

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 24 2014

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-781
A.C. No. 46-01816-316352

v.

PINNACLE MINING COMPANY, LLC,
Respondent

Mine: Pinnacle Mine

DECISION AND ORDER

Appearances: John R. Slattery, Esq., U.S. Department of Labor, Philadelphia,
Pennsylvania for Petitioner

Jason M. Nutzman, Esq., Dinsmore & Shohl LLP, Charleston, West
Virginia for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petition charges Respondent, Pinnacle Mining, LLC (Pinnacle), with a significant and substantial (S&S) violation of 30 C.F.R. § 75.370(a)(1).

A settlement was reached regarding 21 of 22 alleged violations at issue in this docket.¹ Tr. 9; Jt. Ex. 1. I have reviewed the parties' joint settlement motion and I approve the parties' settlement agreement set forth in Joint Exhibit 1 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

¹ Joint Exhibit 1 proposes a reduction in the penalties from \$27,214 to \$19,070. The parties further request that Order No. 8103472 be modified to change the type of action from a section 104(d)(2) order to a section 104(a) citation; Citation No. 8152115 be modified to reduce the level of negligence from "high" to "moderate;" Citation Nos. 7195134, 8152118, 8152119, 8152105, 8152120, and 7224308 be modified to reduce the level of negligence from "moderate" to "low;" and Citation/Order Nos. 8103441, 8103465, 8150032, and 8150039 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. The remaining citations and penalties are unchanged.

Citation No. 7195128 remains unsettled. Tr. 10. Respondent concedes that it violated the standard and acted with low negligence. Tr. 19. Respondent disputes the S&S designation and the number of persons affected by the violation. Tr. 20.

A hearing was held in Beckley, West Virginia on December 10, 2013. Witnesses were sequestered. Tr. 15-18. MSHA inspector Joshua S. Bennett testified for the Secretary. Pinnacle mine foreman John David Cox, II, testified for Respondent. Based on the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,² I find that Citation No. 7195128 was properly designated as S&S and that ten persons were reasonably likely to suffer fatalities or injuries of a reasonably serious nature as a result of the hazard contributed to by Pinnacle's violation of mandatory safety standard 30 C.F.R. § 75.370(a)(1).

II. Factual Background

A. Stipulations of Fact

At hearing, the parties agreed to the following stipulations:

1. Respondent is the owner and operator of Pinnacle Mining Company, LLC and is subject to the jurisdiction of the Mine Act.
2. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.
3. Pinnacle Mining may be considered a large size mine operator for the purposes of 30 U.S.C. § 820(i).
4. The assessed penalties will not affect the ability of Respondent to remain in business.
5. Certified Mine Inspector (CMI) Bennett from MSHA was acting as a representative of the Secretary of Labor when he issued Citation No. 7195128.
6. Citation No. 7195128 was properly served by a duly authorized representative of the Secretary of Labor upon the agent of Respondent at the date, time, and place stated therein.

² In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

7. MSHA's Proposed Assessment Data Sheet and Petitioner's Exhibit 1 set forth: (a) the number of assessed penalty violations charges to Respondent for the period stated and (b) the number of inspection days per month for the period stated.
8. On December 28, 2012, Respondent violated 30 C.F.R. 75.370(a)(1) by failing to follow the approved ventilation plan on the 071-0MMU longwall, which requires a minimum air velocity of 500 feet-per-minute (fpm) to be maintained at the trailside location.
9. The Citations and Order may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

Tr. 7-8.

B. Background

Pinnacle Mine is a bituminous underground coal mine located in Pineville, West Virginia. The gassy mine and produced approximately five million cubic feet of methane daily at the time that Citation No. 7195128 issued on December 28, 2012. P. Ex. 6, at 2; P. Ex. 3. Section 103(i) of the Mine Act provides that any mine liberating over one million cubic feet of methane daily must be spot checked for methane emissions at least once over each five-day period. Tr. 85.

MSHA regulations provide that gassy mines must be ventilated in order to flush methane and coal dust from the mine according to a ventilation plan developed by the mine operator and approved by a MSHA representative. 30 C.F.R. § 75.370(a)(1).³ At the time of the violation, Pinnacle's ventilation plan required a minimum air velocity of 500 feet-per-minute along the 9G tailgate working face. R. Ex. 1, at 1; Tr. 44.

