FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 12, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 96-253
	:	A.C. No. 48-01215-03525
v.	:	
	:	Docket No. WEST 96-254
S & M CONSTRUCTION INC., Respondent	:	A.C. No. 48-01215-03526
	:	
	:	Coal Creek Mine

DECISION

Appearances: Tambra Leonard, Esq., Margaret A. Miller, Esq., (On Brief), U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the Petitioner;
Stephen Kepp, S & M Construction, Gillette, Wyoming, and J. Stan Wolfe, Esq., Gillette, Wyoming (On Brief), for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Secretary), alleging violations of various mandatory safety regulations set forth in Title 30 of the Code of Federal Regulations by S & M Construction Incorporated (AS & M@). A hearing was held on October 22, 1996, in Gillette, Wyoming. On December 9, 1996, the Secretary filed a Post-Hearing Brief. On December 11, 1996, S & M filed Proposed Findings of Fact and Conclusions of Law. On December 26, 1996, S & M Filed a Reply Brief.

1. Docket No. WEST 96-254

S & M performs mining operations at the Thunder Basin Coal Company=s Coal Creek Mine. After coal is mined and crushed, it is transported to a 200 foot high silo for storage. In order to remove coal dust from the air at various coal transfer points in the operation, a fan pulls the air filled with coal dust through

a duct from the silo to a baghouse. The baghouse is approximately 38 feet high, 10 feet in diameter, and is located at the top of the silo. When the air filled with coal dust enters the baghouse, the coal dust is filtered out of the air by way of 368 ten foot long bags that hang vertically inside the baghouse. A rotating air jet knocks the dust from the bag, and the dust then drops down through a funnel shaped cone where it is expelled from the baghouse through a rotating valve. If the coal dust is not expelled properly throughout the valve, it can accumulate inside the baghouse. If the accumulation of dust reaches a level of five feet and eight inches from the floor of the baghouse, a sensor located at that level inside the baghouse shuts off power to the fan so that air laden with coal dust is no longer being drawn to the baghouse.

On August 27, 1995, Inspector Herbert A. Skeens, inspected the subject site pursuant to an investigation of a fire that had occurred there the previous day. He observed sparks falling from the horizontal beam inside the silo. He issued a section 107(a) withdrawal order covering the silo, an adjacent silo, and a conveyor, but did not allege the violation of any specific mandatory safety standard.[1]

Skeens set forth the following sequence of events based on his investigation[2]: the sensor had tripped the fan on Monday, August 21, 1996; miners tried two to three times to reset the power to the fan without checking to diagnose and repair the problem; several hours later they succeeded in getting the power running but that the sensor tripped the power to the fan again on August 22, 1996; miners tried several times to restart the power without diagnosing or trying repair the problem, but were unsuccessful; the baghouse was unattended from August 22 until August 26; on August 25, a miner detected the smell of burning coal and suspected a fire; the coal silo was emptied and water

[1]S & M did not file any notice of contest of the Section 107(a) withdrawal order pursuant to 29 C.F.R. ' 2700.22. Also, the petition for assessment of civil penalty filed by the Secretary seeks a penalty in this case only for Citation No. 4058552 which was issued alleging a violation only of 30 C.F.R. ' 77.404(a), but not alleging a violation of Section 107(a) of the Act. Accordingly the propriety of the issuance of the Section 107(a) withdrawal order is not an issue before me, and will not be discussed.

[2]Those persons furnishing information and/or present during the investigation are listed in the appendix to Skeens= Accident Investigation Report (Exhibit P-6).

was sprayed into the silo; and on August 26, smoke was discovered coming from the top of the silo, and firefighters were called from the neighboring black thunder mine, but they could not control the fire. The Campbell county fire department was then called and extinguished the fire in the baghouse.

