FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
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June 20, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2007-327 A. C. No. 46-08365-109357
v.	:	
WHITE BUCK COAL COMPANY, Respondent	:	Grassy Creek No. 1

DECISION

Appearances: Karen M. Torre, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against White Buck Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $5,272.00. A trial was held in Beckley, West Virginia. For the reasons set forth below, I affirm the citations, modifying one, and assess a penalty of $4,848.00.

Background

The Grassy Creek No. 1 Mine is an underground coal mine operated by White Buck Coal Company in Nicholas County, West Virginia. MSHA Inspector James A. Starcher conducted a quarterly inspection of the mine in August 2006. On August 2, the inspector issued two citations concerning the trailing cables on two shuttle cars in the mine. On August 8, he issued a citation pertaining to the trailing cable on a roof bolting machine.

On November 15, 2006, MSHA Inspector Roger Bennett conducted a spot inspection at the mine. As part of the inspection he issued a citation regarding the dust collection system on a roof bolting machine. Coincidentally, the operator had collected a respirable dust sample on the same roof bolter the day before.

When tested, the dust sample showed that the level of respirable dust was 7.233 mg/m^3, considerably over the limit of 1.5 mg/m^3. As a result, the operator was required to submit five additional dust samples for the roof bolting machine. The samples were collected on December 4, 5 and 6, 2006. They also exceeded the applicable limit. Consequently, a citation alleging a violation of the respirable dust standards was issued on December 21, 2006.

To abate the violation, the operator was to submit five more samples which complied with the standard. When the operator failed to submit any additional samples by the deadline set, a 104(b) order, 30 U.S.C. § 814(b), was issued on January 9, 2007. The citation was subsequently abated and the order terminated on January 24, 2007.

The Respondent contested the five citations and the order and the matter was set for trial. Prior to the trial, the Petitioner filed an Motion for Partial Summary decision. The motion was granted to the extent the operator was found to have committed all of the violations. (Tr. 5.)

In addition, prior to the taking of evidence, the Respondent withdrew its contest of Citation No. 9967903, the respirable dust citation, as well as the attendant 104(b) order. (Tr. 6-7.) By withdrawing the contest, the citation and order became affirmable without the presentation of evidence by the Secretary.

Therefore, the issues contested at the trial, and which will be discussed in this decision, are whether the four remaining violations were "significant and substantial," the level of negligence involved in the four violations and the appropriate penalty for each of the five violations. The violations will be discussed in the order issued.

Findings of Fact and Conclusions of Law

Citation No. 7251446

This citation alleges a violation of section 75.517, 30 C.F.R. § 75.517, in that: "The 480 volt cable provided for the No. 2 Joy shuttle car s/n ET 17495 in service in the 002-0 MMU, contained 2 damaged places in the outer jacket exposing insulated power and ground wires." (Jt. Ex. 1.) Section 75.517 requires that: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

Inspector Starcher testified that during his August 2, 2006, inspection of the mine, he observed that the outer jacket of the cable from the No. 2 Joy shuttle car was damaged in two places, exposing insulated power and ground wires. (Tr. 14-16.) He said that he was able to observe this condition while he was standing over the cable that had been laid out on the mine floor. (Tr. 56.) He further related that at least one of the damaged areas had been previously repaired with tape. (Tr. 56-57.) The Respondent does not contest that this condition violated the regulation. (Resp. Br. at 2.) In addition, as noted above, I have already found that the violation existed.

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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." A violation is properly designated S&S "if, based upon 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 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

The inspector testified that he found the violation to be S&S because the 480 volts conducted by the cable, if contacted by a miner, would cause permanently disabling injuries such as nerve damage or loss of fingers, if it were not fatal. (Tr. 22.) He stated that the insulation on the inner wires in the cable is softer and weaker than the outer jacket which is designed to protect the inner wires that actually conduct the electricity. (Tr. 17.) He opined that even a pinhole size hole in the inner insulation would be sufficient to shock a miner if he handled it. (Tr. 18-19.) In this connection, he said that the cable is regularly contacted by miners in either handling it to move it, to hang it for the passage of other equipment or by stepping on it to pass over it. (Tr. 19-21, 49, 53.) Finally, Inspector Starcher testified that the roadways were wet, increasing the danger to those handling the cable and that, although provided by the operator, the miners did not wear rubber gloves, which would have protected them, while working in the mine. (Tr. 18-20, 59.)

