

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 9, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-51
Petitioner	:	A.C. No. 01-01401-44081
v.	:	
	:	
JIM WALTERS RESOURCES, INC.,	:	
Respondent.	:	No. 7 Mine

DECISION

Appearances: Dana L. Ferguson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, GA for the Secretary;
David Smith, Esq., and John B. Holmes, III, Esq., Birmingham, AL, Maynard, Cooper & Bale P.C., for the Respondent

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) alleging that Jim Walter Resources (“Jim Walter”) violated 30 CFR Section 75.1725(c). A trial was held in Birmingham, Alabama on September 27-28, 2005. Subsequent to the trial, the parties filed Proposed Findings of Fact and a Brief, along with Objections and Replies thereto.

Introduction

Jim Walter operates the No. 7 Mine, an underground coal mine. Coal is conveyed from the working faces to the dumping point outside the mine via electrically operated conveyor belt systems. Coal that is conveyed on the North Main belt goes through a chute at the outby end of the belt where it falls onto the West A belt, and is then conveyed outby to the surface of the mine. Various remote switches control the flow of electricity to these belts¹.

¹A signal sent from switch (button), B-1 or B-2 (identified in JWR-1), removes the power from the North Main belt. Similarly, power is removed from the West A belt via either buttons R-1, R-2, R-3, R-4, R-5, R-6 or R-7 as identified on JWR-1.

On April 22, 2004 Gary Keeton was employed by the No. 7 Mine as a general inside laborer on the evening shift. On April 22, 2004, Keeton's normal work area included the West A belt and North Main belt head roller. His normal duties included cleaning of coal spillage along the West A belt and North Main belt head roller, and clearing any obstruction from the North Main belt head roller chute at the West A belt.

On April 22, 2004, Keeton was performing his normal duties at his normal work area on the evening shift, and was fatally injured. The last person known to have seen and talked to Keeton was Carlos M. Maynor. At approximately 10:35 p.m., Maynor observed Keeton washing the discharge chute with water at the West A belt head roller.

A television camera that was located underground transmitted pictures of the area in question to a screen and located in an office on the surface. At approximately 10:57 p.m., an individual who was in the office looked at the screen and observed "boots ... that were junked up or got on the, in front of the Discharge Chute, the North Main Discharge Chute on the apron or East Catwalk." (sic) (Tr. 212)

On April 22, 2004 from 10:57:22 p.m. to 11:26 p.m., electric power to the North Main belt was turned off via a remote switch. The computer log, which is the source for these times, based this time record on a signal that was from either switch B-1 or B-2 as identified on JWR-1. The computer log does not distinguish between or identify which one of these two buttons was pressed or pulled.

On April 22, 2004 from 10:57:38 pm. to 10:58:10 p.m., electric power to the West A belt was turned off via a remote switch. The computer log, which is the source for these times, based this time record on a signal from either switch R-1, R-2, R-3, R-4, R-5, R-6 or R-7 as identified on JWR-1. The computer log does not distinguish between or identify which one of these buttons was pressed or pulled.

Ned Jackson Martin worked on the owl shift as an inside laborer performing the same duties and at the same site assigned to Keeton the previous shift. When he arrived at the site in question at the beginning of the owl shift, the West A belt was running, but the North belt was off. When Martin noticed that the North Main belt was not moving, he looked up into the chute and observed a rock "...at the top of it ... [y]ou could just barely see it." (Tr. 159) He did not attempt to dislodge it. He stated that the rock was about three to four inches thick and that the edge "... looked like it'd been - it was kind of rounded off." (sic) (Tr. 160). Martin described the rock in the chute as "...white looking... [s]hiny... [and that] it kind of had a glossy looking. It did have a like it'd been beat up." (sic) (Tr. 159-60) Later that shift after he had turned power on to the North Main belt, he noted that the rock was no longer there.

According to Martin, it is not unusual for material to clog the chutes, and the North Main chute becomes clogged more often than the West A chute.

At approximately, 4:00 a.m., Keeton's body was found on the surface in a pile of rocks that had been scooped out of a rock pile.² Additionally, a slate bar³ was found on the surface in the structure of the preparation plant "... in the duct work between the skip dumping area at the top of the production shaft and the rotary breaker." (Tr. 31) The location of the slate bar was not at the recovery site where Keeton's body had been found. On April 23, a ladder was found in the underground area at issue.