Skeens issued a Citation alleging a violation of 30 C.F.R. ' 77.404(a), which provides as follows: A[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.@

It appears to be the position of the Secretary as argued by Counsel in her post-hearing brief, and as articulated by Skeens in the citation he wrote and in his testimony, that the baghouse was not in a safe condition. This conclusion appears to be based upon the existence of the following Afacts@: the sensor had been tripped on August 21 and August 22, coal dust had accumulated in the baghouse to at least the level of the sensor i.e., five feet and eight inches, and that the resulting accumulation was not cleaned up. However, the Secretary has failed to establish the existence of these facts based upon competent evidence. Skeens did not have any personal knowledge of the existence of these conditions. His testimony regarding these conditions was based solely upon information he gathered during an investigation, and inferences he drew from that information. In support of her case, the Secretary did not proffer the testimony of any persons having personal knowledge regarding the existence of the above conditions that are relied upon. Nor is there any competent documentary evidence in the record to support the Secretary=s position. S & M introduced in evidence six pages of handwritten notes (Defendant=s Exh. R-1) which, according to its representative, are part of an Activity Report prepared by the control room operator. However, the person or persons who prepared this report where not called to testify, and hence there is no explanation in the record for any of the entries, some of which are ambiguous. I thus find that the Secretary has failed to establish by way of competent evidence, the existence of the facts she relies upon to establish the violation herein.[3]

[3]I take cognizance of the serious hazards created by an accumulation of coal dust inside a baghouse. As explained by the Secretary=s expert, Thomas Koenning, the seam in which the coal mine at issue is located is considered to be highly susceptible to spontaneous combustion. Also, in the past five years there had been five baghouse fires in the county in which the subject mine is located. In each of these instances, the baghouse had been shut down for a period of a few days with an accumulation of

coal left inside the baghouse, and then spontaneous combustion had occurred. It would thus appear that the serious hazard of spontaneous combustion was created by a dangerous accumulation. However, S & M was not cited for allowing coal dust to accumulate. (c.f., 30 C.F.R. ' 77.202). Instead the Secretary chose to cite S & M for violating Section 77.404(a) which does not deal with accumulations, but requires that machinery and equipment be maintained not free of accumulations, but in Asafe operating condition.@ (Emphasis added.). There is no evidence

footnote 3 cont=d.

that the baghouse was not in safe working condition. There is no evidence that there was any defect in any element of the baghouse affecting its operation.

For all these I find that the Secretary has failed to establish that S & M violated Section 77.404(a). Accordingly, Citation No. 4058552 shall be dismissed, and Docket No. WEST 96-254 shall be dismissed.

2. Docket No. WEST 96-253

1. Citation No. 9894926, and Order No. 4058625

1. Background

Sometime prior to September 19, 1994, a designated work position 001-0375 (375) had been established for a 14G Caterpillar road grader at the Campbell Creek Mine operated by S & M. Respirable dust sampling taken on September 14, 1994, for the designated work position 375, designated work position 368, a rubber tire dozer, and designated work position 310, indicated that the former two were in compliance but that the designated work position 310, a Caterpillar scraper, was not in compliance. Stephen Kepp, S & M=s Safety Director, indicated that the Caterpillar scraper was then removed from service, and was removed from the mine property. According to Kepp, in subsequent telephone conversations with Leo Boatwright, of the McAlister, Oklahoma MSHA office, the former advised him that the designated work position that had been established for the Caterpillar scraper was abandoned. Kepp indicated that Boatwright also informed him not to worry about any citations that would be subsequently computer generated.

A computer generated notice to S & M from MSHA, dated February 7, 1995, advised that MSHA had not received valid samples for the designated work occupation 375 for December-January 1995. A similar notice was generated April 10, 1995, for the period February-March 1995. On June 7, 1995, a similar notice was generated for the period April-May 1995. On June 8, 1995, Citation No. 9894915 was issued alleging that there was no dust sample received for the period April-May 1995, for the designated work position, 375. This citation was abated on August 16, 1995, based on a valid sample taken on July 20, 1995.

On October 13, 1995, Citation No. 9894926 was issued to S & M alleging that 30 C.F.R. ' 71.208 was violated as there was no sample taken for the designated work position 375 in the Bi-monthly period August-September 1995. The citation set November 15, 1995, as the termination date.

On December 5, 1995, Skeens issued a section 104(b) Order (No. 4058625), alleging that no apparent effort had been made to collect a respirable dust sample on the designated work position

375. Skeens subsequently modified the order to allow the Caterpilar grader to be operated for the collection of a dust sample on the designated work position 375. However, Skeens subsequently reinstated the order on the ground that a respirable dust sample had not been taken. This order was finally terminated on January 30, 1996.

