

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-565
Petitioner,	:	A.C. No. 12-02295-188278
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent.	:	Mine: Francisco Mine-Underground Pit

DECISION

Appearances: Awilda Marquez, Pam Mucklow, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
 Arthur Wolfson, Dana Svendsen, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company at its Francisco Mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This case was heard along with six other dockets that involve alleged violations at Black Beauty's Air Quality #1 Mine. However, this decision is being issued separately due to the number of citations in the other dockets and the length of the decision. This case involves four alleged violations with a total proposed assessment of \$49,463.00. The parties have settled three of the violations, leaving one citation for decision after hearing. The parties presented testimony and documentary evidence at a hearing held in Evansville, Indiana that commenced on February 15, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company, ("Black Beauty") operates the Francisco Mine (the "mine"), a bituminous, underground coal mine near Vincennes, Indiana. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to

section 103(a) of the Act, 30 U.S.C. § 813(a), as well as spot inspections. The parties stipulated that Black Beauty is the operator of the mine, that the mine's operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1, Stip. 1-7; (Tr. 587-588). Black Beauty is owned by Peabody Energy and is considered a large operator.

a. *Citation No. 6682485*

On April 21, 2009, Inspector Shaun Batty issued Citation No. 6682485 to Black Beauty for an alleged violation of section 75.380(d)(7)(iv) of the Secretary's regulations. The citation alleges that:

The lifeline located in the North West sub main secondary escape way from cross cut 1 through cross cut 4 is not located in such a manner for miners to use effectively to escape. The lifeline in the affected area measures approximately 7 feet up to 12 1/2 feet above the mine floor, for a distance of approximately 120 feet. The operator tried but was unable to pull the lifeline down therefore in the event of a disaster the miners trying to use the lifeline to escape would not have been able to keep hold of the lifeline and safely exit the mine. The operator immediately began taking action to correct the hazard.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that fourteen persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$40,180.00.

1. The Violation

Shaun Batty, a MSHA mine inspector, has worked for the Mine Safety and Health Administration for nearly four years. (Tr. 14). Prior to his employment with MSHA, Batty worked in the mining industry for ten years. *Id.* Batty explained that the Francisco mine is located near Francisco, Indiana and is a gassy mine that is subject to spot inspections. The mine operates three shifts per day and utilizes the room and pillar mining method. Inspector Batty arrived at the mine on April 21, 2009 at approximately 7:05 am to conduct a regular inspection. He was accompanied on the inspection by Chad Dudley, a Black Beauty representative. (Tr. 16).

After viewing the directional lifeline in the number two secondary escapeway, he cited a violation of 30 C.F.R. § 75.380(d)(7)(iv) which requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape." Batty observed that a length of approximately 100 to 110 feet of the lifeline was 7 to 12 feet above the mine floor and could not be reached by miners. (Tr. 18). Batty requested that Dudley reach up and attempt to pull the

lifeline down to a location where it could be held. Dudley walked to a nearby area where the lifeline was at a height that allowed him to reach up and grasp it. Dudley attempted to pull the lifeline down from the roof to a height that would allow a miner to use it to quickly escape the mine. Dudley was unable to successfully pull the line down to a reasonable height. (Tr. 19). Batty also attempted to pull the lifeline down but was unable to do so. Batty explained that, in the event of a mine fire where smoke filled the mine, a miner would be unable to use the lifeline for a distance of 100 to 110 feet. The lack of the lifeline over that distance created a hazard such that, when lost in smoke, a miner would not be able to locate or use the lifeline and, therefore, would have difficulty safely and quickly exiting the mine. (Tr. 18-19).

Chad Dudley, a maintenance supervisor who accompanied Batty, has worked on belt drives and equipment for the past two years and has seven years of mining experience. He testified that he traveled with Batty on the rubber-tired diesel equipment as they traveled to the newer #2 unit. (Tr. 56-57). Dudley agreed that the lifeline was at an unreachable height and that he was not able to pull it down to an accessible height for the distance described by Batty. However, Dudley disagrees that the position of the lifeline, high above the reach of a miner, created a hazard. (Tr. 63-64).

