

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 30, 2008

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-325
Petitioner	:	A.C. No. 36-05018-122224
	:	
v.	:	
	:	
CUMBERLAND COAL RESOURCES, LP.,	:	Mine: Cumberland
Respondent	:	

DECISION

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Ralph Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Cumberland Coal Resources, LP.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Cumberland Coal Resources, LP, is liable for one significant and substantial (“S&S”) violation of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of a civil penalty in the amount of \$5,800.00. A hearing was held in Pittsburgh, Pennsylvania, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Cumberland committed the violation, but that it was not S&S, and impose a civil penalty in the amount of \$1,000.00.

Findings of Fact - Conclusions of Law

On September 22, 2006, MSHA coal mine safety and health inspector, Barry Radolec, was conducting a quarterly inspection of Respondent’s Cumberland mine. In the No. 2 entry of the East Mains section, also referred to as the 54 tailgate section, he observed that the roof of the mine had been raised to allow for the future installation of a conveyor belt system. Normal mining height was approximately eight feet. The “high spot” extended some 200 feet, from the section loading point near the No. 84 crosscut inby to the No. 1 crosscut. Its maximum height was approximately 21 feet in the area of the No. 85 crosscut, and it tapered down to a height of 14-15 feet near the feeder and at its inby end near the No. 1 crosscut.

Cumberland is a “gassy” mine, liberating over one million cubic feet of methane per day,

and is subject to spot inspections under the Act. 30 U.S.C. § 301(i). Methane, an explosive gas at concentrations of 5-15%, is lighter than air, and can accumulate in high spots. Methane in a high spot can be drawn down by the passage of mobile equipment, where it can mix with air in the entry and possibly encounter an ignition source. The Secretary's regulations require that the atmosphere in high spots, in intake air courses where equipment is likely to operate, be tested during preshift examinations. 30 C.F.R. § 75.360(b)(8). Testing is required to be made no closer than 12 inches from the roof, and industry practice is to test about one foot from the roof. Tr. 86-88, 150.

Persons conducting preshift examinations of areas where miners are expected to work or travel are required to make notations of the date and time of the examination, and initial the entries, at enough locations to show that the entire work area has been examined. 30 C.F.R. § 75.360(e). Notations are typically made on a post, timber or board, often referred to as a "date board." Examinations of high spots are done with a probe, an instrument to which an atmospheric monitor can be attached and extended to the required testing height. Radolec was aware that date boards and extendable probes had been maintained at other high spots in the mine. Tr. 46-47. There was no probe or date board at the high spot in the No. 2 entry. The nearest probe was about 50 feet away, near the feeder. However, that probe was only 7.5 feet long, too short for a proper test of the atmosphere in the high spot.

Radolec was concerned that the atmosphere in the high spot was not being monitored for methane content. He related his concerns to Fred Evans, a Cumberland safety representative, who accompanied him on the inspection. Radolec tested the atmosphere, using an extendable probe from a continuous mining machine, and found that there was very little methane in the high spot.¹ He decided not to issue a citation because he had some doubt about whether the tests were being conducted.

Radolec returned to the mine on September 25, to conduct a five-day spot inspection for methane. He decided to visit the East Mains section to see if Cumberland had taken any steps to assure that the atmosphere in the high spot was being tested for methane. He traveled with Michael Konosky, a Cumberland senior safety representative. As on his earlier visit, there was no date board or extendable probe at the location. He spoke with Harry Casteel, the section foreman, who had conducted the preshift examination on September 22, and asked him if he had an extendable probe. Casteel responded that he would call outside to get one.² Radolec asked Casteel to get a probe from a continuous miner so that he could test the high spot. Casteel retrieved a probe, and Radolec's test showed a methane concentration of 0.1%, well below its explosive range. Tr. 46. Radolec also tested the atmosphere at the working faces and found 0.0-

¹ Methane tests must be made at faces every 20 minutes when mining is being done. 30 C.F.R. § 75.362(d). Consequently, probes that can be extended into areas where the roof is unsupported are kept on continuous mining machines.

² There are substantial conflicts between Radolec's and Casteel's recollections of their conversation. They are discussed below.