Pinnacle has a history of ignitions over the past 25 years at the mine. In its Belt Air Justification submitted to MSHA in 2010, Pinnacle references 16 confirmed instances of ignitions and one alleged ignition at the mine. P. Ex. 6, at 6.⁴

³ The standard provides: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager." 30 C.F.R. § 75.370(a)(1).

⁴ The Belt Air Justification was a revision to the original ventilation plan. Tr. 33; *see also* 30 C.F.R. § 75.370(a)(2).

C. The Instant Inspection

On December 28, 2012 at approximately 7:45 a.m., inspector Bennett⁵ arrived at Pinnacle Mine in order to conduct a methane spot inspection. Tr. 34. Bennett, accompanied by a management and miner representative, traveled to the 9G longwall tailgate. Tr. 36-37. A longwall continuous miner plow (longwall plow) was actively cutting coal and generating a large amount of coal dust. Tr. 65.

After arriving at the 9G longwall tailgate, Bennett walked to the working face and entered the shield line to take a methane reading with his multi-gas detector.⁶ Tr. 38, 40, 44. The detector registered a methane concentration in the ambient air of between .9-1% and an oxygen concentration of 20.8%. Tr. 38. Bennett's multi-gas meter registered between .9% and 1% methane during the entire time that Bennett traveled along the longwall tailgate area. Tr. 43.

Bennett also took an air velocity reading at the longwall with his Davis anemometer. Tr. 43. The anemometer registered an air velocity of 435 fpm. Tr. 44. After obtaining this air velocity reading, Bennett took another reading using a wand anemometer. *Id.* The wand anemometer also registered an air velocity of approximately 435 fpm. Tr. 45.

Thereafter, Bennett informed the tail boss that his anemometers had registered air velocities along the longwall face that were below those required by Pinnacle's ventilation plan. *Id.* The tail boss then contacted mine workers on the headgate side to make adjustments to the ventilation system for the tailgate side. *Id.*

About 30 minutes later, Bennett took another air velocity reading at the working face. Tr. 46. At that time, Bennett's anemometer registered an air velocity of 550 fpm and his multi-gas detector registered a methane content of .5%. *Id.*

Bennett then travelled toward the 9G longwall tailgate entry and issued Citation No. 7195128 for a violation of § 75.370(a)(1). Tr. 47. The violation was designated S&S, reasonably likely to result in fatal injuries affecting ten miners, and was attributed to Respondent's low negligence. P. Ex. 1, at 18. The proposed penalty was \$5,503.00. *Id.* at 9.

Bennett designated the citation as S&S because substandard air velocities from the failure to follow the ventilation plan would result in an accumulation of methane that would cause an ignition resulting in an explosion from methane liberated at the face where float coal dust was

⁵ Bennett had been a ventilation specialist for MSHA for about six months. Tr. 26. Before that, he had been a CMI for about three and one-half years. *Id.* Bennett was familiar with Pinnacle Mine and had conducted numerous inspections there for MSHA. Tr. 30. At MSHA, Bennett received a year-long training course, which included a three to four week module on ventilation. Tr. 27-28. Prior to employment with MSHA, Bennett had worked in the mining industry for about six years. Tr. 16-27.

⁶ Bennett credibly testified that he had calibrated his Solaris multi-gas detector at the Pineville MSHA field office earlier that morning. Tr. 40.

present. Tr. 75-77. Bennett explained that methane would accumulate quickly because Respondent was actively cutting coal, not following the ventilation plan, and if normal mining operations continued, an explosive amount of methane would likely have been liberated. *Id.*

Bennett testified that the three conditions necessary for an explosion were present: fuel, oxygen, and an ignition source. Tr. 64. There was fuel in the form of methane at the longwall face and in the gob. Tr. 65. There was also float coal dust, coal fines, and accumulations of grease near the working face. *Id.*; Tr. 104. There was oxygen in the ambient air at a concentration of 20.8%.⁷ Tr. 117. Further, Bennett highlighted several potential ignition sources: frictional heat sources, including the conveyor chain running in a metal pan; the tail drive sprocket on the continuous miner; sparks from the longwall plow scraping against rock streaks in the coal seam; and electrical sources, such a high voltage cord feeding the longwall plow, a starter box, telephones, and lighting across the face. Tr. 65-67, 104-105. Bennett further testified that Pinnacle had been cited for numerous permissibility issues, both before and after Citation No. 7195128 was issued. Tr. 67.