2. Discussion

It appears to be S & M=s argument that, since sampling of the grader on September 14, 1994, indicated that it was in compliance with the applicable standard, no designated work position should have been subsequently established. For the reasons that follow, I find this argument to be without any merit.

30 C.F.R. ' 71.208(e) provides, as pertinent, that the MSHA District Manager shall designate work positions at each mine for Respirable dust sampling. 30 C.F.R. ' 71.208(f), provides that a designation of a work position for sampling is to be withdrawn upon a finding that A . . . the operator is able to maintain continuing compliance with the applicable respirable dust standard . . . .@ Section 71.208(f) supra, goes on to specifically sets forth the required basis for this finding as follows: A[t]his finding shall be based on the results of samples taken during at least a one-year period under this part and by MSHA@.

The record does not contain any evidence to establish that in at least a one-year period results of sampling by MSHA indicated compliance for the designated work position 375. Accordingly, it was clearly proper for MSHA to continue requiring sampling on the designated work position 375.

30 C.F.R. ' 71.208(a) provides, in essence, that the operator shall take one valid respirable dust sample from each designated work position during each bi-monthly period. The bi-monthly periods are set forth as follows: February 1 - March 31, April - May 31, June 1 - July 31, August 1 - September 30, October 1 - November 30, and December 1 - January 31. S & M has not presented any facts or argument to challenge the allegation set forth in the citation at issue that no samples were submitted for the bi-monthly period August - September 1995. In essence, S & M argues that Kemp was confused regarding the requirement to sample for work occupation 375. In this connection, Kepp referred to a conversation that he had with Boatwright who advised him that the designated work position of the Caterpilar

scraper was being abandoned, and that he should not be concerned about any citations that would be subsequently computer generated.

The regulatory scheme set forth in Title 30 imposes strict liability upon an operator. (Asarco, Incorporated-Northwest Mining Dept., 8 FMSHRC 1632 (1986) aff'd, 868 F2d 1195 (10th Cir, 1989)). The operator is not allowed to escape compliance based upon any confusion. I thus reject S & M's argument.

I find that it has been established that no samples were submitted for the period August-September 1995. Accordingly, the citation at issue was properly issued, as S & M did violate Section 71.208 supra.

Citation No. 9894926 set a termination date of November 15, 1995. S & M did not comply with this date. S & M did not submit any sample between October 13, 1995, the date of the citation and the termination date of November 15, 1995.

S & M has not specifically challenged the issuance of the 104(b) order. The time set for termination was more than 30 days beyond the date of the original citation. There is no evidence in the record of any technical or other difficulty that would have prevented S & M from submitting samples by November 15, 1995.[4]

Based on all the above, I find that it has not been established that there was any abuse of abuse of discretion in the issuance of the Section 104(b) order, that it was properly issued, and that S & M did violate the Section 104(b) order.

3. Penalty

In essence, it is the position of S & M that any penalty to be assessed should be reduced on the ground that there was no negligence on its part relating to the violation. S & M takes the position that it was of the opinion that it was not required to sample the 375 designated work occupation, because the sampling on September 14, 1994, of that position did not exceed the pertinent standard. However, subsequent to that date, S & M was put on notice that it was required by MSHA to submit testing

[4]Although no one at S & M's mine was qualified to take a sample, Julie Hart, who was certified, worked at a neighboring mine.

for that position, and that such testing had not been received for the following bi-monthly periods: December-January 1995, February-March 1995, and April-May 1995. Also, in response to the issuance of citation on June 8, 1995, based upon the failure to submit a sample for the bi-monthly period April-May 1995, S & M had a valid sample taken on designated work position 375 on July 20, 1995. Hence, when the instant citation was issued on October 13, 1995, based on the failure to have submitted a sample for the period August-September 1995, S & M clearly should have known of its responsibility in this regard. I do not put much weight on Kepp=s testimony that, in telephone conversations with Boatwright, the latter told him not to worry about any subsequent citations that might be computer generated, as the designated work position that had been established for the Caterpillar scraper had been abandoned. This alleged statement by Boatwright has no bearing on the obligation of S & M to submit a sample for the designated work position at issue, i.e., 375, the 14G grader. I thus find that S & M=s negligence was relatively high. However, in reviewing the history of violations, Exhibit P-1, I conclude that the number of violations from April 18, 1994 to February 6, 1996, 35, is not inordinately high. According to Skeens, and not contradicted or impeached by S & M, the designated work position at issue had previously been tested, and a dust reading of 1.0 m.g. per cubic meter was the result. I accept Skeens= uncontradicted testimony that dust samples at the mine site at issue Ahave been found to contain as high as 12-percent quartz silica@ (Tr. 130). (Emphasis added). Further, I accept Skeens= testimony that exposure to quartz silica can cause lung disease. I find that the level of gravity of the violation was moderate. Taking all of these factors into account, I find that a penalty of $1,000 is appropriate.

