FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 5, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-259-M A.C. No. 04-05146-05503
v.	:	
AT&E ENTERPRISES, INC., Respondent	:	AT&E Mine

DECISION

Appearances: Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Gregory J. Roberts, Esq., Christensen & Barrus, Fresno, California, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against AT&E Enterprises, Inc. ("AT&E"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petition alleges five violations of the Secretary's safety standards. For the reasons set forth below, I vacate one citation, modify one citation, and assess civil penalties in the amount of $200.00.

A hearing was held in this case on December 13, 1994, in Fresno, California. The parties presented testimony and filed post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The AT&E Mine is a small, underground gold mine in Mariposa County, California. The mine had been operated in the past and AT&E was in the process of rehabilitating it. (Tr. 24). At the time of the inspection, December 1, 1993, no ore had been extracted. The mine is located at the top of a mountain and its portal

opens into a drift that is supported by timber. AT&E was replacing old timber sets with new timber sets and mucking out loose rock. Miners had been working underground for less than two months. Id. At the time of the inspection, miners had replaced timbers about 50 feet into the drift from the portal. Mike Garoogian is president and sole owner of AT&E. (Tr. 110). The inspection was conducted by MSHA Inspector David Kerber.

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that AT&E was issued two citations in the 24 months preceding the inspection in this case. (Tr. 6). I also find that AT&E was a small operator, employing about 18 people, with three miners working underground. (Tr. 17, 112). AT&E reported about 19,350 man-hours over the previous year. (Tr. 6). I also find that the civil penalties assessed in this decision would not affect AT&E's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that AT&E is concerned about the safety of its miners and made good faith efforts to comply with MSHA's safety standards.

B. Citation No. 3932726

This citation alleges that the "timber located at the mine entrance in the portal was not provided with a fire suppression system, covered with a material equivalent for fire protection, or fire-retardant paint to prevent a fire." The citation states that the timber was exposed for about 55 feet. The safety standard cited, 30 C.F.R. ' 57.4560, provides, in pertinent part:

> For at least 200 feet inside the mine portal ... timber used for ground support in intake openings and in exhaust openings that are designated escapeways shall be --
>
> (a) Provided with a fire suppression system, ... capable of controlling a fire in its early stages; or
>
> (b) Covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or
>
> (c) Coated with fire-retardant paint or other material....

There is no dispute that the timbers were not protected with a fire suppression system, covered with shotcrete or other material, or coated with fire-retardant paint. Matthew Swanson, operations officer for the mine, testified that AT&E had considered how to protect the timbers and had purchased fire-retardant paint for that purpose. (Tr. 85-89). He stated that AT&E planned to spray on the paint, but that they had not done so because the

timber was still wet. Id. He stated that due to the remote location of the mine, AT&E operates a sawmill at the mine site and cuts its own timber out of sugar pine trees on mine property. He stated that the timber is soaking wet, heavy and dense when it is used and must dry out before it can be painted. Id. He believed that the timber was too wet to be painted at the time of the inspection. He further stated that the timber at the portal was almost dry enough to be painted. I credit the testimony of Mr. Swanson.

Inspector Kerber testified that the purpose of the standard is to prevent carbon monoxide from entering the mine. (Tr. 47). He stated that an operator is required to paint or otherwise pro-tect the timber as each set is installed in the mine. (Tr. 47-48, 59, 72). I find, however, that the safety standard does not expressly contain such a requirement. The language of the safety standard does not address when fire-retardant material must be applied if a mine operator is developing a new mine or is rehab-ilitating an old mine by installing new timber sets. Under the standard, an operator is permitted to cover the timber with shotcrete or gunite. Those materials are generally made of cement and are sprayed on pneumatically. It would not be fea-sible to spray the timber with gunite or shotcrete as it is placed in the mine because that material must be prepared in batches. (Tr. 87). I reject the inspector's interpretation of the standard as requiring each timber set to be protected as it is installed.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess as its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990); Lanham Coal Co., 13 FMSHRC 1341, 1343 (September 1991). Although the subject standard is not broadly worded, it does not address the issue raised here. I do not believe that a reasonably prudent person would have recognized that it was prohibited by the safety standard from installing timber sets without applying gunite, shotcrete, fire-retardant paint, or other material at the time it was installed.

See definitions of "gunite," "guniting," and "shotcrete" in Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms, at 518-19, 1004 (1968).

Based on the particular facts in this case, I conclude that the citation should be vacated. I find, based on the testimony of Mr. Swanson, that the timber sets were raw, very wet, and could not have been painted at the time of the inspection. Fire retardant paint does not prevent wood from burning, but rather retards the burning process. (Tr. 13, 56). In vacating the citation, I have taken into consideration the fact the AT&E had only advanced about 50 feet into the mine, air naturally flowed out of the mine through the entry being timbered, and there was no evidence of any sources for a fire. As a consequence, the lack of fire-retardant paint did not present a danger of carbon monoxide poisoning.