The Respondent argues that the Secretary has not shown a reasonable likelihood that this violation would result in an injury of a reasonably serious nature. The operator points out the following factors to support this assertion: (1) The inspector did not check the inner insulation for any holes or damage and, therefore, cannot prove that there were any; (2) There was a ground fault breaker at the power center which would knock the circuit breaker if a miner came in contact with an exposed wire and reduce the likelihood of shock; (3) Shuttle car cables are handled less frequently than continuous miner cables or roof bolter cables; (4) If the damaged area of the cable were on the reel, a miner could not come in contact with it; and (5) The cable was de-energized at

the time the inspector wrote the citation.

In *U.S. Steel*, the operator similarly argued that there was no likelihood of serious injury when the outer jacket of a cable was torn, but there was no evidence that the inner insulation had been compromised. 6 FMSHRC at 1574. The Commission held that because "the mining environment is harsh," the "damage to the outer layer of insulation weakened the protection afforded by the inner layer," thus the "case properly was designated 'significant and substantial' in that there was a reasonable likelihood that the condition of the trailing cable could contribute, significantly and substantially, to the cause and effect of a safety hazard." *Id.* at 1575.

The operator also asserted that a ground fault system in the cable made an injury unlikely. Holding that "[t]he ground fault system is designed to deenergize the trailing cable if a power wire comes in contact with the ground wire," the Commission approved the judge's finding that despite such a system an "electrical shock of some degree could occur." *Id.* at 1574 n.2.

Citing *U.S. Steel*, the Commission has subsequently reaffirmed that the "argument that reasonable likelihood of injury cannot be established if the record lacks direct evidence of damaged interior conductors or proof of the existence of exposed, uninsulated wire is inconsistent with Commission precedent." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1287 (Dec. 1998). Attempting to distinguish these cases, the Respondent notes that *U.S. Steel* involved the trailing cable of a continuous miner and *Harlan Cumberland* involved the trailing cable of a roof bolter, while this case involves the trailing cable of a shuttle car. According to the Respondent, this is important because "it is well known that roof bolter cables and continuous miner cables are handled far more frequently than shuttle car cables." (Resp. Br. at 5.) This does not mean, however, that energized shuttle car cables are not handled in the normal course of mining operations.

In this case, continued normal mining operations would have been expected for at least several more shifts. The company had a policy of inspecting the cables for damage on Tuesday and Thursday evenings. (Tr. 126.) The violation occurred on a Wednesday. (Tr. 156.) At least one shift had occurred since the most recent inspection. None of the company employees had apparently noticed the damage to the cable, as it was lying on the mine floor, when the inspector saw it. Finally, the cable would not have been inspected before it was reeled up and put into use at the beginning of the next shift. (Tr. 169.)

Taking all of these factors into consideration, and giving particular weight to the inspector's testimony, I find that the Secretary has established a reasonable likelihood that a serious injury would have resulted from this violation. Accordingly, the violation is "significant and substantial."

Citation No. 7251448

This citation alleges a violation of section 75.605, 30 C.F.R. § 75.605, because:

> The 480 volt cable provided for the No. 1 shuttle car s/n ET 17501 in service in the 001-0 MMU was not clamped to the cable reel of the machine to protect the cable from damage and to prevent strain on the electrical connections. The cable[']s outer jacket had been pulled thru the restraining clamp exposing insulated power and ground wires.

(Jt. Ex. 2.) Section 75.605 requires that: "Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections."

Inspector Starcher testified that the trailing cable is connected to the shuttle car by threading the cable through a guide, known as a "doughnut," on the cable reel to the inside of the reel where it is spliced to wires from the shuttle car. (Tr. 34.) The "doughnut" slides back and forth on the reel to insure that the cable is wound evenly on the reel. (Tr. 35-36.) The protected cable is attached to the reel by a restraining clamp to protect the cable from damage and to prevent strain on the spliced connection. (Tr. 34-36.) During his inspection, the inspector noticed that the restraining clamp was not attached to the reel and the cable's outer jacket had been pulled through the clamp, exposing the inner insulated power and ground wires. (Tr. 33, 36.) That this was a violation of the regulation is not contested by the Respondent. (Resp. Br. at 9.)