2. Citation No. 4058621

1. Violation of 30 C.F.R. ' 72.620

On December 5, 1995, while in the Pit area, Skeens observed a truck mounted drill, drilling into overburden consisting of rock, shell and dirt. When Skeens was about 1,000 feet away from the drill, he saw a cloud of dust billowing around the rear of the drill. He estimated that the cloud of dust was approximately 15 feet by 15 feet. When Skeen approached the drill, he saw that the operator was sitting on the seat of the drill located on the cab, but both doors were opened, and the operator was hanging out the side of the cab. According to Skeens, the helper was standing within a few feet of the hole that was being drilled. Skeens said that both the operator and the helper were covered with yellowish-brown dust. According to Skeens, no dust control

measure was being used.

Skeens issued a Section 104(d)(1) citation alleging a violation of 30 C.F.R. ' 72.620 which provides as pertinent, as follows: A[h]oles shall be collared and drilled wet, or other effective dust control measures shall be used when drilling non-water soluble material.@ It appears to be S & M=s position, as a defense to this matter, that the testimony did not establish the

contents of the dust flowing from the drill hole. S & M also asserts that the water dust suppression although not being used was operable. Kepp testified that on the previous day the operator using the water system A . . . had plugged the hole@ (Tr. 174).

Kepp who was present during Skeens= inspection, did not contradict the latter=s testimony that, in essence, dust control measures were not being used. Nor did he contradict Skeens= testimony that the material being drilled was non-water soluble. Nor did Kepp did indicate that the holes were in any way collared or being drilled wet. I thus accept Skeens= testimony, and find that S & M did violate Section 72.620 supra.

1. 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 C.F.R. ' 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 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 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, 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 discussed above, the evidence establishes that Section 77.620 supra, was violated by S & M. (See, II(B)(1), infra). Further, S & M did not object to the introduction in evidence of two statements issued by MSHA (Exhibits P-20 and P-21), which explain that exposure to dust containing silica from drilling can cause silicosis. Hence, the second element of Mathies has been met. According to Skeens, as observed by him, the drill operator and the helper were both exposed to the cloud of dust produced because drilling took place in the absence of dust control measures. Kepp testified that the two individuals involved Adon=t pay a great amount of attention to personal hygiene,@ (Tr. 173), and accordingly argued that any dust on them did not necessarily get there on December 5. I find this testimony too hypothetical and reject it. I also take cognizance of Kepp=s testimony as follows reqarding the placement of these individuals:

> The weather conditions that particular day were a brisk wind blowing out of the north at 20 to 25 miles an hour. I remember this very well, because I was cold. The drill was -- the motor carrier was facing west.
>
> That means that the drill operator and the helper would have been north of the bore hole. Therefore, any dust cloud that would have been generated by the drill would have blown to the south and away from the two individuals (Emphasis added.) (Tr. 173-174).

I find this testimony as to where the location of the two individuals would have been, and where the location of the cloud dust would have been, to be hypothetical, and insufficient to contradict the specific eyewitness testimony of Skeens as to his observations of the individuals, and their locations relative to the cloud of dust. Skeens assumed that the miners in question were exposed to silica dust. However, the record does not establish this fact. Here is no evidence regarding the composition of the dust cloud and the specific overburden material that was being drilled. Keep, in discussing his allegation that the drill operator had plugged the hole using the water system the previous day stated that this occurred Abecause the drill was working in overburden in a clay material@ (Tr. 174). This statement alone is insufficient to establish the composition of the overburden. Skeens was asked what the material consisted of, and he stated as follows: A[i]t was a combination of rock and shale and dirt. I don=t know the exact identity of the strata@ (Tr. 158).