0.4% methane. Tr. 25-26. No active mining was taking place because equipment was being moved from the No. 4 face to the No. 2 face.

Radolec issued Citation No. 7076359, alleging that Cumberland failed to test the atmosphere in the high spot. Cumberland timely contested the citation and proposed penalty.

Citation No. 7076359

Citation No. 7076359 alleges a violation of 30 C.F.R. § 75.360(b)(8), which requires that persons conducting preshift examinations test for methane in “[h]igh spots along intake air courses where methane is likely to accumulate, if equipment will be operated in the area during the shift.”

The “Condition and Practice” section of the Citation stated:

The person conducting the pre-shift examination for hazardous conditions and testing for methane and oxygen deficiency failed to examine in high spots along intake air courses where methane is likely to accumulate. This condition existed on the active coal producing section of East Mains, 026-0 (M.M.U.) development mining section of mine, in the number 2 entry, inby the section loading point, at number 85 cross-cut to number 1 cross-cut (as viewed on section working mine map). This area is from 15 feet to 21 feet above the mine floor, in an area where immediate mine roof has been elevated to provide for future mining conveyor systems. [grammatical and punctuation errors corrected]

Ex. G-1.

Radolec determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that six persons were affected, and that the operator’s negligence was high. A specially assessed civil penalty in the amount of \$5,800.00 has been proposed for this violation.

The Violation

Cumberland contends that the high spot was not located in an “intake air course,” and that testing was not required by the regulation, but was done as a matter of good practice. Under Cumberland’s approved ventilation plan, air was supplied to the East Mains section through the No. 3 and No. 4 entries. At the No. 84 crosscut, the air flow was split, such that in the No. 2 entry part of it flowed inby, past the feeder toward the face, and part flowed outby along the belt. The No. 1 entry was the return entry. Cumberland contends that only entries which carry the main flow of intake air are “intake air courses” within the meaning of the regulation and, since the No. 2 entry carried only a split of intake air, it was not an “intake air course.”

Cumberland's argument is based upon the testimony of Robert Bohach, its manager of safety, who was accepted as an expert in the field of mine ventilation.³ Tr. 154. While Bohach described the No. 2 entry as an "intake entry," he declined to classify it as an "intake air course," because it was not one of the main entries supplying air to the section. Tr. 155. Dennis Swentosky, an MSHA supervisory mine safety and health specialist, who has been a ventilation specialist for over twenty years, was also accepted as an expert witness in the field of mine ventilation. Tr. 78-82; ex. G-4. He referred to the Secretary's regulations which define intake air, in pertinent part, as "[a]ir that has not yet ventilated the last working place on any split of any working section." 30 C.F.R. § 75.301. Conversely, return air is air that "has" ventilated the last working place on any split of any working section. *Id.* An air course is defined as "[a]n entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." *Id.* The No. 2 entry in by the feeder met the definition of an air course. As Swentosky explained, entries through which intake air is coursed to working places are intake air courses. Tr. 92-93.

The area of the high spot in the No. 2 entry was to become part of the belt entry. Tr. 58. The Secretary's regulations provide that a belt air course must not be used as a return air course, and must be separated from return air courses "and from *other intake air courses.*" 30 C.F.R. § 75.350(a)(1) (emphasis added). Cumberland's overly restrictive interpretation of the term "intake air course" is unsupported by the regulations, and is inconsistent with the use of the term in the regulatory scheme. Bohach agreed that his narrow definition of an intake air course is not found in the regulations. Tr. 156. Cumberland section foreman, Charles Fisher, also referred to the No. 2 entry as an intake entry, and agreed that it was an intake air course, "but not the main intake air course." Tr. 148-50. I accept Swentosky and Radolec's testimony, and find that the high spot was located in an intake air course. There was considerable mobile equipment traffic in the area and, under the regulation, the atmosphere in the high spot was required to be tested for methane content during preshift examinations.

Radolec was concerned that testing was not being done because, unlike other high spots in the Cumberland mine, there was no probe at that location sufficient to reach to the required testing height, and there was no date board to indicate that a preshift examiner had visited the location and, presumably, taken the test. He was guided by a provision in MSHA's Program Policy Manual, stating that the lack of some method to safely make such tests, e.g., ladders, tubes, or methane detectors with probes, "would be a good indication that tests were not being made or not properly being made." Ex. G-5. His concerns were heightened by the fact that the situation had not changed since his September 22 inspection, when he specifically discussed the problem with Evans.