Significant and Substantial

Inspector Starcher testified that the violation was S&S because if the cable was not clamped to the reel, strain would be placed on the wire connections when the cable was reeled in, possibly severing the spliced connections and creating a shock hazard. (Tr. 40, 79.) In addition, if there was damage to the inner insulation it could result in electricity being conducted through the shuttle car so that "the individual that could be walking by that could touch it and be shocked. The individual that would be sitting on the shuttle car and getting off of it could also be shocked." (Tr. 65.)

The Respondent points out that the clamp is insulated by a rubber covering or insulated paint and is located inside the reel which is inside a reel box. (Tr. 64, 140.) Further, if the wires were completely pulled out of the splice the shuttle car would de-energize. (Tr. 66.) Therefore, the company argues, there is little likelihood that a miner would come in contact with the bare wires or that the shuttle could become energized by coming in contact with the bare wires.

In this instance, I find that the operator has the better argument. The Secretary has failed to demonstrate that the confluence of events necessary to result in a serious injury is likely.

Accordingly, I find that this violation was not "significant and substantial" and will modify the citation appropriately.

Citation No. 7251449

This citation alleges a violation of section 75.517 in that: "The energized trailing cable on the Fletcher twin head roof bolting machine s/n 97029, operating in the face of the No. 9 entry on the 003-0 MMU had the outer protective jacket damaged and the inner insulated conductors were exposed. The roadways were wet." (Jt. Ex. 3.) Inspector Starcher discovered the damage to the cable, which was on the left side of the dust box, while it was lying on the floor. (Tr. 45, 72.) As with the previous citations, the violation is not contested. (Resp. Br. at 13.)

Significant and Substantial

In addition to the previously stated reasons he gave for all of the cable violations being S&S, the inspector testified that the roof bolting machine cable is frequently handled by miners, either to hang it from the roof during use or to allow for the passage of other equipment. (Tr. 43-44.) He noted that roof bolter operators are under pressure to perform their function rapidly and are, therefore, less likely to notice damage to the cable, which could also be obscured by the dirt and dust in the area. (Tr. 74, 146.)

The Respondent gave essentially the same arguments for this violation not being S&S as it did for Citation No. 7251446. For the same reasons that I found that citation to be S&S, I find that this violation was "significant and substantial." Indeed, the evidence is stronger with regard to this violation in view of the fact that the roof bolting machine cable is handled more frequently than the shuttle car cable.

Citation No. 7260338

This citation sets out a violation of section 72.630(b), 30 C.F.R. § 72.630(b), because:

> The dust collection system provided for the Fletcher roof bolting machine, serial no. 96044-2005332, in service on the operating 001-0 MMU, was not being properly maintained. The roof bolting machine was installing bolts in the No. 4 face and drill dust visible to the eye was exhausting from the rear of the machine into the last open crosscut. When examined, there was fine white powdery dust located on the clean side of the filtering system.

(Jt. Ex. 4.) Section 72.630(b) provides that: "Dust collectors shall be maintained in permissible and operating condition."

While conducting a spot inspection of the mine on November 15, 2006, Inspector Roger Bennett observed a Fletcher roof bolting machine installing roof bolts in the No. 4 face. Drill dust was "blowing out of the back of the mufflers" of the machine. (Tr. 88.) The dust was blowing away from the operator and toward the No. 3 left entry where a miner operator and a shuttle car operator were working with the bits on the continuous miner. (Tr. 94.) This led the inspector to

believe that the dust collection system was not operating properly, so he had the machine stopped so he could inspect it. On closer inspection, he found a white, powdery dust behind the dust filters in an area that was supposed to be clean. (Tr. 89.) The Respondent does not contest that this was a violation of section 72.630(b). (Resp. Br. at 16.)

Significant and Substantial

Inspector Bennett testified that the roof bolter was a designated area for respirable dust testing in the mine. (Tr. 91.) He further stated that the area was on a lower respirable dust standard of 1.5 milligrams per cubic meter, rather than the baseline standard of 2 milligrams per cubic meter, because there was silica from quartz present. (Tr. 91-2.) Finally, he testified that drill dust was blowing out of the back of the machine and miners were working down wind of it. (Tr. 94.) The inspector said that the fact that the inhalation of respirable dust, over time, causes pneumoconiosis (black lung) or silicosis, incurable lung diseases which result in permanently disabling conditions, lend him to conclude that the violation was S&S. (Tr. 93.)

