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BEAVER CREEK COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

BEAVER CREEK COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

BEAVER CREEK COAL COMPANY,
RESPONDENT

CONTEST PROCEEDING

Docket No. WEST 88-191-R
Citation No. 3225156

Trail Mountain Mine No. 9
Mine ID 42-01211

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-319
A.C. No. 42-01814-03517

Trail Mountain No. 9

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent;
David M. Arnolds, Esq., Thomas F. Linn, Esq.,
Beaver Creek Coal Company, Denver, Colorado,
for Contestant/Respondent.

Before: Judge Cetti

Statement of the Proceeding

These consolidated proceedings concern a Notice of Contest filed by the Contestant, Beaver Creek, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the captioned citation issued by MSHA. The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Beaver Creek for the alleged violation stated in the citation.

After notice to the parties, the matter came on for hearing on the merits before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the arguments made on the record during the hearing in my adjudication of these matters and the post-hearing briefs filed by the parties.

ISSUES

1. Whether the condition and practice cited by the inspector constitutes a violation of 30 C.F.C. 75.1704 by Beaver Creek.

2. If the alleged violation occurred, was it a "significant and substantial" violation.

3. If a violation occurred, what is the appropriate penalty, in view of the statutory civil penalty criteria at Section 110(i) of the Act.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Beaver Creek Coal Company is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Beaver Creek Coal Company is the owner and operator of Gordon Creek No. 7 Mine, MSHA I.D. No. 42-01814, an underground coal mine.

3. Beaver Creek Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 821, et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The exhibits to be offered by Beaver Creek Coal Company and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

6. The proposed penalty will not affect Beaver Creek Coal Company's ability to continue business.

7. Beaver Creek Coal Company demonstrated good faith in abating the violation.

8. Beaver Creek Coal Company is a medium-size mine operator which had 537,321 tons of coal production in 1987.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the past two years prior to the date of the citation. (Joint Ex. 1)

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Citation No. 3225156:

Federal Coal Mine Safety and Health Inspector Larry W. Ramey made a Triple A inspection of Beaver Creek's underground coal Mine, Gordon Creek No. 7. The inspector cited Beaver Creek for the alleged violation of 30 C.F.R. 75.1704. This mandatory regulation essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. 877(f)(1) and provides:

75.1704 Escapeways

(Statutory Provisions)

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground are of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the even of an emergency. (Emphasis added.)

Inspector Ramey, in Citation No. 3225156, described the alleged violative condition he observed as follows:

The alternate escapeway belt entry, located in first south active section, and main conveyor belt entry was not being maintained in the condition to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. The following conditions did not comply with 75.1704-1A, location as follows: First south number one undercast, number nine crosscut, outby step platform to belt sixty-two inches wide, inby steps to belt sixty-two inches wide. Undercast number eight, crosscut, inby step sixty-nine inches wide to belt, outby steps sixty-nine inches to belt.

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Number three, distance from eight undercast to main belt line approximately thirty feet in length, the width between the coal rib and the belt line and belt drive is fifty-two inches to forty-four inches in width. Number four, the crossunder the main belt is sixty inches wide by twenty-four and a half inches high. This condition is where the first south belt dumps on to the belt line. Num-Number five, main belt line belt check stoppings located located at number four overcast, two steel doors installed on each wall forty inches wide by sixty-three inches high. Number six, number one crosscut belt checks stopping steel door forty inches wide by sixty-three inches high. Number seven, steel located at mouth of entry, outside entrance, ninety-three inches high by forty-eight inches wide; see diagram below, not to scale.

Inspector Ramey, after reviewing the Gordon Creek mine map, determined that the main intake was the primary escapeway and the section belt line was the alternate escapeway. He went underground, accompanied by the mine's general foreman, John Perla, to inspect the first south working section. While walking the belt line outby, the inspector noted the seven different obstructions described in the citation he issued to Beaver Creek. Each of these cited obstructions were measured by both Inspector Ramey and Foreman Perla. These measurements were not disputed.

