

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

7 PARKWAY CENTER

875 GREEN TREE ROAD, SUITE 290

PITTSBURGH, PA 15220

TELEPHONE: (412)920-7240

FAX:(412)928-8689

August 18, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-318
Petitioner	:	A.C. No. 36-06475-173653
	:	
v.	:	
	:	
HOMER CITY COAL PROCESSING	:	
CORPORATION,	:	Mine: Homer City Coal Cleaning
Respondent	:	Plant

DECISION

Appearances: Joseph L. Gordon, Esq., and Michele Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA for the Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave, Pittsburgh, PA for the Respondent

STATEMENT OF THE CASE

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §802 et seq. (2000), (the “Act”). This matter concerns an alleged violation of the mandatory safety standards 30 C.F.R. §77.204 and 30 C.F.R. §77.1713. Citation No.7049778, a 104(d)(2) violation, and Order No. 7049779 were served on Respondent on November 12, 2008. These alleged violations were both found to be significant and substantial in nature, as well as unwarrantable failures to comply with mandatory safety standards. A hearing was held in Pittsburgh, Pennsylvania on June 2, 2011, and the parties participated fully therein. They later submitted post-hearing briefs.

STIPULATIONS AT HEARING

The parties stipulated to the following facts at hearing:

1. Homer City is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d),

at the coal preparation plant at which the Citation and Order at issue in this proceeding was issued.

2. Operation of Homer City at the plant at which the Citation and Order were issued in this proceeding are subject to the jurisdiction of the Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
4. The individual whose signature appears in Block 22 of the Citation and Order at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Citation and Order were issued.
5. True copies of the Citation and Order that are at issue in this proceeding were served on Homer City as required by the Act.
6. Homer City demonstrated good faith in the abatement of the Citation and Order.
7. There was work performed by a contractor to Homer City, Rizzo & Sons Construction, on the 5 ½ floor of the plant that involved beams under the floor and some floor grating near the feeder boxes that are referenced in the Citation and Order. This work was performed between July 26 and August 11, 2008.
8. Payment of the proposed penalties will not affect Homer City's ability to continue in business.

SUMMARY OF THE TESTIMONY

Respondent is a wash plant¹ that cleans and processes coal prior to its burning to produce electricity. Tr. 32-34. In its progression consisting of eight (8) full floors and two (2) half floors, the raw coal enters the plant on the eighth floor and goes through various processes as it travels down to the lower floors. Tr. 32, 33-35, 79. The end result is coal that has had most impurities removed and is uniform in size. Tr. 33-35.

The issue at hearing concerns the 5 ½ Floor, which contains twelve (12) bin sieve feeder boxes that are arranged in two rows of six. Tr. 37. The 5 ½ Floor is not accessible by elevator; rather, it must be accessed by stairways from either the fifth or sixth floor. Tr. 80. Because of this and the low head clearance described below, the 5 ½ Floor receives much more limited

¹This facility is considered a "wet" plant because it uses large amounts of water during the cleaning process and the facility is hosed down to prevent coal from accumulating in dangerous quantities. Tr. 33.

traffic than the others. Tr. 38, 79, 161-162. Further, these boxes are the only equipment located on this particular floor. Tr. 164.

The placement of the bin sieve feeder boxes is a checkerboard pattern, proving access to the boxes all the way around. Tr. 38-39, Ex. G1-G6. Due to pipes connected to the distributors on the floor above the boxes, head clearance is very low. Tr. 38. Although the boxes themselves are covered and jut up from the floor as much as fifteen (15) inches, railings were also installed around each of them. Tr. 84, 130, 170-171, Ex. R-1B, G1-6. Eight (8) of the twelve (12) railings were found to be unsecured by the inspector. Tr. 37, 45.

Upon finding the unsecured railings, the inspector, Robert Swope (“Swope”) issued a Section 104(d)(1) citation to Respondent alleging a violation of 30 C.F.R. §77.204(a) because, in his opinion, the inadequately secured railings would not protect miners from falling into the open feeder boxes. Ex. G-7. In issuing this citation, he expressed his concern that the loose guardrails created a false sense of security, as reasonable people would assume that they were secured to the floor. Tr. 43. He testified at hearing that a person who grabs the guardrail, believing that it will hold weight, could fall and suffer injuries serious in nature, such as head lacerations or broken bones from falling into the feeder box. Tr. 56-58.

