FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 19, 1998

TANOMA MINING COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST PROCEEDING Docket No. PENN 97-81-R Order No. 3692732; 1/16/97 Tanoma Mine Mine ID 36-06967
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TANOMA MINING COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. PENN 97-129 A. C. No. 36-06967-03912 Tanoma Mine

DECISION

Appearances: Pamela W. McKee, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest and a Petition for Assessment of Civil Penalty filed by Tanoma Mining Company against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Tanoma, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance to it of a 107(a) order, 30 U.S.C. § 817(a). The Secretary's petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $951.00. For the reasons set forth below, I affirm the order and the citations, as modified, and assess a penalty of $425.00.

A hearing was held on October 7, 1997, in Indiana, Pennsylvania. The parties also submitted posthearing briefs in the cases.

Settled Citation

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled Citation No. 3692439. The agreement provides that the citation be modified by deleting the "significant and substantial" designation and that the penalty be reduced from $147.00 to $75.00. After considering the parties representations, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Tr. 12-18) The provisions of the agreement will be carried out in the order at the end of this decision.

Background

The Tanoma Mine is an underground coal mine, owned and operated by Tanoma Mining Company, in Indiana County, Pennsylvania. At about 12:30 p.m. on January 15, 1997, miners in the E-4 section of the mine detected rising levels of methane. The crew was removed from the section, power on the section was turned off and ventilation changes were made in the section in an attempt to correct the problem. By mid-afternoon methane levels had been reduced below 1% and mining was resumed. Nevertheless, William Moyer, the mine foreman, instructed the afternoon shift foreman to check the methane levels at Evaluation Point E1-1 (EP E1-1) periodically during the shift.

That evening, the shift foreman called Moyer to advise him that methane in excess of 4% at been detected at EP E1-1. Moyer told the foreman to remove everyone from the mine and to de-energize everything except the fans. He then called Robert DeBreucq, Vice President of Operations, to inform him of the situation and both men went to the mine. After ascertaining the situation, DeBreucq called the supervisor of the MSHA field office to advise him what was happening. The supervisor told DeBreucq that he would send an inspector out in the morning.

Inspector William Sparvieri was called by his supervisor and told to go to the mine in the morning. Sometime later, the inspector received another call from his supervisor instructing him to go to the mine that night. He arrived at the mine sometime between 11:00 p.m. and midnight. By then, all production personnel had been sent home from the mine by the operator and all power in the mine had been turned off, except for the fans.

After being advised by mine management about what had occurred and the steps that had been taken to correct the problem, Inspector Sparvieri began an inspection of the mine in the early morning hours of February 16. While traveling the main E left return he detected concentrations of methane ranging from 2.4% to over 5%. Concluding that an imminent danger existed, the inspector verbally issued a 107(a) order for the area between E-1 and C-12 in the mine. The order was reduced to writing as Order No. 3692732 when the inspector exited the mine and served on the company's superintendent at 3:30 a.m. The order stated that: "2.4% to 5.2% of methane was detected in the Main E left return between C-12 and where the E1 bleeder entry enters the return, a distance of 2300 feet. The methane being liberated from the E4 pillar gob

where severe bottom heave has occurred." (Govt. Ex. 2.) The order was modified 4 hours later to include the whole mine as the area closed.

Inspector Sparvieri issued Citation No. 3692733 in conjunction with the 107(a) order. It alleged a violation of section 75.323(e), 30 C.F.R. § 75.323(e), because: "2.4% to 5.2% of methane was detected in the Main E left return between C-12 section and where the E1 bleeder entry enters the Main E left return." (Govt. Ex. 3.)

Although the 107(a) order was subsequently modified several times to permit the company to attempt to solve the problem, it was not terminated until January 23, 1997. While inspecting the mine on that date to determine if the order could be terminated, the inspector issued Citation No. 3692734, also for a violation of section 75.323(e), since: "Methane at the EP 4-2 was measured at 3.4% at a point just before it enters the Main E left return." (Govt. Ex. 6.)

Findings of Fact and Conclusions of Law

The Respondent argues that there was no imminent danger when the inspector issued the order and that, therefore, it should be vacated. This argument is premised on the belief that a methane ignition could not occur because no ignition source was present. The evidence in the case, however, does not support the Respondent's argument. I find that it was reasonable for the inspector to conclude that an imminent danger existed.

Section 107(a) of the Act states:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

With regard to what constitutes an imminent danger, the Commission follows the law as set out by the U.S. Courts of Appeals. In *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) the Commission stated:

> In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. *See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that if will result in an injury before it can be abated. *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974). The court has adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*" 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 33 (7th Cir. 1975).

In applying this definition, the Commission has held that: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991). *Accord Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996).