There are several significant conflicts in the testimony regarding conversations that Radolec had with Casteel. Radolec testified that Casteel told him that he was not conducting the

³ Bohach has served as ventilation coordinator for Cumberland, and holds a degree in mining engineering and a masters degree in safety management.

tests because he did not have anything to test with. Tr. 41-42. Casteel denied making that statement. Tr. 122. Casteel's alleged response, which would have been a critical admission, is not reflected in Radolec's field notes.⁴ Tr. 42-43; ex. G-2 at 6. The notes reflect that Radolec asked for a probe, and that Casteel responded that he did not have one, but would call outside to get one. Radolec testified that he interpreted Casteel's reply as a "suggestion" that he did not know that there was an extendable probe on the continuous miner, or that he did not want to take a probe from a continuous miner. Tr. 52-53. Radolec also contradicted Casteel's testimony that he stated that he used a probe from a continuous miner to conduct tests. Tr. 45.

I place no weight on Radolec's testimony regarding his conversations with Casteel. I find that Casteel, most likely aware that Radolec wanted a probe left at the high spot, responded to his inquiry by stating that he would call outside for one. That would have been a reasonable reaction and, most likely, the only way to procure a probe that could have been left permanently at the high spot. Radolec's testimony indicates that he substantially misinterpreted Casteel's communication.

Nevertheless, while it is possible, if not likely, that some of Cumberland's preshift examiners properly tested the high spot, I find that it was not properly tested during preshift examinations at the time the citation was issued. Cumberland had an established procedure for testing high spots. An extendable probe and a date board were placed at the location. The absence of a readily available extendable probe is evidence that tests were not being performed, or were not being performed properly. Cumberland's witnesses described two methods of conducting the test, both of which were cumbersome and time consuming. Casteel stated that he retrieved an extendable probe from a continuous miner, brought it back to the high spot, performed the test, and returned it to the miner. When the miner was in the No. 4 face, which it had been on the day that the citation was issued, it was some 320 feet away from the high spot. While Casteel claimed that it took only five minutes to retrieve the probe, perform the test, and return it, it most likely would have taken longer, especially if the miner were operating.

Fisher and Thomas Illar, a section supervisor, did not use a probe from the miner to examine the atmosphere in the high spot. Rather, they testified that they used the shorter, more readily available probe near the feeder, and were able to reach the required height by climbing onto the operator's canopy of a shuttle car, approximately six feet high. Miners typically took a dinner break about 4:00 a.m., and they instructed a shuttle car operator to position the car under the high spot where a test could be made. Tr. 130, 147. Fisher, who conducted the preshift examination for the day shift on September 23, was a reasonably convincing witness as he described how he walked up the inby end of the shuttle car and onto the canopy. Tr. 147, 150.

⁴ Radolec's field notes were either made, or edited, after the citation was issued, i.e., after Radolec had exited the mine and typed the citation into his computer, which generated the citation number. Tr. 66. Radolec explained that he wrote the notes after issuing the citation, in order to justify the gravity of the alleged violation, and that he "cleans them up," and may add to them as he gets further information. Tr. 65-66.

He may well have conducted tests in that fashion and would have been able to reach the required height.

Illar conducted the preshift examination for the day shift on September 25. Tr. 127-28; ex. R-1 at 69. Unlike Fisher, his description of his test methodology was unconvincing. He hesitated when asked to explain how he mounted the canopy, and then explained that he used an opening near a light to start his ascent. Tr. 132. His demeanor conveyed the distinct impression that he had never taken the test in the manner he described.