Swope simultaneously issued a Section 104(d)(1) order to Respondent alleging a violation of 30 C.F.R. §77.1713 for conducting an inadequate daily examination. Ex. G-8. During his conversation with then Safety Director Robert Dominick (“Dominick”), Swope learned that the steel flooring had been replaced with steel grating by a third-party contractor and all of the guardrails had been removed in order to accomplish this task. Tr. 63, 198. Ex. J1 - 7. From his conversation with Dominick, Swope also learned that this work had been completed months earlier. Tr. 63, Ex. J1 - 7.

LAW AND REGULATIONS

Thirty C.F.R. §77.204 states that “[o]penings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices.”

Likewise, 30 C.F.R. §77.1713 provides:

- (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.
- (b) If any hazardous condition noted during an examination conducted in accordance with paragraph (a) of this section creates an imminent danger, the person conducting such examination shall notify the operator and the operator shall withdraw all persons from the area affected, except those persons referred to in section 104(d) of the Act, until the danger is abated.

(c) After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard.

(d) All examination reports recorded in accordance with the provisions of paragraph (c) of this section shall include a report of the action taken to abate hazardous conditions and shall be signed or countersigned each day by at least one of the following persons:

- (1) The surface mine foreman;
- (2) The assistant superintendent of the mine;
- (3) The superintendent of the mine; or,
- (4) The person designated by the operator as responsible for health and safety at the mine.

ISSUES

The critical questions at hearing were whether the alleged violations were, first, significant and substantial in nature and, second unwarrantable failures to comply with mandatory safety standards.

DISCUSSION AND CONCLUSION

A violation is significant and substantial “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). The Commission later clarified 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 show: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature (the “Mathies” Test). *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

“Unwarranted failure” suggests more than ordinary negligence. *Emery Mining Corporation*, 9 FMSHRC 1997, 2000 (1987). It is aggravated conduct that is “characterized by such reckless disregard, intentional misconduct, indifference or serious lack of reasonable care.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001). Some aggravating factors include: the length of time the violation existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s

efforts in abating the violative condition, the obviousness of the violation, involvement of a supervisor in the conduct and the operator's knowledge of the violation. *Consolidation Coal Co.* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances must be considered when determining whether the actor's conduct is aggravated, or whether the level of negligence should be mitigated. *Id.*

After a careful review of the total record, the Undersigned finds that Respondent's conduct was not so aggravating in nature so as to constitute an unwarrantable failure. Moreover, while the record supports a finding of ordinary negligence associated with Respondent's failure to maintain secure railings around the eight (8) feeder boxes in question, the Court does not find that Respondent's violative conduct rises to a significant and substantial level. Indeed, the Undersigned is compelled to note that the Secretary barely carried its burden of proving that violations of 30 C.F.R. §77.204 and 30 C.F.R. §77.1713 had actually occurred.

At hearing, the Secretary maintained that Respondent had violated §77.204 based upon two alternative theories of liability: first, miners might "slip and fall" on the steel grated flooring surrounding the bin feeder boxes or, second, miners might lose their balance grabbing onto unsecured railings and fall through "openings."

As to the "slip and fall" hazard, the Secretary essentially argued that the flooring could become wet or have debris lodged in its openings, causing miners to slip or stumble, further losing their balance upon grabbing onto the loose railings. Within this same theory, the Secretary also argues that a miner could grab hold of the railings, assuming that they would bear weight, and lose his/her balance when the railings could not. This would then cause the miner to slip and fall, possibly causing lacerations or broken bones in the process. Under this theory, the Secretary claims, and Swope testified, that the railings are a danger because they provide a false sense of security to the unwary that approach them. Tr. 43.

Later, however, at hearing the Secretary essentially abandoned this theory of violative conduct, conceding that the unprotected "openings," which were the subjects of the violations/citations at issue were not the walkway grated floor openings but, rather, were the bin feeder boxes themselves and the open spaces along the sides of such.