Inspector Ramey testified that the most serious obstruction was the crossunder the main belt at the place where the first south belt dumps onto the main belt line. He testified that to travel the escapeway at that area "you had to literally get down and crawl underneath the main belt to get on the other side of the main belt to continue on down toward the outside."

To travel the escapeway, the miner is required to crawl a distance of 4.5 feet under this obstruction with only a 24.5-inch clearance from the mine floor to the bottom of the main belt line.

The Secretary points out that, in addition to the 24.5-inch high crossunder the main belt, there are the other cited conditions in the alternate escapeway which included undercasts [items (1) and (2) in the citation] which required miners traveling this escapeway to ascend and descend steps after crossing platforms built over the undercasts and with a wide clearance between the coal rib and the belt drive which narrowed to only 44 inches. (No. 3 in the citation).

However, as Beaver Creek points out in its brief, Inspector Ramey's testimony was clear that he considered only one point in the escapeway, the crossunder at the main belt, designated as

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No. 4 in the citation, to be an actual obstruction to passage and that he cited the other six points only because they did not meet the criteria of Section 75.1704-1(a). For instance, Mr. Ramey stated that, if the 69-inch wide steps at the No. 8 crosscut had been three inches wider, he would not have cited them, yet the three inches would have had "no bearing, very little effect," on the ability of men to pass. Mr. Ramey further agreed that the doors he cited at points 5, 6, and 7 allowed one person to pass fairly easily and that he cited them only because they failed to meet the criteria of Section 75.1704-1(a). Mr. Ramey confirmed that the crossunder was his only concern as follows:

Q. And do I understand your testimony that this is the one hazard in the citation that you recognized as an obstruction; that is, that miners would have to get down and crawl under [the crossunder] on their way up?

A. That's correct.

Mr. Ramey repeated this a short time later.

Q. Is it your testimony then, in essence, that the one obstruction was in the escapeway, which was the crossunder, and that the other points were cited because of the violation or the lack of compliance with 1704-1(a).

A. 30 CFR 75.1704 was cited because of the 24.5-inch space that you had to get down and crawl through. The other areas mentioned here were cited because the law states that the District Manager has to approve that escapeway if an operator installs that or it should be approved by the District Manager. In my opinion, these guidelines were set out, were tested that this was the most economical and feasible way, due to the width and height, to quickly allow persons to escape out of an area.

In *Secretary of Labor v. Utah Power & Light Co.*, No. WEST No. 87-211-R, et al., 11 FMSHRC 1926 (October 27, 1989), the commission held that the criteria set forth in 30 CFR 75.1704-1(a) aren't mandatory requirements, and the proper test for adequacy of escapeways is whether they are "maintained to insure passage at all times of any person, including disabled persons," as provided in 30 CFR 71.1704.

The panel said that 30 CFR 75.1704 establishes a "general functional test" of "passability" and doesn't impose upon operators any obligation to seek MSHA's prior approval for their escapeways.

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The commission explained in footnote No. 5, that the term "passability" as used in the decision, was as an abbreviated expression for the phrase in section 75.1704, "maintained to insure passage at all times of any person, including disabled persons."

Inspector Ramey's testimony that Section 75.1704 "was cited because of the twenty-four and one-half-inch (height of the undercross of the main belt) that you had to get down and crawl," makes it clear that the real issue is whether a 24.5-inch high cross-under of the 48-inch wide main belt would insure passage at all times of any person, including a disabled person. The indeinspector was clearly of the opinion that it did not. Upon independent review and evaluation of all the evidence, I agree with Inspector Ramey's opinion.

Based upon the undisputed measurements and the credible testimony of Inspector Ramey, I find that the 24.5-inch height of the 4.5-foot long undercross of the main belt is a hindrance that would not insure the passage at all times of any person including disabled persons, particularly in a disaster-type situation where the entry could be filled with smoke.