C. Citation No. 3932727

This citation alleges that AT&E did not have any means of testing for gases or fumes before entering into the part of the mine that was not ventilated with a fan. The citation states that miners had gone about 100 feet into the mine to work on an air door. The cited safety standard, 30 C.F.R. ' 57.5002, states: "Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures."

There is no dispute that AT&E did not have any devices to test the mine atmosphere. AT&E maintains that during previous MSHA inspections and when consultants had visited the mine, the mine atmosphere had been tested and that such tests did not indicate that there any bad air in the mine. (Tr. 91, 132-34) It further argues that the miners had never gone more than about 50 feet into the mine except on two days when two miners worked on the air door that was about 120 feet into the mine. (Tr. 16, 30, 93). AT&E states that it was going to install a new ventilation system and it was looking into various types of testing equipment to monitor and control the air quality. It believes that it met the standard's "as frequently as necessary" requirement because all of the previous tests indicated that the air was good and the natural air flow from the upper workings kept the air circulating.

On at least one occasion miners complained about the quality of the air in the mine and some said that they had become sick from the air. (Tr. 14, 29, 50, 60-61). In addition, AT&E was rehabilitating an old mine and air circulated through old stopes before exiting the mine through the portal. (Tr. 29, 36). AT&E did not have any means to test the quality of the air. I find that, given the circumstances of this case, AT&E was required to have testing equipment at its disposal to check the air in the mine, especially because miners were required, on occasion, to enter the deeper areas of the mine where contaminated or oxygen

deficient air is more likely to accumulate. (Tr. 14). I find that AT&E violated the standard because it did not, and could not, test the air as frequently as necessary to determine the adequacy of its air control measures.

Inspector Kerber determined in the citation that the gravity of the violation was low and that the violation was the result of AT&E's low negligence. The violation was not designated as significant and substantial ("S&S"). I agree with the inspector's determinations and reject the Secretary's argument in his brief that the negligence of AT&E was greater than originally determined by the inspector. After considering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i).

D. Citation No. 3932730

This citation alleges that AT&E did not have a check-in and check-out system at the mine to provide an accurate record of persons who are underground. In addition, the citation alleges that persons underground did not carry a positive means of being identified. The cited safety standard, 30 C.F.R. ' 57.11058, requires each operator of an underground mine to "establish a check-in and check-out system which shall provide an accurate record of persons in the mine." The standard also states that every person underground "shall carry a positive means of being identified."

AT&E contends that it had a check-in and check-out system. It argues that because only three miners worked underground and they could generally be seen from the mine entrance, it could rely on verbal communication and a visual check to determine who was underground. Miners were not permitted to go underground without notifying Bill Gergen, AT&E's mine engineer. (Tr. 30-31, 38, 94). In addition, AT&E contends that each miner had a positive means of identification in the form of a training certificate which each carried.

I find that AT&E's check-in and check-out system did not meet the requirements of the standard. Although under normal circumstances AT&E would know who was underground, confusion could arise during an emergency and rescue efforts could be hindered. (Tr. 52). Under AT&E's system, an accurate "record" of persons in the mine was not kept. In addition, I find that training certificates do not constitute a positive means of identification because they can be easily destroyed. Although the standard does not expressly require that metal tags be used, I find that metal tags are standard in the industry and, conse-

quently, a reasonably prudent person familiar with the mining industry would know that metal identification tags are required. (Tr. 72-73). Mr. Gergen testified that he carried a brass tag and Mr. Swanson stated that he has worked at many mines and not one used paper certificates as a positive means of indentification. (Tr. 17, 107-08).

Inspector Kerber determined that the gravity of the violation was low and that the violation was the result of AT&E's high negligence. The violation was not designated as significant and substantial ("S&S"). I agree with the inspector's determinations. After considering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

E. Citation No. 3932731

This citation alleges that AT&E did not have a neutral return spring on the control handle for the 12-B mucker. The citation states that the lack of a return spring created a hazard to employees using the mucker. The cited safety standard, 30 C.F.R. ' 57.14100(b), provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

There is no dispute that the return spring was missing from AT&E's track-mounted mucker. This mucker was used to pick up waste rock from the mine and dump the material into an ore car for removal. The function of the return spring was to return the gear shift to neutral if the mucker operator took his hand off the control handle. Without the return spring, it was possible for the mucker to remain running and in motion if the operator's hand was removed from the control handle.