In any case, this Court finds that the Secretary's slippery walkway theory of liability viz-a-viz §77.204 would be unsupported by applicable law and the facts of this case. The clear and unambiguous language of §77.204 provides that the safety standard is violated when there exist unprotected "openings in surface installations through which a man [...] may fall." The evidence patently establishes that miners could not fall through the grated flooring openings in question. At hearing, shift foreman John Anthony Maggio ("Maggio") testified that an I-beam runs just below the floor grating. Tr. 168. Either I-beams or angle-iron also run below the sluice boxes, enclosing much of the area that is considered "open" around the feeder boxes. Tr. 168-170. Further, considering the actual plant processes taking place on Floor 5 ½ and the actual physical structure of the facility and the bin feeder boxes, no materials falling through the grated floor openings would pose an actual hazard to miners.

Whether using a “Chevron I or II” analysis, it appears improper to interpret §77.204 as applying to slippery floor gratings, and, further given the actual language in the citation, violative of due process to have raised such a theory of liability for the first time at hearing. Even assuming *arguendo*, however, that such a statutory interpretation would pass appellate muster, there was insufficient evidence to establish a hazardous condition based upon the foregoing. At hearing, there was no convincing evidence presented that the floor gratings in question were wet or slippery or had debris lodged within. In fact, Swope testified that he did not recall seeing any accumulations of material on the floor while inspecting the plant. Tr. 91. Respondent’s witnesses indicated that, although the facility was a “wet plant,” the 5 ½ floor was dry. Tr. 201-202. Any liquids or debris fell unimpeded through the floor gratings and this material would be small in nature. Tr. 178, 201. There had been no problems with liquids pooling on the walkways or debris accumulating on such. Tr. 90. Nor had there ever been a “slip and fall” accident reported on the 5 ½ floor. Tr. 202.

The Undersigned, however, does accept that the open feeder boxes themselves and the spaces on the sides of such could reasonably be interpreted as “openings [...] through which men or material may fall” so as to invoke §77.204 protections. Although the feeder boxes were at least partially covered, there was a risk, albeit remote, that a miner could fall into an unprotected bin feeder box or catch his foot in the spaces along the sides of the boxes. Tr. 84, 130, 170-171, Ex. R-1B, G1-6.

In light of the foregoing and, *inter alia*, given that Respondent conceded that the railings in question were, in fact, not secured, the Undersigned finds that the first two prongs of *National Gypsum* have been met. However, the Undersigned finds that the Secretary has failed to prove that there was a reasonable likelihood such that the hazard contributed to would result in an injury or a reasonable likelihood that the injury in question would be of a reasonably serious nature.

At hearing, Respondent presented credible testimony that the 5 ½ floor was rarely frequented by miners. Tr. 38, 79, 161-162. There were stairwells and elevators that employees could use to bypass the floor altogether. Tr. 80. Those traveling through 5 ½ could also avoid the center walkway - where the loose railings were actually located - by using perimeter walkways which were more spacious. Tr. 182. Workers only went to the floor to perform occasional maintenance, usually involving leaking pipes. Tr. 175, 185-186.

Debris or liquids falling into the bin feeder boxes and/or spaces along such would not pose a danger to miners. Given the height of the bin feeder boxes, the covers and over-hanging structures as described at hearing, it appears unlikely that a miner could actually fall into a box. Tr. 84, 130, 170-171, Ex. R-1B, G1-6. Even if he did so, he would not fall through such to the next floor. Tr. 134, 173, 201. If he caught his boot in an opening along side the box, any injury sustained would likely be minor in nature.

The undersigned concludes that neither the §77.204 violation in this case nor the §77.1713(a) violation were significance and substantial in nature. It was unlikely that an injury would occur due to the violations. The negligence associated with such was “low” in nature.

In reaching the foregoing conclusions, the undersigned also carefully considered the past written statements and hearing testimony of Robert Dominick. At the time the above citation and order were issued, Dominick was Safety Director of Respondent's Processing Plant. In a letter to the Commission, dated November 22, 2010, Dominick stated the following:

Dear Sirs:

Homer City Coal Processing Corporation is contesting the high negligence assigned to Citation/Order Nos. 7049778 and 7049779. It is our opinion that the railing being loose in this location was not the result of any type of high negligence, and that the daily examination of this location was adequately performed.

