FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 12, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-0450 A.C. No. 12-02295-447106 Mine: Francisco Underground Pit

DECISION ON REMAND

Before: Judge Simonton

This case is before me upon remand from the Commission. *Peabody Midwest Mining, LLC*, 42 FMSHRC___, slip. op. at 11 (June 2, 2020). It involves a petition for assessment of a civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA") against Peabody Midwest Mining, LLC ("Peabody" or "Respondent"), pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 814(d)(1).

I. HISTORY OF THE CASE

On July 17, 2017, MSHA issued Citation No. 9105403 to Peabody for a violation of section 316(b) of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), which requires every underground coal mine to develop a written plan to provide for the evacuation of all individuals in an emergency and provide for the maintenance of miners trapped underground where evacuation is not possible. 30 U.S.C. § 876(b). Peabody's Emergency Response Plan ("ERP") requires two properly positioned refuge chambers, sufficient to shelter all the miners present in the event of an emergency, even during a shift change when two teams of 15 miners would be present. Ex. S–3. It states that refuge chambers "will not be placed in the direct line of sight of the working face." However, at the time of inspection, one refuge chamber was in the travelway in the direct line of sight of the working face and in violation of the ERP. Ex. R–A; Tr. 27–29. The inspector designated the citation significant and substantial ("S&S"), reasonably likely to be fatal, and the result of Peabody's high negligence and unwarrantable failure to comply with the Mine Act. Ex. S–1. The Secretary proposed a civil penalty of $44,546.00.

Peabody contested the S&S, negligence, unwarrantable failure designation, and the penalty. Respondent's Post-Hearing Brief at 10. A violation is S&S "if based upon the

particular facts surrounding the 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). I determined that the violation was S&S because the Secretary proved the four elements of the *Mathies* test: (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). In analyzing the second criterion, I acknowledged the Commission's recognition in past cases that "emergency standards are different from other mine safety standards because they are intended to apply meaningfully only when an emergency actually occurs." *IGC Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016) *citing Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). Because Commission precedent directs judges to *assume* the existence of a contemplated emergency when defining the hazard contributed to by a violation, *see, e.g., ICG Illinois, LLC*, 38 FMSHRC at 2476, I assumed an emergency in which evacuation was impossible and the refuge chamber was necessary.

Testimony at the hearing established that the ERP prohibits positioning the refuge chamber in the direct line of sight of the working face because an explosion traveling out could damage or destroy the chamber. Tr. 29–30, 84–85. In presuming the occurrence of a fire or ignition significant enough to prevent miners from evacuating, I found that all four elements of the *Mathies* test were satisfied and thus the violation was S&S. I affirmed the citation as written and assessed a penalty of $50,000.00. 40 FMSHRC 861 (June 2018) (ALJ).

Following the issuance of my June 28, 2018 decision after hearing, Peabody appealed the decision to the Commission. It did not contest the fact of violation or the unwarrantable failure designation, but challenged the citation's Significant and Substantial ("S&S") designation. Upon review, the Commission reversed the S&S designation. 42 FMSHRC___, slip op. at 10–11. In doing so, it reviewed S&S precedent and restated the proper test for an S&S violation:

> In order to establish that a violation of a mandatory safety standard is significant and substantial, the Secretary of Labor under *National Gypsum* must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Id. at 5. Because more than 15 miners were only present during shift changes when no mining activities were occurring, the Commission determined that the one properly-placed refuge chamber was sufficient for the contemplated emergency because an explosion was only ever likely during mining activities. *Id*. at 8–10. The Commission remanded the case for reassessment of the civil penalty in accordance with its decision.

II. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, 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 have considered and applied the six penalty criteria. In the fifteen months preceding the issuance of this citation, Peabody averaged 0.59 violations per inspection day and had only one previous violation of section 316(b). The mine is a large operator and the parties stipulated that the Secretary's proposed penalty of $44,546.00 would not affect Peabody's ability to remain in business. The high negligence designation was not challenged on appeal and remains unaffected by the Commission's decision. The Commission has determined that this violation is not S&S, so the gravity involved is less severe than originally designated in the citation and affirmed in my initial decision. Relatedly, as a result of the S&S designation being vacated, the violation must be reclassified as a section 104(a) citation, which effectively removes the unwarrantable failure determination. Peabody immediately worked to abate the condition following the issuance of the citation. Tr. 62-63, 150, 172. However, it also admitted that the refuge chamber would have remained in the direct line of sight of the working face for a couple of days if not for the citation. Tr. 150.

I remain convinced that Peabody's failure to follow its own ERP by placing a refuge chamber in direct line of sight of the working face constitutes an extremely serious violation. After considering the penalty criteria in light of the Commission's decision, I find that a penalty of $35,000 is appropriate.

III. ORDER

Because the citation's S&S designation has been eliminated, it is hereby **ORDERED** that Citation No. 9105403 be changed from a section 104(d)(1) citation to a section 104(a) citation. Peabody Midwest Mining, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$35,000** within 30 days of this decision. [1]

David P. Simonton
Administrative Law Judge

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