

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

September 8, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-384
Petitioner	:	A. C. No. 46-08751-112972
	:	
v.	:	
	:	
KINGWOOD MINING COMPANY, LLC,	:	Mine: Whitetail Kittanning
Respondent	:	

DECISION

Appearances: Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Carol Ann Marunich, Esq., Justin A. Rubenstein, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Kingwood Mining Company, LLC.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Kingwood Mining Company, LLC, is liable for twelve violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties totaling \$14,976.00. The parties reached an agreement to settle eleven of the alleged violations, and filed a motion seeking approval of the settlement. That motion will be granted. A hearing was held on the remaining violation in Morgantown, West Virginia, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Kingwood committed the violation, and impose a civil penalty in the amount of \$500.00.

Findings of Fact - Conclusions of Law

Kingwood Mining Company, a subsidiary of Alpha Natural Resources, LLC, operates the Whitetail Kittanning Mine near Newburg in Preston County, West Virginia. The underground mine produces 12,000 tons of coal daily and employs about 255 persons for two production shifts and one maintenance shift, six days a week. On July 17, 2006, at 8:00 a.m., Grayden Wolfe, an MSHA inspector, visited the Whitetail Mine to conduct a spot methane inspection and collect respirable dust samples. Tr. 26-27. While traveling from the power center through the cross cut on the right side of the East Mains Section, Wolfe noticed a large steel plate leaning against the right rib of the intersection at block 18. Tr. 31. The plate, which Wolfe described as a “very,

very heavy piece of steel,” measured 76 inches long. It was 10 inches wide, with rectangular pieces measuring 20 inches by 21 inches on each end . Tr. 45, 73. Wolfe continued with his inspection and proceeded to an Oldenburg Stamler Belt Feeder to conduct an intake dust reading.

Coal is dumped onto the feeder, which runs it through a crusher to break up oversized pieces before depositing it onto a conveyor belt that transports it out of the mine. The bed of the feeder, upon which the coal is dumped, is approximately eight feet wide and twelve feet long. It is elevated off the mine floor about one foot, and is open on three sides, so that it can be accessed by shuttle cars and scoops from three directions. Tr. 157. The bed consists of a steel pan, approximately six feet wide. Metal flights, approximately six inches wide by three inches high and spaced at two-foot intervals, move along the pan to push the coal into the crusher. The flights are mounted on chains that run on sprockets¹ located at the ends of the pan. The drive sprockets are at the crusher end. Idler sprockets rotate on a stationery shaft at the open end of the feeder bed. There are several inches of space between the shaft and the flights. Tr. 56. The flights are about two inches above the pan when they reach the top of the idler sprockets. They settle onto and slide along the pan as they move toward the crusher. Tr. 43. The area where the idler sprockets rotate, moving the flights from under the pan to the top of the pan, is covered by a steel plate, i.e., the plate found by Wolfe. The wings of the plate were designed to cover the idler sprockets and the ten-inch-wide section covers the area where the flights rotate toward the top of the pan.

The inspection was conducted at the beginning of the day shift on a Monday morning and, when Wolfe approached the feeder, it was not yet operating. Coal was piled on it to a height of about six feet, and was spilling over the edges. Tr. 32. There were two sets of footprints on the pile, over the place where the cover plate should have been. Tr. 32-33. Wolfe was unable to determine whether there was a cover plate in place over the idler sprockets. Tr. 32-33. He observed Richard Kelly, the left side section day-shift foreman, walk directly past the feeder and the detached cover plate. Tr. 35. Wolfe expressed concern to Kelly about the plate leaning against the rib, and inquired whether there was a plate on the feeder. Tr. 53. Kelly indicated that he did not know, and Wolfe instructed him to have the coal removed. Tr. 53. Once the coal was removed, Wolfe could see that there was no cover plate on the feeder, and it was apparent that the steel plate leaning against the rib was the missing cover plate. Tr. 44-45, 56; ex. G-3.

At 9:40 a.m., Wolfe issued Order No. 7143320 to Kingwood pursuant to section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. §75.1722(a), for failure to guard the “tail roller and sprocket” on the open end of the feeder. Tr. 56; ex. G-1. During the course of the inspection, Wolfe learned that there had been previous incidents at the mine in which cover plates had been dislodged from feeders as a result of being struck by shuttle cars. Tr. 168-69, 207. The company’s maintenance report indicated that the cover plate in question had become dislodged just days before, and had been replaced during the morning of Saturday, July 15. Tr. 61-62.

¹ A “sprocket” or “sprocket gear” is a gear that meshes with a roller or silent chain. Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 531 (2d ed. 1997).