In further support of finding this violation to be S&S, the Secretary points out that the dust samples taken on the same machine the day before turned out to be considerably above the permissible standard; that the samples taken three weeks later were also out of compliance; and that it was not until samples taken in the middle of January 2007 that the area was shown to be in compliance. Therefore, she argues, "since bimonthly samples are to be considered representative of exposure levels for the sampling period, it is appropriate to presume that the area was out of compliance for the entire bimonthly period and that the violative condition of the roof bolter filter cited in Citation 7260338 contributed to that hazard." (Sec. Br. at 25.)

On the other hand, the Respondent asserts that violation was not S&S because the roof bolter's ineffective condition could had happened as it was moved from one area to another and water, designed to absorb dust, splashed out of the box. Or the water could have evaporated. Further, the operator argues, the miners down wind of the bolter were 120 to 140 feet away and the mine did not have low air readings at the time, decreasing the likelihood of suspension of the dust in the air. In all of these scenarios, the Respondent asserts, the exposure to the dust would have been limited. Finally, the operator notes that inspector did not test the dust blowing out of the roof bolter for respirable dust.

There is no doubt that a violation of the respirable dust standards, sections 70.100 or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be "significant and substantial." *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). This citation, however, does not involve a violation of a respirable dust standard. Therefore, nothing can be presumed.

Nevertheless, like the dust standards, section 72.630 was promulgated by the Secretary to protect miners from exposure to harmful respirable dust. Thus, in the introduction to the promulgation of this rule, the Secretary noted that during drilling, "there is the potential for extremely high exposures in short periods of time to both miners doing the . . . drilling and to

other miners in the immediate areas. Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (February 18, 1994). The Secretary went on to state that: "The development of silicosis and pneumoconiosis among underground coal miners has been well documented, *particularly among roof bolters* and transportation workers." *Id.* at 8322 (emphasis added). Finally, the Secretary set out that "§ 72.630 is a work practice standard that does not require sampling." *Id*.

Based on this, I find the company's arguments unavailing. I find that the violation contributed to a discrete health hazard, silicosis or pneumoconiosis. I further find that, in the context of continued normal mining operations, it was reasonably likely that this would contribute to the development of lung disease no matter how short the exposure. Finally, I find that the seriousness of these diseases is beyond question. Accordingly, I find that the violation was "significant and substantial."[1]

Civil Penalty Assessment

The Secretary has proposed penalties of $5,272.00 for these five violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In this connection, I find that the Grassy Creek No. 1 mine is a medium size mine and its controlling entity, Massey Energy Co., is a medium size company. (Govt. Ex. 10, Pet. Ex. A.) I further find that the operator has an average history of previous violations. (Govt. Ex. 10, Pet. Ex. A.) There is no evidence that payment of these penalties will adversely affect the company's ability to remain in business and I so find. Likewise, there is no evidence that the operator did not demonstrate good faith in attempting to abate the violations, with the exception of Citation No. 9967903, so I find that the company did demonstrate good faith. With regard to Citation No. 9967903, it appears that a 104(b) order, 30 U.S.C. § 814(b), had to be issued shutting down the roof bolter before the operator brought it into compliance.

Turning to gravity, I find that Citation Nos. 7251446, 7251449, 7260338 and 9967903 are serious violations that they could have resulted in serious injuries or life threatening illnesses. Citation No. 7251448, however, was not so serious. Finally, I agree with the inspectors that these violations were the result of "moderate" negligence on the part of the operator. The violations were readily apparent to the inspectors, but obviously had not been observed by the company's employees. On the other hand, it is clear that the operator was making additional efforts in an attempt to reduce the number of cable violations.

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[1] While not necessary to reach this finding, the problems with this particular roof bolting machine evidenced by Citation No. 9967903, which occurred before and after this violation, certainly strongly support it.

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 7251446, $524.00; (2) Citation No. 7251448, $100.00; (3) Citation No. 7251449, $524.00; (4) Citation No. 7260338, $614.00; and (5) Citation No. 9967903, $3,086.00.

Order

In view of the above, Citation Nos. 7251446, 7251449, 7260338 and 9967903 are **AFFIRMED**; Citation No. 7251448 is **MODIFIED**, by deleting the "significant and substantial" designation, and is **AFFIRMED** as modified. White Buck Coal Company is **ORDERED TO PAY** a civil penalty of **$4,848.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Karen M. Torre, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Arlington, VA 22209-2247

Carol Ann Marunich, Esq., Dinsmore & Shohl LLP, 215 Don Knotts Blvd, Suite 310, Morgantown, WV 26501

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