Respondent's sole witness, John David Cox, II,⁸ conceded that substandard ventilation practices could contribute to methane accumulations in the mine. Tr. 146. Cox testified that the longwall plow was equipped with several safety devices, including water sprays to reduce dust accumulations at the face. Tr. 137. In addition, he testified that the longwall plow was designed to stop working the face once it encountered rock, thus reducing the likelihood of sparking. *Id.* Further, the plow was designed to stop operating once a methane concentration of 1% was detected. Tr. 141. Cox also testified that coal production would stop if substandard air velocity was detected at any point along the working face, or if methane sensors in a single location along the working face stopped working. Tr. 130.

III. Legal Analysis - Significant and Substantial Analysis and Disposition

Section 104(d) of the Mine Act describes a S&S violation as “a violation of any mandatory health or safety standard . . . [when] such violation is of such a 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).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission announced four criteria for an S&S violation, “(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.” *Id.* at 3-4. The Secretary must introduce substantial evidence to support a finding for each of these four factors. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester &*

⁷ Bennett testified that methane explosions are possible at oxygen levels above 10.0%. Tr. 117.

⁸ Cox holds an electrical engineering degree and a mechanical engineering degree from Bluefield State College. Tr. 127. At the time of the hearing, Mr. Cox was employed as a longwall foreman. *Id.* He is certified by West Virginia as an assistant underground mine foreman. *Id.*

Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

As to the first *Mathies* factor, section 3(l) of the Mine Act defines “mandatory health or safety standards” as “the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act.” All standards are promulgated pursuant to title I of the Mine Act. The parties have stipulated to the violation of section 75.370(a)(1), a mandatory safety standard. Tr. 19.

As to the second *Mathies* factor, the Secretary need only identify a discrete safety hazard associated with the putative S&S violation. *Bledsoe Coal Corp.*, 34 FMSHRC 2569, 2573 (Oct. 2012) (ALJ) (explaining that the second *Mathies* factor requires the Secretary to identify a discrete hazard contributed to by an underlying violation). The risk of a methane explosion articulated by inspector Bennett is a discrete safety hazard. See *Knox Creek Coal Corp.*, 36 FMSHRC __, slip op. at 6 (May 28, 2014); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013) (upholding an ALJ’s finding that the “danger of methane accumulation” was a safety discrete hazard); *Jim Walter Res.*, 28 FMSHRC 579 (Aug. 2006) (stating that methane buildup is a discrete safety hazard).

I credit both Bennett’s and Cox’s testimony that substandard ventilation practices, including insufficient air velocities, contribute to the risk of a methane explosion in a gassy mine. Tr. 75, 146. Moreover, once Respondent’s tail boss had the ventilation system adjusted and compliant air velocity levels were achieved at the working face, the methane concentration was cut nearly in half in a matter of twenty minutes. Tr. 45-46.

Respondent’s brief makes too much of inspector Bennett’s testimony that “an operator is permitted to continue to operate a coal mine when there is 1% of methane or less present.” R. Br. 15. On this basis, Respondent argues that “if an operator is permitted to continue to operate with 1% or less of methane [*sic*] MSHA does not believe a hazard is created.” R. Br. 15. This conclusion, however, discounts the substandard air velocities that were found by inspector Bennett. Citation No. 7195128 was issued *precisely because* they were *impermissible* under MSHA regulations. Accordingly, the Secretary has shown by substantial evidence that there was a discrete safety hazard contributed to by the section 75.370(a)(1) violation.

The third *Mathies* factor requires that the Secretary show “a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An injury need not be more probable than not to be “reasonably likely.” *Id.* at 1130. The reasonable likelihood determination is made “in terms of continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). That is, whether the hazard (methane explosion) contributed to by the violation (failure to follow the ventilation plan because of insufficient air velocities) has a reasonable likelihood of resulting in an injury if the mine were to continue in normal operation.

When analyzing the “reasonable likelihood” of an ignition or explosion, “the Commission examines whether a ‘confluence of factors’ is present on the particular facts surrounding the violation.” *Texas Gulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors

include “the extent of accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area.” *Utah Power & Light Co.*, 12 FMSHRC 964, 970-71 (May 1990).