The high spot had existed for approximately one month, and preshift examinations had to be performed more than once each day. Tr. 124. I find it incredible that experienced miners would repeatedly perform the tests in the manners described, when a much better alternative was readily available, i.e., obtaining an extendable probe to be kept at that location. Retrieving a probe from a continuous miner would have required a considerable expenditure of time and effort. Climbing up onto the canopy of a shuttle car, which may have had to be re-positioned, would have been dangerous. Neither Fisher, nor Illar deenergized the shuttle car before climbing onto it. The area was admittedly dark, and the shuttle cars were typically dirty and slippery. Tr. 136. Neither of them described using fall protection. Not surprisingly, Bohach, who was not aware that preshift examiners were climbing onto the canopies of shuttle cars, would have directed them to obtain and use an extendable probe. Tr. 157.

Illar testified that he used the shorter probe at the feeder, because it had been used for testing the high spot "when it wasn't so high," and that it was "still there." Tr. 129. I find that preshift examiners routinely continued to use the shorter probe. They did not climb onto shuttle car canopies, but tested the atmosphere at the maximum height they could reach, approximately 15-16 feet. Readings for methane in that intake entry, in the area of the high spot, had always been very low, and testing at the lower height was most likely deemed sufficient. Tr. 147.

I find that the Secretary has proven, by a preponderance of the evidence, that Cumberland violated the regulation, by not conducting a proper test of the atmosphere in the high spot during preshift examinations. I concur with Radolec's assessment that Cumberland's negligence was high and that six persons were affected by the violation.

Significant and Substantial

An 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that 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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The measure of danger to safety was contributed to by the failure to properly test the atmosphere in the high spot, and any injury resulting from an ignition of methane would have been of a serious nature. The focus of the S&S analysis, therefore, is whether the violation was reasonably likely to result in an injury. I find that the Secretary has failed to carry her burden of proof on this issue.

The preamble to the latest amendments to the regulation notes that methane liberation is highly unpredictable, and that "the potential for a dangerous accumulation of methane in a high spot is influenced by mine ventilation, particularly the air velocity in the entry." Ex. G-6. There was no evidence of insufficient air flow in the entry, and there is no evidence of the existence of methane, in other than trace concentrations, in the entry or the high spot. Radolec had tested the

air in the No. 2 entry, and found no methane. Tr. 60. At the apex of the high spot, he found only 0.1% methane, and Fisher testified that he had never found more than 0.2% methane in that area, although his measurements may not have been taken at the proper height. Tr. 147.

As evidenced by the requirement for frequent tests at working faces, the greatest volume of methane is generally liberated where coal is being cut. Radolec was concerned about methane accumulating in the high spot because of an interruption in mine ventilation, including the moving of line curtains. Tr. 61. However, he did not explain how the moving of a line curtain, downstream in the air flow from the high spot, could affect air flow, or produce an accumulation of methane in that area. As Swentosky stated, methane liberated in the working section would be swept out the return, not back to the feeder. Tr. 95-96. In addition, I have found that Cumberland conducted tests of the atmosphere in the high spot, but did not do so at the proper height. Consequently, the hazard contributed to by the violation was a potential accumulation of methane in the relatively smaller area above 15 feet. While passing mobile equipment might draw down an accumulation of methane immediately above the normal mining height, there is no evidence that methane in the upper reaches of the high spot would be drawn down by passing equipment. Certainly, passing equipment would have considerably less tendency to disturb atmosphere nine feet above it.

I find that the Secretary has failed to prove, by a preponderance of the evidence, that the violation was S&S.

The Appropriate Civil Penalties

The parties stipulated to many of the factors that are to be considered in establishing the amount of a civil penalty. The Cumberland mine has an annual coal production of approximately 7,515,984 tons, and Cumberland Coal Resources, LP, is a large operator that produces approximately 71,492,892 tons of coal annually. In the 24 month period immediately preceding the issuance of the Citation, Cumberland was assessed a total of 472 violations, over 827 inspection days. Payment of the proposed penalty will not affect its ability to continue in business. Cumberland demonstrated good faith in promptly abating the violation. The gravity and negligence associated with the violation have been discussed above.

Citation No. 7076359 is affirmed. However, the violation is found to be non-S&S. A civil penalty of \$5,800.00 is proposed by the Secretary. The lowering of the level of gravity justifies a significant reduction in the proposed penalty. I impose a penalty in the amount of \$1,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation No. 7076359 is **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$1,000.00, within 30 days of this decision.

Michael E. Zielinski
Administrative Law Judge

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