However, it is significant to note the uncontradicted testimony of Skeens that dust samplers collected at the mine have been found to contain as high as 12 percent quartz silica. In addition, I note the following: the testimony of Skeens that exposure to quartz silica can cause lung disease, the significant size of the cloud dust at issue, and the proximity of the exposed miners to the cloud dust as observed by Skeens. Within this context, I find that the third and fourth elements in Mathies, supra, have been met. Accordingly, I find that the violation was S & S.

3. Unwarrantable Failure

In an earlier inspection on March 19, 1995, Skeens had observed an independent contractor drilling blast holes. He said that dust was being generated, although no miners were exposed. According to Skeens, in the presence of Kepp he talked to the miners A . . . about compliance with 72.620" (Tr. 161). According to Skeens, he spoke to the independent contractor as follows: AAnd I told them if they didn=t get some dust control on that drill it was a matter of time until they were going to get caught, because they were gambling on which direction the wind blowed@ (Tr. 162).

Also, according to Skeens, the dust cloud at issue was seen by him when he was 1,000 feet away. Hence, it was obvious that dust control measures were not in use. Skeens indicated that when he asked one of the miners present how long the drill had

been Abelching drill dust@, the response was A[a]bout six months@ (Tr. 167). This miner was not called to testify. I thus do not place much weight upon Skeens= hearsay testimony in this regard. The Secretary relies on Skeens= testimony that on November 17, 1994, Inspector Doug Liller went to the mine, and distributed literature concerning the hazards of exposure to silica. However, Skeens did not have any personal knowledge of these facts, as Skeens was not present when Liller went to the mine. The Secretary did not call Liller to testify to establish these facts. I thus place no weight upon Skeens= hearsay testimony in these regards.

In contrast, Kepp testified that S & M had owned that drill for six months; that it is incorrect that it was not operated for six months with no dust control measures being used; and that S & M had Ato take the drill down because the water pump did freeze up; it broke. And the drill did not work until the water pump was replaced@ (Tr. 175). He also indicated that on the previous day the operator using the water system Ahad plugged the hole@ (Tr. 174). I observed Kepp=s demeanor, and found him credible. I find that there is insufficient evidence that the violative condition had existed for a length of time as to establish that S & M=s negligence was more than ordinary.

Within the above framework, I find that the level of S & M=s did not reach aggravated conduct. As such, the violation did not result from its unwarrantable failure (c.f., Emery Mining Corp., 9 FMSHRC 1997 (1987)).

4. Penalty

I find that the miners in question were working in close proximity to the dust that contained silica. Hence I find that the violation was of a high level of gravity.

For the reasons set forth above, II (C)(3), I find that S & M was negligent to only a moderate degree in connection with the violation. I find that a penalty of $2,000 is appropriate for this violation.

3. Order 4058624.

1. Violation of 30 C.F.R. ' 77.1605

On December 5, 1995, Skeens observed approximately six scrapers on the top of a coal highwall. Skeens observed the scrapers driving perpendicular to the edge of the highwall, and then making a U-turn. The high wall was 22 feet high, and there

was a Anearly vertical@ (Tr. 178), drop off at the edge of the highwall. There was no berm provided on the outer bank of the highwall.

Skeens issued an order under Section 104(d)(1) alleging a violation of 30 C.F.R. ' 77.1605(k) which provides that A[b]erms or guards shall be provided on the outer bank of elevated roadways.@ According to Kepp, the scrapers were being operated on the horizontal surface of a coal seam. They were being used to remove the final amount of the overburden off the coal so it could be drilled and shot.

There is no evidence in the record as to whether, as understood in the mining industry, the term Aelevated roadway@, encompasses the area in question. It is manifest that the requirement of a berm in Section 77.1605(k) is to prevent a vehicle from over traveling the edge of the highwall. Clearly this hazard arises when vehicles traverse the area in question in order to remove overburden. The common meaning of the term Aroadway,@ as set forth in Webster=s Third New International Dictionary (1986 Edition), is as follows: A1(b) the part of a road over which vehicle traffic travels@. Clearly vehicles travel the area in question. I find that it would be contrary to

the regulatory intent of Section 77,1605(k), supra, to carve out an exception, and not require berms in a situation where trucks travel in order to remove overburden. Hence, I find that it has been established that S & M did violate Section 77.1605(k).