Dudley believes that the lifeline was seven to twelve feet above the mine floor because the mine had been grading the road as part of the construction of an undercast, i.e., a ventilation structure to separate the air courses. He testified that no one would travel on the road through the area while the grading was being completed. Once the grading was complete, the overcast was to be put in place. In this instance, the grading had been completed on Saturday or Sunday but, by the time the inspector arrived on Tuesday, the overcast had not yet been put in place. (Tr. 59-60).

The Commission has regularly held that an escapeway is important and must be always ready to use for a safe and quick escape in the event of an emergency. In *American Coal Company*, 29 FMSHRC 941 (Dec. 2007), the Commission discussed the importance of escapeways and concluded that:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is "to allow persons to escape quickly to the surface in the event of an emergency." S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).

29 FMSHRC at 948. In this case, the existence of a continuous lifeline is the means to quickly and safely exit the mine. Given that there is no dispute that the lifeline was at a height of seven to twelve feet above the mine floor, I find that the lifeline was not located such that a miner could effectively use it. For the foregoing reasons, I find that the Secretary has demonstrated the violation as alleged.

2. Significant and Substantial Violation

A significant and substantial (“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.” 30 U.S.C. § 814(d)(1). 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). The Commission has explained that:

[i]n 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).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. 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 consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*,

6 FMSHRC at 1574. 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).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine. While there may be safety measures in place, they do not take away from the fact that an incident necessitating the use of the lifeline is likely to occur in this gassy mine. Third, the hazard described will result in an injury. Fourth, and finally, that injury will be serious or even fatal.

While I do not disagree with the Secretary's argument that escapeway violations and citations that deal with emergency requirements should be subject to a presumption that an emergency will occur, no such presumption is required in this case. Batty explained that, based on the history of similarly situated mines, as well as his own experience, there is a likelihood of fire or explosion. There is a well-documented history of fires and explosions in underground mines where the lack of visibility and potential disruption in ventilation have caused miners to lose their lives. The Francisco mine is a gassy mine. On the day of the inspection, Batty observed a belt out of alignment in the entry adjacent to the escapeway. The belt rubbing on the metal of the conveyor was a heat source that would ignite the coal and coal dust if the conditions remained as he observed them. (Tr. 21-22). In addition, Batty has cited the mine in the past for extensive accumulations along the belt lines and on electrical and diesel powered equipment. (Tr. 22-23). Batty believes that there is a real likelihood of a fire and explosion that would bring in to play the lifelines in the escapeway.

Batty further addressed the likelihood of an accident or explosion when he testified that this is a gassy mine that, at the time of the inspection, was subject to a ten day spot inspection. Given the continued course of mining, the fact that this is considered a gassy mine, and the previous violations, I am persuaded that an emergency is reasonably likely to occur in the course of continued mining operations. It may be reasonably inferred that, in the continued mining operations and given the presence of accumulations and ignition sources, a fire was reasonably likely to occur which would have necessitated the use of the lifeline. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan.1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501(Apr. 1988). Any fire or explosion necessitating the use of the cited lifeline would certainly have resulted in miners being seriously, or even fatally, injured.

In Batty's view, the fact that there is another, primary, escapeway does not take away from the hazard, as the other escapeway is equally vulnerable to the effects of a fire. (Tr. 23-24). When an explosion or fire does occur, mines quickly fill with smoke, thereby making it difficult, if not impossible, to see. Batty described the consequences of a fire or explosion in a mine without an accessible lifeline by stating that "the visibility it's next to nothing, you can't see your

hand in front of your face. You're in such a panic, you're tripping, your stumble hazard, not being able to grab ahold of [the] lifeline." (Tr.25).

Lifelines serve the important purpose of facilitating a miner's quick and safe exit from a mine. Miners expect to easily locate and grab hold of the lifeline. Even if they can't see it, they are trained to know where it should be and how to find it. If the lifeline is not where it is expected to be, the miners become disoriented and it becomes even more difficult to safely and quickly escape, especially when combined with tripping and stumbling hazards along the escapeway that may not be visible. There are not always mantrips available on the section, and even if one is available, the lack of visibility would hinder the ability to drive it out of the mine. Hence, if an escaping miner cannot reach the lifeline for 110 feet, he will become disoriented in a matter of seconds, could stumble and fall, and not know which way to travel to exit the mine. A miner unable to quickly find his way out would be exposed to toxic fumes and carbon dioxide. Serious injury or death would occur. Moreover, the likelihood of injuries or death increases as the distance of unavailability of the lifeline increases. There were 14 miners on the section at the time the citation was issued, all of whom would have been affected by this condition. In addition, approximately 28 miners could have been affected if a fire or explosion were to occur during a shift change. (Tr. 27).