Following issuance of the Order, Robert Maxwell, the section coordinator of the East Mains, along with four other miners, repositioned the plate on the feeder and bolted it down. Tr. 54, 56-57. Maxwell stated that he was unaware that the cover plate had come off until Wolfe brought it to his attention. Tr. 196-97. According to Wolfe, the plate appeared to have been intentionally placed against the rib. Tr. 73, 82. He concluded that it was unlikely that such action would have been taken without the direction of a supervisor. After running the feeder to ensure that the flights were not catching, Wolfe lifted the Order at 10:35 a.m. Tr. 57-58.

At approximately 8:20 a.m., with two miners standing eleven feet away and a shuttle car parked twenty inches from the end of the feeder, the feeder and the belt line were energized. Tr. 34-35, 46-47; ex. G-3. Wolfe did not witness anyone physically energize the feeder, and he is unsure whether the feeder was energized automatically or manually. Tr. 119-20. Feeders may be energized manually or may be set to energize automatically at specific times. Tr. 118. According to Maxwell, the feeder in question is energized manually by hitting a reset button and a switch located on the side of the feeder. Tr. 173. It is mainly operated during the two production shifts, and is typically energized for the entire shift. Tr. 132. Maxwell stated that, although it is not uncommon for the feeder to be operated during the midnight maintenance shift, it is usually only operated to clean spillage or to conduct a maintenance check of the equipment. Tr. 112, 167-68.

The feeder was last operated before the inspection during the day shift on Saturday, July 15. Tr. 76-78, 200. The next shift to work was the midnight shift at the beginning of July 17, during which the feeder was not operated. At 12:00 a.m. on July 17, scoop operator, Dixie Sutton dumped a bucket of coal onto the bed of the feeder, where it remained until Wolfe's inspection. Tr. 164-65. Consequently, the plate was likely dislodged at some point prior to the end of the day shift on July 15.

On a normal day, there could be up to two hundred shuttle car loads dumped onto the feeder in an eight to nine hour period, and a scoop would clean around it one to three times daily. Tr. 157. Occasionally, miners clean coal from the dump area by shoveling it onto the end of the feeder. Tr. 101. Maxwell described the feeder as "dirty, black looking, rusty looking." Tr. 160, 178. He also testified that the area was not well lit, and was primarily lit with "cap lights or lights on the equipment." Tr. 201. Sutton described the area as having "a lot of spillage, a lot of debris," including pieces that tear off of "machinery" and are usually left at the feeder. Tr. 149-51.

It is not unusual for miners to travel past the feeder at the beginning of their shifts to reach their work areas, and during breaks to retrieve their lunch buckets. Tr. 70. Sutton testified that miners are trained not to walk across the feeder. Tr. 138. There are pipes wrapped in blue reflective tape hanging at each corner of the feeder to alert miners to its presence. Tr. 155-56, 187. Should a miner get caught in the flights, there is a "dead-man's switch," activated by a cable strung above the pan, which a miner could use to cut power to the machine. Tr. 120-21, 193-94.

Order No. 7143320

Order No. 7143320 alleges a violation of 30 C.F.R. § 75.1722(a), which provides, in pertinent part:

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

The “Condition and Practice” section of the Order stated:

The Operator failed to guard the Oldenburg Stamler Feeder, tail roller and sprocket. This feeder serves the East Mains number 2 Belt, (MMU-007 and MMU-008). The exposed area was covered over with coal, and the cover plate was laying on the corner of 18 Block. The plate measures 76 inches x 10 inches, with 20 inch x 21 inch wings on the ends. The feeder was started at 8:20 A.M. with 2 employees standing in close pro[ximity]. A company mechanical report stated that the cover plate was replaced on 07-15-2006, on day shift. The fireboss report for this East Mains Section, on 07-17-2006 (day shift) 5:50 A.M. - 6:18 A.M. did not state that the cover plate was missing. This uncovered area exposes workers to a turning sprocket and gear, and crusher. This violation is an unwarrantable failure on the Operator’s part to comply with a mandatory standard.

Wolfe determined that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial (“S&S”), that one person was affected, and that the operator’s negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleges that the violation was the result of Kingwood’s unwarrantable failure to comply with the safety standard. A civil penalty in the amount of \$6,600.00 has been proposed for this violation.

The Violation

Kingwood does not dispute the fact that, at the time of Wolfe’s inspection, the feeder’s cover plate was not in place. Instead, it argues that there was no violation of section 75.1722(a) because the cover plate or “apron” is designed to protect the feeder from scoop and shuttle cars dumping coal, not to guard moving machine parts or protect miners from the moving flights, chains or idler gears and shaft. Kingwood argues that the shaft positioned beneath the cover plate is stationary, it does not rotate, and the design provides for exposed chains and flights that are necessary for the feeder to perform its function. Resp. Br. at 5. It argues that because those moving parts are equally exposed along the length of the machine, the cover plate would have to

cover the entire feeder to function as a “guard,” which would eliminate the machine’s function by preventing the dumping of coal onto the feeder.²

The Secretary argues that, while the feeder is in operation, the absent cover plate exposes the turning steel shaft and gears that interlock with the chains, to which the metal flights are attached, and that those “moving machine parts” would likely cause injury to miners coming into contact with them. The Secretary maintains that these facts prove a clear violation of the standard.