Subsequent to an investigation, the MSHA Inspector, Harry Wilcox issued a citation alleging a violation of 30 CFR Section 75.1725(c) in that "... maintenance was being conducted on April 22, 2004 between 10:57 p.m. and 11:15 p.m. at the North Main Belt Header and West "A" belt conveyor without removing power and blocking the West "A" belt from motion... ."

I. Further Findings and Discussion

Section 75.1725(c), supra, provides as follows: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion"

Respondent argues that the Secretary has not established by a preponderance of the evidence that it violated Section 1725(c), supra. Specifically, Respondent cites the lack of any witnesses as to Keeton's location during the time in question, and his activities at that time. Thus it is argued that there are not witnesses to establish that he was performing maintenance at the cited location during the cited time period. In this connection, Respondent refers to the parties' stipulation that there is not any photographic or videotape evidence that Keeton was involved in maintenance work when he contacted the belt. Also, that it is not known if there was any material jamming the chute when Keeton contacted the belt.

In essence, it is the Secretary's position that on April 22, 2004, between 10:57 p.m. and 11:15 p.m., Keeton was performing maintenance at the North Main belt header and the West A belt conveyor when the belts were not de-energized, and the West A belt was not blocked against a motion. These inferences are based on the following facts stipulated to by the parties or testified to by the Secretary's witnesses:

(1) On April 23, Keeton was the only miner on the evening shift assigned to the North and West Main belts. Among his duties was the clearing of any obstruction from the North Main

²These rocks had originally been deposited at a bunker where coal from the mine underground is deposited, adjacent to the Prep Plant. According to John Aldrich, Safety Director at the mine, these rocks "... came from the preparation plant" and were conveyed on a belt that "...went over the radial stacker ...". (Tr. 251)

³This item also is referred to in the transcript by the following terms: bar, steel bar, drill steel bar, and long bar.

belt head roller chute at the West Main belt;

(2) According to Martin's testimony a chute can become clogged. The North Main chute in relation to the West A chute becomes clogged more frequently than the West A chute;

(3) According to Martin on April 23, when he arrived at the North Main chute at the beginning of the owl shift, the North Main belt was not running, and he observed a rock on top of the chute. He described the rock as about three inches thick. He said that a portion of the rock, about the size of a dollar bill, was shiny and was "[k]ind of unusual" as it was "smooth [and] ... kind of rounded off." (Tr. 160) He also indicated that "[i]t did have a like it'd been beat up" (sic.) (Tr. 160);

(4) Martin indicated that one way of removing a rock that is obstructing a chute is to use a steel bar to pry it loose;

(5) Aldrich indicated that on April 23, around the time that Keeton's body was found on the surface, a slate bar, that was recognized by Martin as similar to the one used by him to pry rocks loose from the chute, was also found on the surface;⁴

(6) Martin testified that although miners are not allowed to climb on a belt to clear a chute, one of the ways he has used a bar to dislodge a rock from a chute, is to get on the West Main belt and attempt to pry the rock loose from below while standing on the belt;

(7) In the course of the investigation by MSHA Inspectors, it was determined that on the night shift on April 23, a television camera monitoring the underground area in question transmitted pictures to a screen located in an office above ground. At approximately 10:57 p.m., an individual who was in the office where the screen was located indicated he saw boots on a catwalk in front of the North Main chute. Further, on April 23, a ladder was found in the cited area;

(8) On April 23, starting at 10:57:38 p.m., power was turned off the North Main belt for approximately a half hour; for approximately thirty seconds during that time period, power was turned off at the West A belt; and

(9) At approximately 4:23 a.m., on April 24, Keeton's body was found on the surface in a pile of rocks that had been conveyed from the underground out of the mine.

Respondent attempts to rebut the Secretary's inferences by referring to the lack of any physical evidence that, during the time in question, Keeton was engaged in removing a rock from

⁴The slate bar was not found at the recovery site; it was found in the structure of the preparation plant. According to Aldrich, Keeton's body was found amidst a pile of rocks that had originated underground and were conveyed out of the mine via the preparation plant.

the North Main chute. Respondent also cites Martin's testimony that on April 22, when he arrived at the area in question, there was not any "mess". (Tr. 163) Respondent argues that the lack of a "mess", would indicate that there was not a blockage of the chute on the prior shift, as it would have caused spillage of material from the North Main belt that feeds onto the chute.

