

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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Washington, D.C. 20001

August 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2006-191
Petitioner	:	A. C. No. 36-09274-84278
v.	:	
	:	
	:	
SUMMIT ANTHRACITE, INC.,	:	Brockton Slope
Respondent	:	

**DECISION**

Appearances: Kenneth G. Hare, Conference & Litigation Representative, U.S. Department of Labor, Wilkes-Barre, Pennsylvania, and Susan Jordan, Esq., Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of the Petitioner; Mike Rothermel, President, Summit Anthracite, Inc., Klingerstown, Pennsylvania, 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 Summit Anthracite, Inc. (Summit) with three violations of mandatory standards and proposing civil penalties for the alleged violations.<sup>1</sup> The general issue before me is whether Summit 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.

Summit initially challenged the Secretary’s jurisdiction, arguing that the Brockton Slope at issue was not a “mine” as defined in the Act. Section 3(h)(1) of the Act, provides in relevant part as follows:

“Coal or other mine” means (A) an area of land from which minerals are extracted in non-liquid form... and (C)... shafts, slopes... or other property... on the surface or underground... to be used in... the work of extracting such minerals from their natural deposits in non-liquid form.

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<sup>1</sup> At hearing, the Secretary vacated Citation No. 7008146 and accordingly only two citations remain for disposition.

At hearing, Mr. Rothermel, Summit's president, acknowledged that the Brockton Slope was being driven for the purpose of aiding in future coal production.<sup>2</sup> I find, accordingly, that the Brockton Slope was, at the time the citations at bar were issued, intended "to be used in... the work of extracting such minerals [coal] from their natural deposits in non-liquid form". Accordingly, the Brockton Slope at issue was a "mine" as defined in the Act.

*Citation No. 7008150*

Citation No. 7008150 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1900 and charges as follows:

The operator was not complying with the approved shaft/slope sinking plan dated July 06, 2005, in that steel tubing was only installed 20 feet in by the slope portal and the slope is down approximately 200 feet. Miners were observed working in the slope.

The cited standard, 30 C.F.R. § 77.1900, provides only for the submission and approval of plans for the sinking of slopes and shafts.<sup>3</sup> In its answer to the petition for assessment of civil penalty at bar, Summit stated, in relevant part, as follows:

This citation was written in error. 77.1900 pertains to the submission of a slope and shaft sinking plan. Summit Anthracite has submitted a slope and shaft sinking plan with all of the required information included.

While thereby placed on notice of the operator's defense that the wrong standard had been cited, the Secretary nevertheless failed to modify or amend her citation to allege a violation of the appropriate standard. Moreover, at hearing, the Secretary offered Summit's approved plan into evidence (Government Exh. No. 4). Under the circumstances then, it is clear that Summit was in compliance with the cited standard and Citation No. 7008150 must accordingly be vacated.

*Citation No. 7008152*

Citation No. 7008152, as amended, alleges a violation of the standard at 30 C.F.R. § 77.1911(d), and charges as follows:

The main mine fan was not being operated while persons were working in the underground slope. The foreman Mike Rothermel was directing mining operations and working in the

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<sup>2</sup> Rothermel further acknowledged that during the slope excavation process, materials removed were transported through their coal processing plant in anticipation that some coal was included therewith. While no coal was actually produced as a result of this processing, this evidence clearly supports a finding that there was an intent to produce coal.

<sup>3</sup> 30 C.F.R. § 77.1900-1 requires compliance with such plans.

slope along with two other miners. Foreman Rothermel engaged in aggravated conduct by performing and having two miners perform work in the slope without the main mine fan operating.

The cited standard, 30 C.F.R. § 77.1911(d) provides as follows:

The fan shall be operated continuously when men are below the surface. Any accidental stoppage or reduction in airflow shall be corrected promptly; however, where repairs cannot be made immediately, development work below the surface shall be stopped and all the men not needed to make necessary repairs shall be removed to the surface.

While acknowledging that the mine fan was in fact not operating while three miners were below the surface in the Brockton Slope, Mr. Rothermel argues that the stoppage or reduction in air flow was the result of an accident i.e. the flexible tubing had been damaged when the continuous miner was brought into the slope, and that, therefore, the exception to the requirement that the fan be operated continuously applies hereto.

The Secretary argues, on the other hand, that even if there is an accidental stoppage or reduction in airflow the standard requires that “all the men not needed to make necessary repairs shall be removed to the surface”. The Secretary notes that since Mr. Rothermel was not needed to make necessary repairs, he should have been removed to the surface and not have remained underground. Rothermel himself testified that he was in the mine merely removing the previously installed damaged flexible tubing (Tr. 42-43). It may reasonably be inferred, therefore, that he was not needed to make necessary repairs and should have been removed. The violation is accordingly proven as charged.

I also find that there was a violation of the cited standard because I conclude that there was no “accidental” stoppage or reduction in airflow. Rothermel claims that the flexible tubing that had previously been installed in the slope had been damaged by the continuous miner and that, therefore, its replacement was necessitated by an accident. Under the Respondent’s slope and shaft sinking plan (Plan), however, only the last 50 feet of tubing was permitted to be of flexible material and the remaining tubing must be made of steel. Inspector McGann testified that steel tubing as required by the Plan was not installed as required and his testimony is undisputed. Since the use of flexible tubing (except for the last 50 feet), was in violation of the Plan, I cannot consider any damage to it caused by the continuous miner to have been “accidental”. The requirements of the Plan are clear and unambiguous and Respondent’s failure to have utilized the steel tubing was obviously intentional.

As amended, the citation alleges that “injury or illness” is “unlikely” and would involve “no lost workdays”. No evidence was elicited by the Secretary at hearings regarding gravity. Under the circumstances, I must find the absence of gravity. Inspector McGann found the operator in this case chargeable with moderate negligence “based on Mr. Rothermel being a certified mine foreman for a number of years and knowing he should have had the mine fan on while men were underground” (Tr. 25). I find no sound reason for modifying the inspector’s negligence findings.

*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 effect the operator's ability to continue in business. The record shows that the operator is small in size with no history of "final" violations at the facility cited. There is no dispute that the violations were abated in a timely and good faith manner and no evidence has been presented as to the effect the penalties would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision.

**ORDER**

Citations No. 7008146 and 7008150 are hereby vacated. Citation No. 7008152 is hereby affirmed and Summit Anthracite Inc. is directed to pay civil penalties of \$75.00 for the violation charged therein within 40 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
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