Gears, sprockets, and chains are moving machine parts that are specifically enumerated in section 75.1722(a). When the feeder in question is operational, the idler sprockets rotate on the stationary shaft, guiding the chains on which the flights are mounted. Respondent’s assertion that the chains are exposed by design is incorrect. Pictures of a similar feeder clearly show that the moving chains are covered by protective plates at all locations. Ex. R-1, R-2. Although Respondent is correct in its claim that the flights pose a danger with or without the cover plate in place, the danger is increased when the rotating sprockets and chains are exposed and the flights are moving into place on the top of the feeder bed. The cover appears to serve a dual purpose of protecting the machine parts from damage, as well as preventing contact by miners with these particular moving machine parts.

There is also evidence that miners come in close proximity to the exposed end of the feeder. Miners travel past the feeder at the beginning of their shifts to reach their work stations and during their breaks to retrieve their lunches. A scoop operator cleans the surrounding area one to three times daily, and miners occasionally shovel coal onto the end of the feeder. On the day in question, Wolf observed two miners standing several feet from the end of the feeder, as well as footprints in the coal piled on top of the feeder. The absence of the cover plate exposed miners working near the feeder to additional hazards. I find that the regulation was violated.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the 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.” 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 Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

² Kingwood relies on *Rochester & Pittsburgh Coal Co.*, 10 FMSHRC 1576 (Nov. 1988) (ALJ) for support. Its reliance is misplaced because, unlike the present case, the issue in *Rochester* was whether a conveyor belt fell within the definition of “similar exposed moving machine part,” as stated in section 75.1722(a).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *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).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial 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).

The fact of the violation has been established. The measure of danger to safety was contributed to by the exposed sprockets, chains and rotating flights, and any resulting injury would have been of a serious nature. The focus of the S&S analysis, therefore, is whether the violation was reasonably likely to result in an injury. I find that the Secretary has failed to carry her burden as to this issue.

The Secretary argues that miners frequently come in contact with the end of the feeder, and that the twelve-inch gap between the flights and the idle shaft, around which the flights rotate to the top of the pan, increased the measure of danger. The absent cover plate, which would normally protect miners from contact with the sprockets, chains and rotating flights, made it

reasonably likely that a fatal injury would result from a miner's foot, leg, hand or arm becoming caught between the shaft and rotating flights, or wedged between a flight and the feeder bed, which could result in the miner being dragged into the crusher. The Secretary goes on to assert that the frequency with which miners encountered the feeder made it reasonably likely that an injury would occur. Kingwood argues that the measure of danger posed by the feeder remained the same with or without the cover plate in place.

The feeder, by design, is an inherently dangerous machine. The flights travel the full length of the feeder bed, from the open end to the crusher. The feeder can be approached on three of its four sides, presenting three opportunities to contact the dangerous parts of the machine. The feeder's dangerous moving parts are not confined to the sprockets, chains, and flights beneath the cover plate. A miner would be at similar risk of serious injury if contact were made with a flight that had already passed from under the cover plate. As asserted by Respondent, to truly prevent harmful or fatal contact with the feeder would require that the entire machine be covered, which would render it useless.

I accept that miners travel the area around the feeder, but I am not persuaded that miners frequent the immediate vicinity of the feeder when it is operating. Sutton testified that miners generally do not walk in the area of the feeder during the work day, because they risk being run over by the numerous shuttle cars that approach the feeder to dump loads of coal. Wolfe agreed that any miners in the area would normally be in shuttle cars or scoops. Tr. 97. In addition, most of the miners traveling to their work stations at the beginning of the morning shift would have already passed the feeder by the time the feeder and belts were activated. Tr.131.

Although there were two sets of footprints across the pile of coal, it appears that they were made by a miner or miners who, rather than traveling the longer distance around the shuttle car, which was parked nearly up against the feeder, took an easier and quicker route across the pile of coal on the idle feeder. The shuttle car was parked there only because it was not being used on the midnight shift. It would not have been there if mining were ongoing and the feeder were energized, because it would have been used to transport coal. In addition, given that a person has to manually hit a reset button and then a switch on the side of the feeder to energize it, it is unlikely that the feeder would be energized while a miner was walking across it or otherwise on top of the machine. Kingwood's miners are trained not to walk across the feeder, and Wolfe confirmed that such conduct is not condoned or permitted by operators. If a miner were to be caught in the flights, he could activate the dead-man's switch to shut off the machine.