I find that the evidence is insufficient to conclude that the violation was significant and substantial in nature. The reasons are given below.

Beaver Creek states that its only means of abating the citation was to designate the return entry as the alternate escapeway. However, in Beaver Creek's opinion, the belt entry with its necessary obstructions was safer than the return. Beaver Creek gave four reasons for its opinion: 1) all smoke is vented to the return; 2) the belt itself provides a guide to follow in smoke while there is none in the return; 3) the return entry was longer than the belt entry; and 4) the return had seven turns at which miners could get lost in smoke. Beaver Creek asserts, therefore, that miners are more likely to get lost in the smoke in the return than they would in the belt entry.

Several months after the citation was issued, Beaver Creek performed and photographed (Exhibits 4A through 4E) a test used by MSHA for granting variance from the Section 75.1704-1(a) criteria. The test consisted of two men carrying a third man on a stretcher through all points at issue. John Perla, the mine's general foreman, took part in the test and testified that the test demonstrated that all the cited points could be passed without difficulty. He stated that they had no difficulty in

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going through the (main belt) crossunder and that, although they were slowed down somewhat, the delay was "maybe seconds" but not "anything measurable." The belt was protected along each side by a rope and underneath by a guard. Beaver Creek also presented evidence that the condition cited 1) had existed for years; 2) had been inspected many times without citation; and 3) in Beaver Creek's opinion, was safer than the alternatives it had.

Beaver Creek contends that there was no violation and, even if there was one, it could not be found negligent for the above-stated reasons. Beaver Creek's contention that it was not negligent is rejected. Even assuming *arguendo*, negligence on the part of the enforcing agency, that negligence does not excuse an operator's negligence, nor does it preclude a finding of negligence for Beaver Creek's failure to fulfill its responsibility under 30 CFR 75.1704. This failure was due to the operator's lack of due diligence and indifference, which is ordinary negligence.

There is merit, however, in Beaver Creek's assertion that the violation was not significant and substantial.

A violation is properly designated "significant and substantial" if, based on 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, 815 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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 reasonable serious nature.

Accord, *Austin Power v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988).

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,"

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and that the likelihood of injury must be evaluated in terms of terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that 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., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based upon my independent review and evaluation of all the evidence, including the testimony of Mr. Perla, the mine foreman, I find the evidence presented is insufficient to establish that Beaver Creek's violation was significant and substantial in nature. In particular, with regard to the third and fourth elements of the Mathies test, I find the evidence presented fails to show a reasonable likelihood that the hazard contributed to will result in an injury of a reasonable serious nature. See Rushton Mining Co. v. Secretary of Labor, No. PENN 88-99-R 11 FMSHRC 1432, 1437. (August 24, 1989).

Civil Penalty

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty. In compliance with the mandate, I have considered the following:

The parties stipulated the operator's business was of medium size. The mine produced 537,321 tons of coal the year prior to the issuance of the citation.

The parties stipulated that the proposed penalty would not adversely affect Beaver Creek's ability to continue in business.

Exhibit JE-1, a computer printout, indicated that within the last two years Beaver Creek was assessed 20 violations.

I find the operator's negligence to be moderate. The company should have known that the 24.5-inch height of the underpass of the main belt does not comply with the mandate of the cited safety standard.

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The gravity was high. A miner or a disabled miner attempting to escape during an emergency situation could have been seriously impeded.

The company demonstrated good faith in rapidly abating this violative condition.

Everything considered, I find tht a civil penalty of \$160 is appropriate for this violation.

ORDER

1. Citation No. 3225156 is modified to delete the characterization "significant and substantial" and, as modified, the citation is affirmed.
2. Contest Proceeding Docket No. WEST 88-191-R is dismissed.
3. Beaver Creek Coal Company is ordered to pay the sum of \$160 within 30 days of the date of this decision as a civil penalty for the violation found herein.

August F. Cetti
Administrative Law Judge