Turning to the facts of this case, the Respondent does not dispute that the inspector detected methane at over 5% in the Main E left return. Indeed, the analysis of the bottle samples of the air he took at the time indicates methane of 5.220% and 5.260%, respectively. (Govt. Ex. 4.) Nor does the company dispute that, as testified to by Expert Witness Clete Stephan, methane is explosive in concentrations between 5% and 15%. What it does dispute is whether an explosion was imminent. Although Tanoma presented no evidence on the issue, it argues that an explosion was not imminent because there was no ignition source for such an explosion.

When the inspector issued the imminent danger order, the were no miners in the mine except those permitted by section 104(c) of the Act, 30 U.S.C. § 814(c).[1] Therefore, the order was not issued to withdraw persons from the mine, but to prohibit them from entering the mine "until an authorized representative of the Secretary determine[d] that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." Assuming an imminent danger, this was clearly a proper issuance of an imminent danger order. *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974).

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[1] Section 104(c) provides, in pertinent part: "The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal mine or other mine subject to an order issued under this section: (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order . . . ."

Mr. Stephan testified as an expert in fires and explosions in underground mining. He testified that under normal mining conditions in the Tanoma Mine at the time that the inspector issued his order, the following potential ignition sources were present: (1) frictional heating developed during a roof fall, (2) electrical discharges associated with a roof fall, (3) lightening, (4) defective flame safety lamps, (5) pin holes in compressed air lines, (6) roof bolts broken in a roof fall, (7) non-permissible electrical equipment, and (8) improperly maintained permissible electrical equipment. (Tr. 202-03.)

Tanoma argues that these ignition sources are not pertinent because "normal mining conditions," *i.e.,* production of coal, was not going on at the time the order was issued. This is the same argument Eastern Associated Coal made in the case cited above. The court rejected this argument when it held:

> Eastern asserted that a danger is imminent only if there is a reasonable likelihood that it will result in injury before it can be abated, and that the admittedly dangerous conditions here did not constitute an "imminent danger" because Eastern had voluntarily withdrawn miners from the affected area prior to issuance of the order. The Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner *if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated."* (Emphasis added).

Id. Accordingly, I also reject the argument and conclude that Inspector Sparvieri did not abuse his discretion in finding that an imminent danger existed in this situation necessitating the issuance of an imminent danger order. *See VP-5 Mining Co.,* 15 FMSHRC 1531, 1536-37 (August 1993). In reaching this conclusion, I give great weight to the unrebutted testimony of Mr. Stephan and William Francart, an MSHA ventilation expert, who corroborated the inspector's judgment.

I affirm Order No. 3692732. In doing this, I understand the feeling of management in this case, as expressed by Mr. DeBreucq, that they did everything that they were supposed to do, by evacuating the mine and shutting off the power, and yet they still have an imminent danger order on their record. They did do everything that they were supposed to do and the company should be commended for it. Tanoma was obviously looking out for the safety of its miners. On the other hand, the inspector was faced with what was clearly an imminent danger under the law. He would have been remiss in his duties if he had not issued the order. While I am not aware of any particular stigma that attaches to an imminent danger order, it appears that both the company and MSHA acted as they should have, and by affirming the order I am certainly not concluding that the Respondent was in the "wrong" in this instance.

Citation Nos. 3692733 and 3692734

In its brief, the company has conceded that the conditions in these two citations violated section 75.323(e).[2] It contests, however, the inspector's finding that both violations were "significant and substantial" and the level of negligence he attributed to the violations. I agree that the level of negligence in the citations should be reduced, but I find that both violations were "significant and substantial."

Significant and Substantial

The Inspector found both violations to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such 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 "if, based upon 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 set out four criteria that have to be met for a violation to be S&S. *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, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Relying on its arguments that in this case "normal mining operations" were that the mine was evacuated and de-energized and for that reason there was no ignition source, Tanoma asserts that the third element of the *Mathies* test[3] was not met by either cited violation and, therefore, they were not S&S. This argument is rejected in the S&S context for the same reason it was rejected when discussing the imminent danger order. "Normal mining operations" means operations during which coal is being produced, not periods during which, for whatever reason, the mine is idle. In this case it is unrebutted that numerous ignition sources were present during normal mining operations and that this mine liberated in excess of 800,000 cubic feet of methane a day. Thus, there was a reasonable likelihood that the high concentrations of methane would result

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[2] Section 75.323(e) states: "*Bleeders and other return air courses.* The concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air, or in a return air course other than as described in paragraphs (c) and (d) of this section, shall not exceed 2.0 percent."

[3] The third element is "a reasonable likelihood that the hazard contributed to will result in an injury." *Mathies* at 3-4.

in an explosion causing serious injuries or death. Accordingly, I conclude that both of these violations were "significant and substantial." *United States Steel Mining Co.*, 7 FMSHRC 1125, 1130-31 (August 1985).

<u>Negligence</u>

The inspector found the level of negligence involved in Citation No. 3692733 to be "low." His testimony, however, indicates that there was no operator negligence connected with this violation. When asked why he marked the negligence as "low," he stated:

> I come [*sic*] to the conclusion of low negligence due to the fact that this condition occurred through no fault of the operator. It was a condition that occurred in the [g]ob area. He had no control over the hea[ve] of the bottom and the release of methane. However, low is checked due to the fact that this is an ongoing problem since approximately 12:30 p.m. on the 15th, therefore, we couldn't say that there was no negligence involved. That's how the evaluation of low was determined.

