steep as 90 degrees, and postulates that unconsolidated material standing at a 90 degree angle would defy gravity and nature (Resp. Br. at 8-9). Dirk Smith, engineering assistant to Diamond May=s president, testified to being unsure of whether he had checked the No. 7 coal pit prior to Inspector Ritchie=s 9:00 inspection on the morning of March 18th, but that when he did inspect the site considerably later, around lunchtime, the face of the pile had not been vertical, but Awould appear to be steep due to the angle of repose of this material@ (Tr. 106-109, 125-127, 133, 135-136, 145-146). Mr. Smith acknowledged that he had not actually surveyed or diagramed the cited condition during this inspection, but that the angle of repose of shot material is sometimes steep; he estimated the face of the pile to lay back at an angle of 80 degrees (Tr. 109-110, 114, 126, 130, 140-141).[3] Mr. Smith also testified that he was not in the pit during operation of the front-end loader, that he did not observe any overhanging chimney-like structure on the top of the pile, and that he did not recollect the top having failed, as alleged by Inspector Ritchie (Tr. 112, 120-121, 128, 130).

Joseph Jacobs, Diamond May=s director of risk management, acknowledged that he Adid not see the area that was cited until after the condition that he alleged had been there had allegedly been rectified,@ and that he had not heard of the Abig rock up on top@ until Inspector Ritchie referenced it in his testimony during the hearing (Tr. 169-170).

Diamond May largely presented evidence on the typical loading geometry for the Hazard No. 7 seam surface mining operation, rather than on the particulars of the overburden cited in this case (See Resp. Exs. 1, 2; Tr. 114, 121-125). Inspector Ritchie=s assessment of the condition which he cited remains unrebutted, since Diamond May has produced no witnesses that observed the condition during the relevant timeframe, and has conceded that, although improbable, a vertical wall is possible (Tr. 136). While neither Inspector Ritchie nor Dirk Smith actually surveyed the cited wall, it is clear from their estimates of the slope that it was steep. Moreover, Diamond May has produced no evidence contradicting Inspector=s Ritchie testimony that he observed the top of the wall wobbling when the operator rammed it with the bucket of the front-end loader. That the top of the wall collapsed by itself an hour after the condition had been cited, a fact also unrebutted by Diamond May, removes any doubt that the slope of the wall, in and of

[3]Angle of repose. The maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope. *Id.* at 39. *See also* Tr. 22, 103-104 (the normal angle of response for unconsolidated material is approximately 35 degrees).

itself, posed a very dangerous condition, compounded by the ramming of the front-end loader. I am not persuaded by any suggestion that the distance between the cab of the front end-loader and the wall provided adequate protection to the operator, given the circumstances under which the equipment was being operated. Accordingly, the Secretary having established that a miner had been working near or under a dangerous bank, the evidence is clearly sufficient to sustain the violation.

2. Significant and Substantial

Section 104(d) of the Mine Act designates a violation Asignificant and substantial@ (AS&S@) when it is Aof such a 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 Aif, based upon the particular facts surrounding the 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 set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *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, 103-104 (5th Cir. 1988), *aff=g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of Acontinued mining operations.@ *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based Aon the particular facts surrounding the violation.@ *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Inspector Ritchie found the violation to be S&S. He testified that, based on the separation in the wall and the back and forth movement of the chimney-like portion when the bucket rammed it, he had determined it very likely that continued ramming would eventually knock the top down, and that the falling material could slide off the arms of the bucket into the windshield, resulting in serious injury to the operator, even death (Tr. 33-37). The evidence, evaluated in terms of continued mining operations, proves the inspector=s judgment to be sound, since the size of the sandstone blocks that fell in the area from which the operator and the front-end loader had been removed an hour previously, was roughly eight-by-eight feet, weighing eight to ten tons. I find, based on the evidence, that there was a reasonable likelihood that collapse of the top, which hazard was contributed to by the steep angle of the wall and ramming by the front-end loader, would result in an injury of a very serious nature. Therefore, I conclude that the violation was, indeed, Asignificant and substantial.@

3. Penalty

While the Secretary has proposed a civil penalty of $1,855.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(j). *See Sellersburg Co.,* 5 FMSHRC 287, 291-292 (March 1993), *aff=d* 763 F.2d 1147 (7th Cir. 1984).

Diamond May is a medium-sized operator, with a history of no prior violations of the standard at issue and an overall record that is not an aggravating factor in assessing an appropriate penalty (Gov=t Ex. 1). As stipulated, the proposed civil penalty will not affect Diamond May=s ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Diamond May in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, ranging from cuts and broken bones to head injuries and death, caused by large blocks of sandstone falling into the operators= cab, is substantiated by the record. Consideration of the operator=s aggravating conduct, i. e., ramming an already steep wall of unconsolidated material with the bucket of the front-end loader, so as to shake down the top, leads me to ascribe high negligence to Diamond May. Therefore, having considered Diamond May=s medium size, insignificant history of prior violations, seriousness of the violation, high degree of negligence, good faith abatement and no other mitigating factors, I find that the $1,855. 00 penalty proposed by the Secretary is appropriate.

ORDER

Accordingly, Order No. 4472213 is **FINAL**, Citation No. 4472214 is **AFFIRMED**, and Diamond May is **ORDERED TO PAY** a civil penalty of **$1,855.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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