The railings in question do not serve as a protective barrier around any openings in the floor - they are placed around a steel box that protrudes up through the floor. There is no way any person nor any part of a person's body could go through the flooring or get caught between the steel box and the flooring. If these railings not being secured are a violation of 77.204, they are not the result of high negligence on our part.

The railings are located in an area that is seldom traveled and not a normal walkway due to the amount of low hanging overhead pipes or related feed boxes, which is not a regular occurrence. These railings have been around these boxes in this configuration since the early 1990's. During that time period, the floor was changed from concrete to grating in order to ventilate moisture from the floor below. The railing was replaced by Rizzo & Sons Industrial Services (MSHA Contractor ID #FPL) in July and August 2008. Rizzo employees that worked on this project stated that if the railing had been attached to the grating, they would have reattached them after replacing the floor grating.

It is also the opinion of Homer City Coal Processing that the Foreman on duty that shift did complete an adequate daily examination of the jobsite. He properly inspected the normally used walkway and work area on the 5 ½ floor of the Coal Cleaning Plant, and was satisfied that the non-traveled area with the sliding railings was safe. Between the time Rizzo & Sons Industrial Services replaced the floor grating and the day the citations/orders were written, three Management/Employee Safety Walkdowns were completed (9/5/08, 9/11/08, and 11/5/08) with no mention of any problems in this area.

At hearing, however, Dominick appeared as a witness for the Secretary, indicating that he had left Respondent's employment and was an inspector-trainee for MSHA. Tr. 106. Dominick essentially recanted his assertions in his November 22, 2010 letter to the Commission. He opined that Respondent should not have contested the citations at issue. *Inter alia*, Dominick testified that, if an individual stumbled and fell into one of the feed boxes, he could hit a shin or knee or fall and hit his head. Tr. 124.

Dominick further testified that there was a hazard that existed which should have been “recognized, caught, taken care of and eliminated.” Tr. 127. He also opined that the negligence was high because “this hazard was in the plant and we didn’t discover it, we didn’t know it was there, and we didn’t do anything about it.” Tr. 128. Finally, Dominick maintained that Respondent had not acted “appropriately” in conducting its workplace examinations “because the condition wasn’t found and it wasn’t corrected.” Tr. 128.

The undersigned found that Respondent essentially impeached² Dominick regarding his past contradictory statements to the Commission. Dominick’s explanations for writing and signing a statement he believed not to be true were unpersuasive, compelling the undersigned to give little credence and minimal weight to his testimony. See Tr. 137-140.

The Commission outlined its authority assessing civil penalties in *Douglas R. Rushford Trucking*, stating that “the principles governing the Commission’s authority to assess civil penalties *de novo* for violations of the Mine Act are well established.” 22 FMSHRC 598, 600 (May 2000). While the Secretary’s system for points in part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

After reviewing all the relevant facts and weighing the §110(c) factors applicable to such and considering the above findings as to gravity and level of negligence associated with the citation and order, the Undersigned concludes that a penalty of \$225.00 for each is warranted.

²Contrary to the Secretary’s position, the Undersigned found that said 11/22/2008 letter was clearly a past inconsistent statement which Dominick could be cross-examined about. The record further belies the Secretary’s argument that said letter constituted an inadmissible settlement proposal as, *inter alia*, it was sent directly to the Commission and date-stamped. See Tr. 149, Ex. R-3.

ORDER

Having found that the violations were not significant and substantial in nature and that the negligence attributable to the operator was “low,” it is **ORDERED** that Citation No. 7049778 be modified to reflect these changes and Order No. 7049779 be modified to a 104(a) citation that also reflects the same levels of gravity and negligence. It is further **ORDERED** that Respondent pay the Secretary of Labor the sum of \$450.00 within 30 days of the date of this decision.³ Upon receipt of payment, this case is **DISMISSED**.

John Kent Lewis
Administrative Law Judge

Distribution:

Michele Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

R. Hank Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave, Pittsburgh, PA 15222

/kmb

³Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390