2. Significant and Substantial

In support of its position that the violation was significant and substantial, the Secretary argues that the highwall could have failed, and that A . . . any type of steering or brake problem, if it occurred on one of those scrapers making a turn that close to the edge, could create some big problem for the operator, and probably result in an accident.@ (Tr. 184). According to Skeens, he had observed tracks within 12 feet of the edge of the coal bench. However, he did not testify as to the distance that he observed trucks normally operating in relation to the edge of the highwall. Nor is there any other evidence in the record as to how close to the edge of the highwall the trucks traveled in their normal operation. There is no evidence that the truck=s brakes, or any other mechanical part was defective. Within the framework of this evidence, I find that although the record establishes that a scraper could have traveled over the edge of the highwall, it has not been established that the such

an event was reasonably likely to have occurred. I thus find that it has not been establishes that the violation was significant and substantial.

3. Unwarrantable Failure

A Section 104(d)(1) order can be upheld only if there had previously been issued a valid citation under Section 104(d)(1) of the Act. As set forth above, II (C)(1) infra, the previously issued citation under Section 104(d)(1), is not upheld. Hence, the instant order issued under Section 104(d) shall be reduced to a Section 104(a) citation.

4. Penalty

According to Skeens, on December 5, he had spoken to one of the supervisors who told him that he knew that a berm was required, but that he had removed it earlier that shift. Kepp indicated that a supervisor was in the area, and was guiding and directing scraper operators as they came into the cut area. It is not clear from the record whether this statement is based upon an actual observation of Kepp on December 5, or upon his description in general of mining practices. In essence, Kepp argued that S & M was not negligent since when it was cited it was in the final stage of its operation, i.e., cleaning the top of coal in preparation for a shot.

I find that since the berm was intentionally removed, S & M=s conduct herein constituted a high degree of negligence. Further, considering the height of the edge of the highwall from the ground below, and the fact the drop off was steep, I find that should a vehicle have overtravelled the edge of the highwall, a serious injury could have resulted. I find that a penalty of $2,000 is appropriate.

D. Order No. 4058628

1. Violation of 30 C.F.R ' 1606(c)

On December 6, 1995, Skeens observed that a rear tire of a trailer attached to a truck had an area of missing tread on the surface of the tire that makes contact with the road. Skeens indicated that he was able to see the nylon cords and belts that are normally covered by the tread. Skeens was concerned about the hazard of a blowout of this tire, and issued a order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R.

' 1606(c) which provides that A[e]quipment defects affecting safety shall be corrected before the equipment is used.@

Two front tires and four rear tires were located on the truck. Four rear tires, two on each side, were located on the trailer. The cited tire was the outside rear tire of the trailer. The outside diameter of the tire was 100 inches, the width of the tread of the tire was approximately 27 inches, and the circumference of the tire was 330 inches. The area of the tire tread that was missing and that revealed the inner nylon cords and belts was 13 inches wide, and extended for 72 inches. The tire contained approximately 90 pounds of air per square inch.

Essentially, it appears to be S & M=s position, that if the area of the tread that was missing was penetrated by some object, the tire would become flat and would not suffer any explosive blowout. In support of this position, Kepp testified that since the tire was on the trailer, it was not subject to the stresses of steering or acceleration. Accordingly, it is S & M=s position that the tire was safe. In contrast, Skeens cited an instance where a worn truck tire had blown, and referred to studies A . . . where tires have thrown pieces of debris 300 yards@ (Tr. 210).

Considering Skeens= uncontradicted testimony that the air pressure in the tire was 90 pounds per square inch, and that the area where the nylon cords were exposed extended for a considerable portion of the radius of the tire, I find that the defect to the tire noted by Skeens did affect safety. Since it was being used and the defect was not corrected, I find that S & M did violate Section 77.1606(c) supra.