In summation, while the absence of the cover plate exposed moving machine parts that could cause injury, the exposure only marginally increased the dangerousness of the feeder itself, and while miners were occasionally in the area of the feeder, they were not there frequently enough to justify a finding that there was a reasonable likelihood of an injury occurring due to the missing cover plate. I find that the violation was unlikely to result in an injury, but if an injury were to occur, it would have been permanently disabling, and that the violation was not S&S. Unwarrantable Failure - Negligence

Order No. 7143320 was issued pursuant to section 104(d)(1) of the Act, which requires that the alleged violation be both S&S and “caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards.” 30 U.S.C. § 814(d)(1). The finding that the violation was not S&S obviates the need to decide whether the violation was the result of the operator’s unwarrantable failure.³ However, the issue of negligence must be addressed.

The Secretary argues that the violation was the result of Kingwood’s high negligence and unwarrantable failure because the condition was obvious and existed for parts of three shifts, that a foreman was seen walking directly past the displaced cover plate, that the company failed to record the condition in a pre-shift examination report, and that the cover plate appeared to have been intentionally placed against the rib, which was likely done at the direction of a supervisor.

The Secretary has failed to prove that Kingwood’s conduct rose to the level of reckless disregard or a serious lack of reasonable care. Although the cover plate is large and heavy and was leaning against the rib, the condition was not as obvious as the Secretary urges. The feeder was located in a dimly lit area, and was rusty, dirty, and black due to the constant dumping of coal. The cover plate, which was also rusty and dirty, did not stand out or easily catch the attention of persons in the area. Sutton testified that he worked around the feeder during the previous midnight shift and did not notice the cover. Tr. 149-55. It is plausible and probable that the cover went unnoticed by Kelly, as well as the preshift examiner.

Further, the condition was completely obscured by the large pile of coal. As Wolfe stated, there was “so much coal there I could not tell if there was a cover plate in place or not.” Tr. 47. The plate leaning against the rib would only have served as an indicator, leading someone to question whether a cover plate was in place on the feeder. Additionally, while the condition existed for parts of three shifts, it is unclear just how long it posed an actual danger. At most, the danger existed for part of the day shift on July 15. The feeder was not operational during the one full shift that the plate was unattached, and the condition was abated two and one-half hours after the start of the following shift.

There is insufficient evidence to prove that the cover plate was moved at the direction of a supervisor, or that a supervisor was aware of the hazardous condition. Maxwell testified that he was unaware of the condition until he was informed by Wolfe during the inspection. He went on to explain that a supervisor would need to make the decision to reattach a cover plate, but not to move it if it had become dislodged. Sutton testified that no foreman was involved the one

³ As noted in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04.

time he assisted in moving and replacing a cover plate. Tr. 171. Wolfe, admittedly, had no evidentiary support for his conclusion. Tr. 94.

Based on the foregoing, and considering the fact that the Secretary has the burden of proof on all elements of a violation, I find Kingwood's negligence with respect to this violation to have been moderate.⁴

The Appropriate Civil Penalty

The parties stipulated to many of the factors that are to be considered in establishing the amount of a civil penalty. Kingwood Mining Company is a large mine operator that produced 18,314,945 tons of coal in 2005. The Whitetail Kittanning Mine produced 1,509,283 tons of coal in the same year. In the 24 month period immediately preceding the issuance of the Order, Kingwood was assessed a total of 519 citations, based on 539 inspection days. Payment of the proposed penalty will not affect Respondent's ability to continue in business. Kingwood demonstrated good faith in promptly abating the violation. The gravity and negligence associated with the violation have been discussed above.

Order No. 7143320 is modified to a non-S&S citation, issued pursuant to section 104(a) of the Act. Kingwood's negligence was moderate. The violation was unlikely to result in an injury, and any injury would have been permanently disabling. A civil penalty of \$6,600.00 was proposed by the Secretary. The lowering of the levels of gravity and negligence justify a significant reduction in the proposed penalty. I impose a penalty in the amount of \$500.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

The Settlement

Prior to the hearing, the parties reached an agreement to settle eleven of the violations at issue. The Secretary filed a Motion for Decision and Order Approving Partial Settlement, seeking approval of the settlement agreement. The Secretary has agreed to modify eight of the citations and orders that are the subject of the agreement, and it is proposed that the total penalty for those violations be reduced from \$8,376.00 to \$5,381.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

⁴ In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

ORDER

Order No. 7143320 is modified to a citation issued pursuant to section 104(a) of the Act and is **AFFIRMED, as modified**. Respondent is **ORDERED** to pay a civil penalty in the amount of \$500.00 for that violation. The Motion for Decision and Order Approving Partial Settlement is **GRANTED**, and the citations are hereby amended as proposed in the Motion. Respondent is **ORDERED** to pay civil penalties in the amount of \$5,381.00 for the settled violations. The payments are to be made within 30 days of this decision.

Michael E. Zielinski
Administrative Law Judge

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