(Tr. 87.) He later explained: "I would say for me to make that no negligence, they would have had to show me a little more effort than saying that we're going to idle that section, we're not going to send people in there to load." (Tr. 125.)

I agree with the inspector that the operator had no control over the bottom heave in the gob and the release of methane. I do not agree that the mere passage of time is evidence of negligence. Nor do I agree that the only thing that the Respondent did when the problem was discovered was to evacuate the section. The company also made ventilation adjustments, which reduced the level of methane below 1%. Further, no evidence was presented to suggest what else Tanoma should have done.

I find that when confronted with the methane problem, the company properly evacuated the section and made ventilation adjustments which appeared to have solved the problem. When greater concentrations of methane were detected, it became apparent to management that more than minor ventilation adjustments would be necessary and they began taking steps to confront that problem. The entire mine was evacuated, MSHA was notified, and steps were being taken to identify the extent of the problem when the inspector arrived. Under these circumstances, I cannot conclude that Tanoma acted negligently. Consequently, I will reduce the level of negligence for this violation from "low" to "none."

With respect to Citation No. 3692734, the inspector found the level of negligence to be "moderate." He testified that he made this finding because:

> During the source of this entire situation back to January 15th, there was [*sic*] ventilation changes made throughout this entire area.

> And at this particular location, initially when the air was changed we experienced methane as high as ten, 12, 14 percent the night of the original change. . . .
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> . . . .
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> And the operator had certified people who were agents of the operator, the mine foreman himself, the superintendents were in here daily and sometimes as much as two shifts a day. They were patrolling this area, examining this area, walking this area. *And the fact that methane was present or going to be present at this location, you know, just moderate --- they knew it was going to be there. It's obvious it's not going to disappear all at once over night, and just about everybody that was there was aware that this problem would probably arise at that location.*
>
> . . . .
>
> [The ventilation] was working properly, it just wasn't adequate in the E4 gob area to rid that of the methane in that area.

(Tr. 102-03.) (Emphasis added.)

When he issued the citation, the inspector directed that: "This area shall be monitored by a certified person until the methane is less than 2.0%." (Govt. Ex. 6.) The citation and the above testimony constitute all of the evidence on this issue. I find the emphasized testimony revealing on the issue of negligence. There was an unknown concentration of methane in the gob caused by the bottom heave. Significant ventilation changes, approved by MSHA, reversed the flow of air in the mine. It was expected that the level of methane would increase at this evaluation point until the methane was diluted in the gob. Everyone knew this would occur. But that does not mean that the operator was negligent when it did happen, any more than the company was negligent when the change was first made and the level was 14%.

Significantly, the inspector did not state what the operator should have done about this situation. It appears from the fact that he directed that the area be monitored, that the only thing that could be done was to wait for the problem to abate by itself. It apparently did so on January 26 when the citation was terminated because methane concentrations were below 2%. (Govt. Ex. 6.) Just as the operator had no control over the cause of the heavy methane concentrations, it apparently had no control over the length of time it would take to reduce the level of methane going into the return to workable levels. Accordingly, I conclude that the company was not negligent in this instance and will modify the citation to reduce the level of negligence from "moderate" to "none."

Civil Penalty Assessment

The Secretary has proposed penalties of $442.00 and $362.00, respectively, for the contested citations and the parties have agreed on a penalty of $75.00 for the settled citation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that the Tanoma Mine produces approximately 506,620 tons of coal per year and the company 622,000, that imposition of the proposed civil penalties will not affect the operator's ability to remain in business and that the operator demonstrated good faith in abating the citations. (Tr. 19.) The company's history of violations indicates a low number of prior violations. (Govt. Ex. 1.) Therefore, I find that the Respondent's history of prior violations is good. I find that the gravity of Citation Nos. 3692733 and 3692734 was serious, but that the company was not negligent in either instance.

Taking all of this into consideration, I conclude that a penalty of $225.00 is appropriate for Citation No. 3692733 and a penalty of $125.00 is condign for Citation No. 3692734. As I have already indicated, I conclude that the agreed upon penalty of $75.00 for Citation No. 3692439, as modified, is appropriate.

ORDER

Accordingly, Order No. 3692732 in Docket No. PENN 97-81-R is **AFFIRMED** and Citation Nos. 3692733, 3692734 and 3692439 in Docket No. PENN 97-129 are **MODIFIED** by reducing the level of negligence from "low" to "none" for Citation No. 3692733 and from "moderate" to "none" for Citation No. 3692734 and by deleting the "significant and substantial" designation for Citation No. 3692439, and are **AFFIRMED** as modified.

Tanoma Mining Company is **ORDERED TO PAY** a civil penalty of **$425.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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