2. Significant and Substantial

According to Kepp, in essence, the likelihood of an injury causing event was remote since the cited tire was located on the trailer, and not subject to the stresses of acceleration and steering. He also noted that the truck is usually driven at speeds from only two to three miles an hour, up to 20 miles an hour. However, he conceded that Arocks and bits of coal@ are Apresent on the roadway@ Aon occasion@ (Tr. 227). Also, he conceded that tires with a bulge can blow out. Further, Kepp indicated that the driver of the truck in question, and the loader/operator, would be exposed to the tire in question approximately 20 times a day. Considering also the extent of the area of the missing tread, and the fact that the inner cords and

belts were visible, I conclude that it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

According to Skeens, the defect in the tire in question was obvious. Kepp indicated that it had been torn in an accident two days prior to the issuance of the citation in question on December 6. Also, Kepp indicated that he became aware of this defect on either December 5 or December 6. Yet no efforts were made to remove the tire from the surface. Indeed, the truck was allowed to continue to operate with the defective tire. Within this context, I find that the level of S & M=s negligence to have been more than ordinary, and to have reached the level aggravated conduct. Thus I find that it has been established that the violation was as a result of S & M=s unwarrantable failure. (See, Emery, supra).

4. Penalty

I find that should the tire had blown, a serious injury could have resulted if a person would have been in close proximity to the tire. Also, as discussed above, I find that the level of S & M=s negligence to have been of a relatively high degree. I thus find that a penalty of $2,000 is proper for this violation.

D. Citation No. 3588975.

1. Violation of 30 C.F.R. ' 208(c)

On January 10, 1996, S & M was notified by MSHA that five additional dust samples were required for the designated work position surface area No. 0010, occupation code 375, and that these samples had to be received no later than February 1, 1996.

On February 7, 1996, MSHA supervisory mine inspector Larry Keller learnt that the five additional samples had not been submitted by February 1. He issued a Citation to S & M alleging a violation of 30 C.F.R. ' 71.208(c).

Section 71.208(c), provides, as pertinent, that upon a notification from MSHA that dust samples taken from a designation work position exceeded regulatory requirements, A . . . the operator shall take five valid respirable dust samples from that designated work position within 15 calendar days. The operator

shall begin such sampling on the first day on which there is a normal work shift following the day of receipt of notification.@

According to Kepp, the equipment in question, the 14G Caterpillar blade, needed a certain part and was not available for use from on about January 14, 1996, through January 30. According to Kepp, dust samples were taken on January 30 and January 31, 1996. Kepp indicated that there was no production on February 1, and February 2, due to extreme cold weather, and there was no production on February 3 and 4, as those days constituted a weekend. Dust samples were taken on February 5, February 6 and February 7. (Defendant=s Exhibit R-4).

I have considered Kepp=s testimony. However, since S & M did not take five samples within 15 calendar days of being notified of this requirement, ie., January 10, S & M did violate Section 71.208(c).

2. Significant and Substantial

The violation at issue contributed to the hazard of silicosis. Dust samples collected at the mine have been found to contain as high as 12-percent quartz silica. However, according to Kepp, whose testimony was not contradicted, S & M did take five dust samples on five consecutive production shifts in which the equipment at issue was available. As such, I find that there was not a reasonable likelihood that an injury producing event i.e., lung disease, was reasonably likely to have occurred. I thus find that the violation was not significant and substantial (See, Mathies, supra).

3. Penalty

I accept Kepp=s testimony, as it has not been contradicted, or impeached, that, in essence, five samples were taken, on five consecutive production shifts in which the equipment in issue was available. I thus find that there was no negligence on S & M=s part. I find that it has not been established that the gravity of the violation was more than low. I find that a penalty of $20 is appropriate for this violation.

III. Order

It is ORDERED as follows: 1. Citation No. 3588975, and Order No. 4058624 are reduced to Section 104(a) citations that are not S & S; 2. Citation No. 9894926 and Order Nos. 4058625 and 4058628 are affirmed as written; 3. Citation No. 4058552 is

dismissed; 4. Citation No. 4058621 is reduced to a Section 104(a) S & S violation; and 5. S & M shall. within 30 days of this decision, pay a civil penalty of $7,020.

Avram Weisberger
Administrative Law Judge

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