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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

Civil Penalty Proceeding  
Docket No. LAKE 82-85  
A.C. No: 11-00590-03141 V

v.

OLD BEN COAL COMPANY,  
RESPONDENT

OLD BEN COAL COMPANY,  
CONTESTANT

Contest of Citation or Order  
Docket No: LAKE 82-66-R  
Citation No. 1222957 3/11/82

v.

SECRETARY OF LABOR, AND  
UNITED MINE WORKERS OF AMERICA,  
RESPONDENTS

DECISION

Appearances: Mark M. Pierce, Esq., Chicago, Illinois, for Old Ben Coal Company Miguel J. Carmona, Esq., Office of the Solicitor, Chicago, Illinois, for the Secretary of Labor

Before: Judge Moore

The above cases were re-assigned from Judge Lasher to me on June 23, 1983, with the statement that Judge Lasher is, because of illness, "unavailable to the agency" as that phrase is used in 5 U.S.C. 554(d).

After considering the evidence, Judge Lasher issued a bench decision which appears on page 231 of the transcript. I have studied that decision as well as the testimony, exhibits, and arguments made in the case.

I agree with the bench decision and adopt it as my own. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This is a consolidated proceeding arising out of the filing of a document entitled Application for Review (Notice of Contest) by Old Ben Coal Company, hereinafter Ben, to review Citation No. 1222957 dated March 11, 1982, and a proposal for a penalty filed by the Secretary of Labor, hereinafter the Secretary, seeking assessment of a penalty for the violation charged in the same

Citation. The Citation which was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., charges Old Ben with an infraction of its Roof Control Plan in violation of 30 CFR 75.200. In its Application for Review, Old Ben challenges the occurrence of the violation as well as the specific findings contained on the face of the Citation to the effect that the violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard," and also that the violation resulted from an "unwarrantable failure" on the part of Old Ben to comply with the mandatory health and safety standards.

In this hearing Old Ben has conceded that the violation occurred as charged in the Citation thus leaving the issues to be resolved those raised by the two aforesaid concepts inherent in so-called unwarrantable failure violations, that is "significant and substantial" and "unwarrantable failure." Additional issues, of course, are the amount of penalty which should be assessed for the violation admitted to have been committed by Old Ben. Both parties presented witnesses in this proceeding and submitted documentary evidence and, based upon the evidence of record, I make the following findings;

#### Preliminary Findings

On December 11, 1982, Jesse B. Melvin, an Inspector with the Mine Safety and Health Administration, arrived at Old Ben's No. 26 mine at approximately 7:30 a.m. and proceeded on a Section 103(i) spot inspection of the mine accompanied by Jim Bolen--Old Ben's "top safety man," according to the Inspector.

At approximately 9:50 a.m., Inspector Melvin observed a continuous miner, operated by James Hawkins, backing out from under an area of unsupported roof. This area, 14 feet by 22 feet, was located in the 10 CM 6 unit, ID 014 in the Main South entries. As charged in the Citation and conceded by Old Ben, the continuous miner had advanced 38 feet in by the east row of roof support (roof bolts) and the machine's operator was 16 feet in by the last roof support in the Second Main South entry.

The pertinent provision of the Roof Control Plan violated appears on Page 56 thereof (Exhibit P-4) and provides: "No work to be performed in by permanent supports unless temporary supports are installed on five foot centers or less."

The unsupported area in question had been marked by the placement of a danger tag on a roof bolt on the prior shift (12 midnight to 8:00 a.m.) but the same was not observed by James Hawkins at the time he proceeded

under the unsupported roof. At least one of the reasons for this was the dust which was prevalent in the area at the time.

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Old Ben's Section Foreman at the time was Tim Jones. On March 11, 1982, Mr. Jones' crew consisted of two continuous miner operators, Hawkins and John Zimmerman, and, in addition, two shuttle car operators, two roof bolters, one utility tractor operator, and one repairman. At approximately 9:00 a.m., Mr. Jones instructed his employees to clean up the area in question, but Mr. Jones was not present at the time the violation occurred because of a power defect which occurred on another piece of equipment requiring his presence at a place some 600 feet distant from the entry in question. Hawkins commenced cleaning up the general area and worked at this task for approximately 25 minutes before proceeding under the 14 by 22 foot area of unsupported roof. At the time Hawkins proceeded into this area, he was unaware that he was entering into an area not supported by roof bolts in accordance with the Roof Control Plan. However, Hawkins subsequently realized that he was working under unsupported roof and even so did not immediately back out of the area but continued to work under unsupported roof. His total time under unsupported roof was 10 minutes and he continued to engage in cleaning up the area for a period of approximately seven minutes after he realized he was under unsupported roof. Hawkins' reason for doing so was that he "went ahead and cleaned it up" while he was there to avoid "a big move" later on.