As additional rebuttal of the Secretary's case, Respondent refers to Martin's testimony relating to the rock he observed in the chute at the start of the owl shift. Respondent notes that Martin offered various explanation as to the possible cause of the rock's unusual shiny, "beat up" condition, but did not indicate it might have resulted from having been pried by a bar. Respondent further argues, in essence, that it is not likely that the rock had become lodged in the chute during Keeton's shift as Martin. Later on in the owl shift, after power had been restored to the North Main belt, Martin noticed that the rock was no longer in the chute. Thus, it is argued that it had not been clogging the chute on the evening shift, as it apparently fell out of the chute once power was restored.

Respondent also refers to the fact that although a steel bar was found on the surface, there was not any evidence tending to establish that this bar had been used by Keeton. Moreover, although a ladder was found in the cited area, Respondent relies on the testimony of Aldrich, that he attempted to climb it and experienced difficulties in positioning himself into the 30-inch space between the top of the ladder and the roof.

At best, the factors cited by Respondent might tend to weaken the logical nexus between certain individual facts and inferences the Secretary wishes to be drawn from these facts. However, it is critical to consider the existence of the combination of all the facts relied on by the Secretary. Thus, I note that the record establishes the following: (a) it is not uncommon for rocks to clog the North Main chute; (b) a rock that appeared shiny and beat up was observed at the start of the owl shift, before power had been restored to the North Main belt, (c) power had been shut off from the North and West Main belts at approximately 10:57 pm, April 23; (d) at about the same time the boots of a miner were observed standing on a catwalk in front of the North Main chute; (e) that a steel bar is used to pry rocks that become lodged in a chute; and (f) that a steel bar was found on the surface on April 24, at about the same time as Keeton's body was found.

Based on the existence of all these facts, I find that it is reasonable to infer that during the evening shift, at about 10:57 pm, a miner turned off electric power to the belts in question and then started to use a steel bar to remove a rock or rocks that was/were stuck in the North Main chute. (See, *Garden Creek Pocahantas Co*, 11 FMSHRC 2148, 2152-53, (1989) citing *Mid-Continental Resources* 6 FMSHRC 1132, 1148 (1984). Further, since Keeton was the only miner assigned to work in the area and his duties included clearing obstructions from this chute, it is reasonable to infer that Keeton was the miner performing this task during the time in question. (id) I thus find that the factors relied upon by Respondent are insufficient to rebut the inferences drawn from the Secretary's case-in-chief.

Moreover, Respondent has not set forth any plausible theory based upon any facts in the

record to support a reasonable inference that Keeton was not involved in clearing the chute during the time period in question. Respondent argues that there is not any evidence that Keeton had previously climbed up on a catwalk to dislodge a rock stuck in a chute. Respondent also relies on statements given to the Inspectors that, in general, Keeton was considered a safe worker. Also, Respondent refers to the testimony of Byram, wherein he answered in the affirmative in response to leading questions from counsel as to whether Keeton “had previous slip-and-fall accidents that resulted in minor injuries.” (Tr. 306) Additionally, Respondent cites the presence of orphenadrine in Keeton’s blood stream at the time an autopsy was performed. However, the record does not contain any evidence of the medical effects of the medication found in his blood stream, its quantity, or the length of time it had been in his blood stream prior to the autopsy.

I find that the arguments and evidence relied on by Respondent to be too speculative to support any reasonable inference that Keeton fell on the belt but not while engaged in clearing the chute.

Thus, for all of the above reasons I find that the Secretary has established by a preponderance of evidence, based on reasonable inferences of a combination of facts, that, at the time in question Keeton was engaged in attempting to move a rock or rocks that was/were lodged inside the North Main chute. Also, although power has been removed from the North Main belt, by way of a remote control button and power had been removed from the West Main belt by way of a remote control button for ten seconds, power was then returned to the West Main belt which was in motion during the time period in question.⁵ Thus, it is further concluded that since the West Main belt was in motion, it had not been blocked against hazards.

II. Further Discussion

Respondent argues, in essence, that even if it be found that Keeton was engaged in attempting to remove a rock from the chute, this work does not constitute “maintenance” and therefore Sections 1725(c), supra, is not applicable.