Based on his experience and training, Batty determined that the lack of a lifeline over the cited distance was a hazard that was reasonably likely to cause an injury. The hazard would result in loss of life if this condition were allowed to exist during the continued course of mining. This mine is currently on a 103(i) spot inspection every 5 days, but was on a ten day spot at the time of the citation due to the large quantities of methane liberated. (Tr. 33). The mine argues that the methane is primarily emitted at the sealed areas of the mine but, nonetheless, the mine is considered a gassy mine.

In reaching my conclusion that this violation is significant and substantial, I have considered the arguments set forth by Black Beauty. The mine argues that this is a secondary escapeway and that miners are trained to first use the primary escapeway. Further, if using the secondary escapeway the miners would first attempt to drive out of the mine. (Tr. 57-58, 64). I credit Batty's testimony that the existence of the other, primary, escapeway does not take away from the hazard. Trained miners are still susceptible to panic and disorientation. The mine also argues that the nature of the ventilation system was such that if a miner became disoriented, he could easily correct his direction of travel by feeling the direction the air was blowing and determining if he was heading the right way. (Tr. 65). Again, I credit Batty's testimony regarding the panic and disorientation that miners often exhibit in an emergency. (Tr. 49-50).

I conclude that a preponderance of the evidence establishes that it was reasonably likely that the unreachable, and thus unusable, lifeline created a hazard, that the condition was reasonably likely to result in injury causing event, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Batty in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

3. High Negligence

When Batty arrived in the area, he immediately noticed that the lifeline was 7 to 12 feet above the ground. This condition existed for a distance of at least 100 feet. In Batty's view, management directed the building of the overcast. The grading of the road began on April 16th, i.e., five days prior to the citation he issued on April 21st. (Tr. 28). When the floor was lowered, the lifeline was kept in place instead of being dropped with the floor. The obvious violative condition existed for 5 days while superintendents, examiners, and foreman all traveled in the area. Management had to travel by the inaccessible lifeline during every shift for each of the five days. The lifeline was in the travelway, and had reflective material which causes it to stand out and be more likely to be seen. (Tr. 28-29).

In this case, the lifeline was in a location that could not be reached by anyone, but was visible to everyone, for at least five days. The operator argues that, although the lifeline was higher than it should have been for a number of days, the mine was in the process of building an overcast. According to the mine, the road had been graded but the overcast was not yet in place at the time the violation was issued. However, I find that the mine did not offer a reasonable justification to have left the lifeline out of reach for the five days.

Based upon the credible evidence, the Respondent allowed the obvious condition to go uncorrected for an unjustified extended period of time. I find that the violation is a result of the operator's high negligence.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

I accept the stipulation of the parties that the proposed penalty is appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history of violations at this mine is normal for its size.¹ The size of the operator is large. I have discussed the negligence and gravity associated with the citation above and I accept the designations of negligence and gravity as set forth in the citation. After considering all of the penalty criteria, I assess a penalty of \$45,000.00 for the citation discussed above.

The parties have settled the remaining citations in this docket. The terms of the settlement are as follows:

Citation No.	Cited Standard	Originally Proposed Assessment	Settlement Amount	Modification
8415720	75.370(a)(1)	\$2,473.00	\$499.00	Reduction in gravity to Non-S&S.
8415901	75.1714-6	\$3,405.00	\$687.00	Reduction in gravity to Non-S&S.
8415902	75.1914(f)	\$3,405.00	\$207.00	Reduction in gravity to Non-S&S; reduction in negligence to Moderate.
Total		\$9283.00	\$1393.00	

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

¹

At hearing, the Secretary mistakenly submitted a history of violations for a different mine than the Francisco mine. Consequently, I take judicial notice of the history of violations at the Francisco Mine for the time period 1/4/2008 through 4/21/2009. This information is publicly available on the MSHA website at <http://www.msha.gov/drs/drshome.htm>.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed for the citation heard and the settled citations listed above for a total penalty of \$46,393.00. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$46,393.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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