FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 16, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA-98-61
Petitioner	:	A. C. No. 44-03795-03797
v.	:	
	:	
ISLAND CREEK MINING COMPANY,	:	
Respondent	:	VP 8 Mine

DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Larry A. Coeburn, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Norton, Virginia, on behalf of the Petitioner; Elizabeth S. Chamberlin, Esq., Consol Incorporated, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against the Island Creek Mining Company (Island Creek) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," alleging one violation of the mandatory standard at 30 C.F.R. ' 75.400 and seeking a civil penalty of $396.00 for that violation. The general issue before me is whether Island Creek violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. A secondary issue is whether "Section 104(b)" Order No. 7297719 is valid.[1]

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[1] Section 104(b) of the Act provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mien or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the

Secretary determines that such violation has been abated.

The one citation at issue, No. 7297718 alleges that "loose coal from 1-12 inches in depth was present underneath and along the offside of the 2-East No. 3 conveyor belt beginning at Break No. 68 and extending inby for a distance of approximately 1,000 feet." The cited standard provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel powered and electric equipment therein."

Ronald Blankenship, an inspector for the Department of Labor=s Mine Safety and Health Administration (MSHA) was conducting an ongoing inspection at the VP No. 8 Mine on June 22, 1998. He was accompanied underground by company safety supervisor Ray Phillips and union walkaround Will Smith. At the 2 East No. 3 conveyor he observed an accumulation of coal alongside the belt, underneath the belt and on the offside of the belt. The accumulation was one inch to twelve inches deep and extended for 1,000 feet. Blankenship discussed the problem with Phillips and advised him that he would be issuing a "Section 104(a)" citation. Abatement time was discussed and Blankenship concluded that the condition should be abated by 9:00 a.m. the next day. Blankenship could not recall whether Phillips objected to the abatement time. Since the coal was damp, rockdust had been applied over some areas, there was no coal contacting any rollers or the belts and since the carbon monoxide monitoring system was functioning, Blankenship concluded that a fire was unlikely. He concluded that the violation therefore, was not "significant and substantial" and presumably therefore not of high gravity. He found that the cited area was an area traveled and pre-shifted on a daily basis and observed that no one was cleaning the belt at the time. Accordingly, he felt that the violation was result of moderate operator negligence. While the violation does not appear to be disputed, it is, in any event, proven as charged.

On the following day, June 23, 1998, Blankenship returned to the VP No. 8 Mine. Before proceeding underground he was told by Island Creek safety inspector Mike Canada that the 2 East No. 3 conveyor belt had been cleaned. Arriving at that location Blankenship observed one employee shoveling loose coal from beneath the belt. Blankenship traveled the length of the belt and observed that it had been only spot cleaned. There was coal spillage on the offside of the belt. He opined that it was fine coal dust and not lumps as if from sloughage. He therefore concluded that the offside of the belt had not been cleaned at all. Indeed, one of the miners, Jim Tolliver, told Blankenship that he was instructed only to clean underneath the belt and was not told to clean the offside of the belt.

Mike Canada accompanied Blankenship during his inspection of the entire belt. Canada admitted that it did not look like there had been any cleaning on the back side. Blankenship then issued the subject Section 104(b) order and gave Canada a copy of the order at 10:40 that morning. Once the order was issued 15 employees cleaned the belt in about four hours. After Blankenship told Canada he was issuing the "Section 104(b) order, no one asked for an extension of time to abate the condition nor was Blankenship told of any problems causing delay in the abatement process.

When the validity of a Section 104(b) order is challenged by the operator, the Secretary, as the proponent of the order, bears the burden of proving: 1) the existence of a previously issued citation charging a violation of a mandatory standard, 2) that a reasonable time for abatement of the violation had been provided, 3) that the time for abatement had expired, 4) that the violation had not been abated and 5) that the period of time for abatement should not be extended. *Clinchfield Coal Company v. UMWA*, 11 FMSHRC 2120, 2135 (November 1989).

In this case Island Creek contends only that the inspector did not provide a reasonable time for abatement of the violation and that the period of time for abatement should have been extended. Establishing an appropriate abatement time is obviously not an exact science and considerable judgment must be exercised. Inspector Blankenship opined that it would require four to six men over three shifts and therefore concluded that the operator "could have it cleaned by tomorrow." He set abatement to be completed by 9:00 a.m. the next day. It appears that in response, Phillips, if he said anything at all, said only "I think I need some more time." There is no evidence that Phillips or anyone else even attempted to explain or justify why additional time would be needed.

I further note that when Blankenship returned to abate the cited condition no one asked for additional time and in fact he was told by safety supervisor Canada that everything had been abated except for two or three crosscuts on the No. 2 conveyor belt which had been the subject of another citation. While I also have considered the testimony of the Respondent=s witnesses, regarding their difficulty in accomplishing abatement within the time set forth by Blankenship in his citation, none of these witnesses, including Ray Phillips, Danny Crutchfield and Michael Canada, requested any extension or additional time to abate the violative condition at the time the order was issued. In the absence of such a request it is perfectly understandable that the abatement time was not extended. The operator has the burden to bring to MSHA=s attention any matters justifying extension of the abatement time. *Energy West Mining Co. v. FMSHRC*, 111 F.3d 900 (D.C. Cir. 1997).

Under all the circumstances, I find that the inspector acted reasonably in issuing the order. It is clearly too late for Respondent to now claim that he acted otherwise. I have also considered the testimony of Mr. Canada that much of the coal that remained on the offside of the belt originated from rib sloughage rather than belt spillage. This testimony does not however necessarily contradict Inspector Blankenship=s findings that substantial amounts of violative coal accumulations also remained on the offside on his return to the mine on June 23rd. Under the circumstances the citation and order must be affirmed.

While the problems which hindered timely abatement were not brought to Inspector Blankenship=s attention before he issued the order at bar, I nevertheless consider those factors in mitigation of Respondent=s penalty. Therefore, considering all of the criteria under Section 110(i) of the Act, I find that a penalty of $250.00 is appropriate.

ORDER

Citation No. 7297718 and Order No. 7297719 are hereby affirmed and Island Creek Coal Company is directed to pay a civil penalty of $250.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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