I credit Bennett’s testimony that in order for the discrete hazard of methane explosion to be reasonably likely to result in an injury, the so-called “fire triangle” must be present: oxygen, a fuel source, and an ignition source. Tr. 64. This testimony is consistent with Commission and ALJ precedent establishing that the fire triangle must be present in order for an explosion to be reasonably likely. *U.S. Steel Mining Co.*, 27 FMSHRC 435 (May 2005); *see also Highland Mining Co.*, 35 FMSHRC 221 (Jan. 2013) (ALJ).

At hearing, Bennett testified that the ambient air at the working face consisted of 20.8% oxygen. Tr. 83. Bennett’s testimony establishes that a methane explosion may occur when the oxygen concentration reaches 20.8%. Tr. 117.

I also find a fuel source in the form of methane that would have led to an explosion if Pinnacle’s mine had continued to operate with substandard air velocity at its face. Tr. 65. While Bennett’s gas meter registered a methane concentration in the ambient air of only .9-1.0%, and methane is generally explosive only at concentrations of 5-15%, the explosive point of methane is lowered when there are substantial quantities of coal dust in the air. Tr. 75. Bennett credibly testified that there were large amounts of coal dust present at the working face, where coal was actively produced upon his arrival. *Id.* Furthermore, I credit Bennett’s testimony that methane concentrations may have risen dramatically in a short period of time so as to reach explosive levels. *Id.* I emphasize that Bennett was an experienced MSHA inspector whose opinion that the violation was S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995).

I also find that there were several potential ignition sources present, including sparks generated from the longwall plow’s contact with rock or geological irregularities. Commission precedent has recognized that the operation of a continuous miner at the longwall face is a potential ignition source. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Pinnacle argues that its longwall plow would stop operating once it contacted rock or geological irregularities. R. Br. 16. That is immaterial as sparks may be generated during the plow’s *initial* contact with rock or geological irregularities. Furthermore, there were several electrical devices at the face during Bennett’s inspection. Any one of these devices may have generated a spark or arched, especially given Pinnacle’s history of permissibility violations. Tr. 67.

While Pinnacle relies on several safety measures⁹ designed to reduce the likelihood of explosions, Commission and Circuit Court precedent in analogous situations discounts such measures when making S&S determinations. *Buck Creek Coal Co.*, 52 F.3d at 136 (“The fact that [a mine] has safety measures in place to deal with a fire does not mean that fires do not pose

⁹ Respondent alleges a “redundant system” of methane monitors designed to immediately stop coal production if monitors malfunctioned at any location at the working face. R. Br. 12. Respondent also alleges that its longwall plow was designed to shut off once methane concentrations of 2% were detected. R. Br. 12.

a serious risk.”); *Cumberland Coal Co.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (explaining that the presence of safety measures is immaterial in a *Mathies* S&S analysis). I thus give little weight to the secondary safety measures relied on by Respondent.

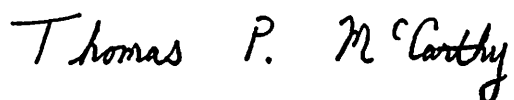
As to the fourth *Mathies* factor, the injury identified in the third *Mathies* factor must be of a reasonably serious nature. The Commission has held that injuries resulting from a methane explosion are of a reasonably serious nature. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2339 (Aug. 2013) (upholding an ALJ’s finding that injuries resulting from a ventilation violation were “reasonably serious”); *see also Buck Creek Coal Co.*, 52 F.3d at 135 (finding that a fire burning in an underground coal mine posed a risk of injuries of a reasonably serious nature).

I credit Bennett’s testimony that there were ten miners in the immediate vicinity of the 9G tailgate working face. Tr. 74. Thus, I find that if an explosion had occurred, which was reasonably likely under the particular facts and circumstances, it would have led to fatalities or injuries of a reasonably serious nature to ten miners.

I have evaluated the Secretary’s proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC__ slip op. at 4-6 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary is consistent with the statutory requirements of section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Thus, I assess a \$5,503.00 penalty against Respondent.

IV. Order

For the reasons set forth above, Citation No. 7195128 is **AFFIRMED**, as written. The Joint Motion for Settlement is **GRANTED**, and it is **ORDERED** that the Citations and Order be modified as set forth above. *See supra* note 1. It is further **ORDERED** that Respondent, Pinnacle Mining Company, LLC, pay a total penalty of \$24,573.00 within 40 days of this order.¹⁰



Thomas P. McCarthy
Administrative Law Judge

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¹⁰ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.