AT&E admits that the return spring was missing, but contends that it ordered the replacement part immediately after it discovered that the spring was missing. Thus, it argues that it was doing all that it could to correct the defect in a timely manner. AT&E also contends that the defect did not create a hazard to persons because the mucker was used only for about an hour a day and it had other safety devices that would stop the mucker in the event the operator was knocked off.

I find that the evidence demonstrates that AT&E violated the safety standard. First, I find that the missing return spring did affect the safety of the mucker. Unanticipated events could cause the mucker operator to let go of the control handle. For example, he could slip or be knocked off the mucker, faint, suffer a heart attack, or become distracted. The return spring is designed to reduce the movement of the mucker in the event the

operator is no longer in control of it. Second, although AT&E immediately ordered a new part, it did not take steps necessary to assure that the defect was corrected in a timely manner. The condition had existed for at least three days prior to the inspection. (Tr. 33). The spring did not arrive for about three months after it was ordered. (Tr. 20). AT&E could have shut down the mucker or fashioned a temporary make-shift spring for use until the replacement part arrived. Indeed, AT&E's mine engineer, Bill Gergen, made a make-shift spring to abate the citation. (Tr. 20, 33). Thus, I conclude that the safety defect was not corrected in a timely manner, as required by the safety standard.

Inspector Kerber determined that it was reasonably likely that a serious injury would occur as a result of the violation and designated the violation as S&S. He also the determined that the violation was caused by AT&E's moderate negligence. I conclude that the Secretary has not established that the violation was S&S. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. The Commission has established a four-part S&S test, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The Secretary established the first two steps of the S&S test. I find, however, that the evidence does not establish a reasonable likelihood that the hazard contributed to by the violation will result in an injury. The mucker was used about one hour every day to remove waste materials as new timber sets were installed in the drift. (Tr. 32). During that hour, it was being moved approximately half of that time. (Tr. 32, 96). Only

three people worked underground and the same two miners operated the mucker whenever it was used. The mucker operator stands to one side as he operates the controls and another miner stands on the same side and slightly behind it to protect the air line. (Tr. 32). The drift was about six feet wide and the mucker was about two and one half feet wide. The operator's side has more clearance that the other side. (Tr. 18-19, 95-96). When functioning, the return spring on the mucker will return the gear to neutral but it will not engage a brake, so the mucker will keep moving at least a few feet if it is on a grade. (Tr. 41-43). Given these facts, and the fact that the mucker operator's hand would have to be unexpectedly removed from the control handle before a hazard is created, I find that it is unlikely that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. In addition, I find that, even if one assumes an event occurs that causes the operator to take his hand off the control handle, it was not likely that the mucker would injure anyone. While I recognize that the return spring is an important piece of safety equipment, I believe that, given the particular facts in this case, the likelihood of an injury was remote.

I find that the violation was caused by AT&E's moderate negligence. After considering the evidence presented at the hearing, I conclude that a penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

F. Citation No. 3932732

The citation alleges that there was not a whip check or safety chain on the one-inch air hose on the oiler. The safety standard, 30 C.F.R. ' 57.13021, provides, in part, that "safety chains or other suitable locking devices shall be used on connections to machines of high pressure hose lines ... where a connection failure would create a hazard."

AT&E argues that the particular air hose in question was not in use at the time of the inspection and that the Secretary did not show that it had ever been used. AT&E also states that whip checks were available at the mine and that one would have been attached to the air hose when it was used.

The mucker is powered by compressed air.

The fourth element of the Mathies S&S test has been met because it is reasonably likely that if an injury occurred, it would be of a serious nature.

A whip check is designed to protect miners from injury in the event an air hose connection fails. An air hose can whip around and strike people if it becomes disconnected from the equipment to which it is attached. There is no dispute that the type of air hose cited was required to be equipped with a whip check. AT&E's engineer testified that while he was not certain that the cited air hose had been used without a whip check, he stated that it could have been used. (Tr. 22, 34). There was no evidence that the air hose was not available for use or that it had been disconnected from the air compressor.

I find that the Secretary has established a violation of the safety standard. Inspector Kerber determined that the gravity of the violation was low and that the violation was the result of AT&E's moderate negligence. The violation was not designated as S&S. I agree with the inspector's determinations. After considering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

II. Civil Penalty Assessments

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess the following civil penalties, as discussed above:

Citation Nos.	30 C.F.R. '	Assessed Penalty
3932726	57.4560	VACATED
3932727	57.5002	$50.00
3932730	57.11058	50.00
3932731	57.14100(b)	50.00
3932732	57.13021	50.00
	Total Penalty	$200.00

III. ORDER

Accordingly, Citation No. 3932726 is **VACATED**, the remaining citations are **AFFIRMED** with Citation No. 3932731 **MODIFIED** to delete the significant and substantial designation, and AT&E Enterprises, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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