FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2007-194 A.C. No. 01-00851-109935
v.	:	
OAK GROVE RESOURCES, LLC, Respondent	:	Oak Grove Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, 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 Oak Grove Resources, LLC (Oak Grove) with two violations of the mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Oak Grove 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.

Citation No. 7691351

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

> The battery powered 602 scoop, company number 69, located on the 10 East section (MMU0280) was not being maintained permissible. There is a[sic] opening in excess of .005 inch between the lid and electrical box (plane flange) off operator side. This mine liberates over 6,000,000 cubit [sic] feet of methane gas in a 24 hour period. This scoop is operated inby the last open crosscut in the faces. The mine operator removed the scoop from service immediately.

The cited standard requires that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

It is undisputed that the cited scoop was electric face equipment required to be permissible under the cited standard and that the cited opening was in excess of that permitted. Indeed, Oak Grove does not dispute the violation as alleged but contests only the Secretary's gravity, "significant and substantial" and negligence findings. The issues are therefore accordingly limited.

Danny Lee Crumpton has been an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) for five years. He holds an MSHA electrical certification and has 13 years industry experience as an underground coal miner including work as an electrician and supervisor. According to the credible expert findings of Inspector Crumpton, the gap in excess of .005 of an inch between the lid and the electrical box of the cited 602 battery powered scoop would permit methane to enter the electrical box and, should the methane be within the explosive range of 5 to 15%, it could or would be ignited by the electrical contact points when power on the scoop would be engaged and could also ignite methane within that range outside the electrical box.

According to the undisputed testimony of Inspector Crumpton, the cited scoop operates in face areas where methane is liberated. The mine is also on a "section 103(i)" spot inspection regimen as a "gassy mine" because it liberates more than 1,000,000 cubic feet of methane within a 24-hour period and, indeed, liberates over 6,000,000 cubic feet of methane in a 24-hour period. While it is also undisputed that no more than .2% methane was detected in any part of the mine tested on the day of the inspection, methane levels are unpredictable and can rise to explosive levels at any time. This is corroborated by the fact that the subject mine has, in the past, had methane ignitions and is, indeed, rated as a "gassy mine". Clearly, should methane in the mine atmosphere ignite or explode, reasonably serious injuries and fatalities are reasonably likely to occur.

I find under the circumstances that the admitted violation was "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on 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 explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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 injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Within the above framework of law and evidence, I have no difficulty finding that the violation at bar was "significant and substantial" and of high gravity. In reaching these conclusions, I have not disregarded the arguments in Respondent's brief based primarily on the testimony of Oak Grove's safety supervisor Larry Pasquale, who is not an electrician, that there was only a remote chance of an explosion and that, while it could occur, so long as the ventilation is maintained, there would not be a problem. Pasquale testified that he did not see any ventilation problems that day.

While Mr. Pasquale was no doubt sincere in his beliefs, I cannot give his testimony significant weight. He did not sufficiently consider that, in evaluating the "significant and substantial" criteria, continuing mining operations must be taken into account. I also attribute the greater weight to the opinions of the witness with the greater expertise established on the record i.e. Inspector Crumpton.[1]

I also find that the Secretary has met her burden of proving that the violation was the result of Oak Grove's moderate negligence. The evidence is undisputed that the lid on the electrical box was placed over dirt and grit thereby causing the cited gap. According to the inspector's undisputed testimony, the electrician who replaced the lid was also responsible for performing a permissibility test after reinstalling it. Requiring a rank-and-file miner to perform such an electrical examination makes that miner an agent of the operator for that limited purpose. *Secretary v. Mettiki Coal Corporation* 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991). The fact that a "section103(g)" complaint made nine days before the inspection herein included a specific complaint that Oak Grove was operating electrical equipment in a non-permissible condition in the 10 East Section also reflects, in itself, at least a moderate degree of negligence in the maintenance of its electrical equipment.

Citation No. 7691352

The instant citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.604(b) and charges as follows:

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[1] *Texas Gulf Inc.*, 10 FMSHRC 498 (April 1988), cited by Respondent, is also inapposite. The mine therein, unlike the Oak Grove mine at issue, had no history of methane ignitions or ignitable levels of methane and was not under a "section 103(i)" inspection regimen for gassy mines.

> A permanent splice in the trailing cable (2 AWG) 480 VAC on the Shuttle Car company number 19 located on the 10 East section (MMU-0280) was not effectively insulated and sealed to exclude moisture. The splice was deteriorated to the point where the insulation has broken apart and rolled back exposing the phase leads. This condition creates an electrical shock hazard of 480 VAC to the miners on this section. The mine operator immediately removed the shuttle car from service.

The cited standard provides in relevant part that "[w]hen permanent splices in trailing cables are made, they shall be...effectively insulated and sealed so as to exclude moisture...."

Oak Grove does not dispute the instant violation and contests only the Secretary's gravity, "significant and substantial" and negligence findings. Inspector Crumpton found that the violation was "significant and substantial" on the basis of his alleged observation of exposed bare copper wiring in the phase leads in the cited trailing cable. The inspector's conclusion that the violation was "significant and substantial" was based upon his testimony that miners handling the energized trailing cable could come into contact with the bare copper wiring suffering burns and even electrocution. I find significant however that the inspector did not allege, in charging the violation, that the bare copper wiring was exposed and did not, in his contemporaneous notes, indicate such exposure. Oak Grove's safety supervisor, Larry Pasquale, who accompanied the inspector and was present to observe the cited condition testified that he was sure that no bare copper wires were exposed on the cited trailing cable. I am therefore constrained to conclude, in light of this conflicting evidence, that the Secretary has not sustained her burden of proving that the violation was "significant and substantial" or of high gravity.

The Secretary also alleges that the violation was the result of "moderate negligence" based on the inspector's opinion that the condition had existed for two hours or more. The inspector reached this conclusion based only on his observation that the splice was worn. In light of the lessened gravity finding and the fact that the Secretary has failed to establish that an agent of the operator knew or even should have known of the violative condition, I do not find that the Secretary has met her burden of proving anything greater than low negligence.

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 affect the operator's ability to continue in business. The record shows that the Oak Grove mine is a large mine and has a significant history of violations. The record indicates that the violative conditions charged herein were abated in a timely manner. There is no evidence that the penalties imposed herein would affect the operator's ability to continue in business. The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of $1,096.00 for Citation No. 7691351 and $250.00 for Citation No. 7691352 are appropriate.

ORDER

Citation No. 7691351 is affirmed and Citation No. 7691352 affirmed but without "significant and substantial" findings. Oak Grove Resources, LLC, is hereby directed to pay civil penalties of $1,096.00 and $250.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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