In *Walker Stone Co.*, 19 FMSHRC 48 (1997) (“*Walker Stone I*”) the operator was cited for having violated Section 56.14105, which in all material aspects is identical to the language in Section 1725(c), supra. In *Walker Stone I*, supra, a rock had become lodged inside a crusher which stalled the drive motor rendering the crusher inoperable until the rock was removed. The issue before the Commission was whether in these circumstances the removal of the rock constituted maintenance of the crusher to fall within the scope of the cited mandatory standard. The Commission, 19 FMSHRC, supra, at 51 relied on *Webster’s Third New International Dictionary Unabridged*, 1362 (1986), which defined the term “maintenance” as “the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep...”

⁵The parties stipulated that these remote controlled buttons were functioning normally, did not have any defects, and that it is unexplained as to why and how power was restored to the West Main belt during the period in question.

and “[p]roper care, repair, and keeping in good order.” (See *Walker Stone*, supra, at 51) The Commission also cited *A Dictionary of Mining Common Mineral, and Related Terms*, 675 (1968). In holding that the activities at issue constituted “maintenance” the Commission noted that the obstructing rock caused the crusher to become inoperable until the rock was removed and that the purpose of dislodging the rock was to unclog the malfunctioning crusher and restore it to functioning condition. The Commission held that “[t]he removal of rock was necessary to restore [the crusher] to a sound state or keep [it] in a state of repair or efficiency.” (*Walker Stone I*, supra, at 51) The Commission went on to hold as follows: “[i]n our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phase ‘repairs or maintenance of machinery or equipment’, and, therefore, the standard adequately expresses the Secretary’s intention to reach the activity to which he applied it.” (id.) Upon appeal, *Walker Stone Co., v. Secretary of Labor*, 156 F 3rd, 1076 (10th Circuit, 1998), (“*Walker Stone II*”) the Court of Appeals found the standard at issue therein to be ambiguous, deferred to the Commission’s interpretation, and affirmed the Commission’s decision.

Respondent argues, based on the testimony of Martin, that when he observed the rock in the chute he did not attempt to remove it; that when the North Main belt was turned on in the owl shift, there was not any evidence that it was blocked and was not functioning normally, and that, the rock in question fell out on its own after the belts had started up. Respondent also refers to the testimony of Martin that there was not any mess in the area when he arrived at the beginning of the owl shift. Respondent argues that this would indicate the lack of spillage caused by any blockage.

As set forth above, I infra, the facts in the case at bar establish, by way of inferences, that the chute had ceased to function because of the presence of a rock or rocks, and that their removal of these obstructions was necessary to unclog the chute (c.f., *Walker Stone I*, supra, at 52). Thus, their removal falls within the meaning of maintenance as set forth in *Walker I and II*, supra.

Therefore, for all the above reasons I find that it has been established that Respondent violated Section 1725(c), supra.

III. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, 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 reasonable 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 explained its

interpretation of the term "significant and substantial" as follows:

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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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.*, 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 Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above it has been found that the Respondent violated Section 1725(c), supra, and that this violation contributed to a discrete safety hazard i.e. a miner coming in contact with a moving belt. Further, since the hazard herein did result in a fatality, it is clear that the third factor set forth in *Mathies*, supra, the reasonable likelihood that the hazard will result in injury, and the fourth factor, a reasonable likelihood that the injury will be serious, has been met. For these reasons I find that it has been established that the violation was significant and substantial.

IV. Penalty

The parties stipulated that a penalty will not impair Respondents ability to remain in business and that Respondent demonstrated good faith abatement.

The level of Respondent's negligence is to be mitigated because Respondent provided a camera at the area in question which transmitted the use of that area to the control room on the surface. Further, it was Respondent's policy for miners to call a control room supervisor before shutting down the belts. The record indicates that Keeton was an experienced worker, and was considered to be a safe worker. Respondent seeks to further mitigate the level of negligence by arguing that it "very deliberately trained its miners" not to straddle a moving belt while attempting to dislodge a rock from a chute. (Respondent's Reply to Petitioner's Post Trial Brief, at 20) However, there is not any evidence in the record to indicate specifically that Keeton received this training. For all these reasons I find that the level of the Respondent's negligence

was moderate.

Because the violation herein resulted in a fatality, I find that the level of gravity of the violation was high. The record does not establish any bases for increasing or decreasing a penalty based on the remaining factors set forth in Section 110 (i) of the Act. Therefore, in evaluating the factors set forth in Section 110 (i) of the Act and placing the most weight on the high level of gravity which resulted in a fatality, I find that a penalty of \$32,500 is appropriate for this violation.

ORDER

It is **ORDERED** that the Respondent pay a civil penalty of \$32,500, within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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