When Hawkins first proceeded under the unsupported roof he was alone. Subsequently, the other operator of the continuous miner, John Zimmerman, arrived in the vicinity but Zimmerman never placed himself under unsupported roof. When Inspector Melvin arrived, Zimmerman made a statement to him to the effect that they had gone under roof (meaning unsupported roof) before and that this time they had been caught.

Subsequent to his announcement that a Section 104(d) Citation would be issued, Inspector Melvin determined that there were conditions or circumstances present in the unsupported roof area which would or might have increased the likelihood of the occurrence of the hazard, i.e., that there was a slip in the coal roof and "rock showing in one place of the roof." (Exhibit P-3).

The danger tag placed by the prior shift on the roof bolt in the area in question was installed by the mine examiner at that time because there was bad top in the area of the unsupported roof and not because it was normal practice to place such a tag in all places where there is unsupported roof regardless of the condition of the roof.

Following the determination by Inspector Melvin to issue Citation No. 1222957 he told Jim Bolen, Old Ben's safety mine inspector at No. 26 mine, that to obtain abatement of the Citation, the Roof Control Plan must be read to the crew. The continuous miner operator, Hawkins, was also reinstructed with respect to compliance with the above-quoted provisions of the plan. Hawkins and Zimmerman were advised by Old Ben management that a

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letter would be placed in their personnel folders indicating that they were involved in the violation which had occurred. Whether that disciplinary action by Old Ben was ever carried out is unclear since such letters were not in the folders for Zimmerman and Hawkins at the time of this hearing. Hawkins and Zimmerman were not otherwise disciplined nor was Tim Jones, the Section Foreman. No meaningful disciplinary action was meted out by Respondent to Hawkins.

Hawkins had been operating a continuous mining machine for approximately one year prior to March 11, 1982. During that period of time, Hawkins had worked under unsupported roof 10 to 12 times, some of which were in the presence of foremen (sometimes referred to as face bosses). On some of these occasions these foremen made statements to Hawkins to the following effect: "Don't get caught" and "I didn't see you." Prior to the violations on March 11, 1982, Old Ben management personnel had condoned infractions of the same or similar provisions of the Roof Control Plan by Hawkins.

Had the roof fallen while Hawkins was working under it in the unsupported area in question, i.e., had the hazard contemplated by the Roof Control provisions in question come to fruition, Hawkins, the only employee jeopardized by the violation, could reasonably have been expected to sustain injuries ranging from very minor injuries to either permanently disabling injuries or fatal injuries.

Hawkins, 22 years of age, had he been aware of the "slip" in the roof observed by Inspector Melvin, would not have continued working under the unsupported roof area after he had determined that he was working under unsupported roof area.

Although Old Ben has a "good" safety program in terms of its format-which includes instructions and training of new employees and employees who are changing jobs (Exhibits R-2 and R-3),-the salubrious effect of this safety program is undermined if not negated by the actual attitudes and practices manifested by Old Ben's foremen and other management personnel in the day-to-day operation of the mine.(FOOTNOTE 1)

The violation committed by Old Ben on March 11, 1982, did not directly result from negligence on the part of its Foreman, Tim Jones. The violation resulted in a significant degree from Old Ben's careless and indifferent approach with regard to requiring compliance by its miners with safety standards in general and provisions of the Roof Control Plan in particular.

Old Ben is a large coal mine operator with an unusually high number of violations committed in the prior 24-month period preceding March 11, 1982 (719 violations).

#### Discussion, Ultimate Findings of Fact and Conclusions of Law

Turning now to the question as to whether or not the violation in question was of such a nature as can "significantly and substantially contribute to the cause and effect of a mine safety or health hazard," it is noted that in *Secretary of Labor v. Cement Division, National Gypsum Company*, 3 FMSHRC 822, 825 (April 1981), the Commission defined the phrase "significant and substantial violation" as being one "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." I have previously found that the occurrence of the event or the hazard contemplated by the provision of the Roof Control Plan violated would likely result in injuries of a reasonably serious nature to or the fatality of the continuous miner operator, James Hawkins. The question remaining under the National Gypsum test is whether or not the violation contributed to the cause and effect of a mine safety hazard.

The Commission noted in *National Gypsum* that the Act does not define the key terms "hazard" or "significantly and substantially." It was determined that the word "hazard" denotes a measure of danger to safety or health and that a violation significantly and substantially contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. Thus two facets of general concept are raised by this language: (1) the likelihood of resulting injury occurring and (2) the gravity or seriousness of the resulting injury.

Significantly, the Commission in *National Gypsum* made the observation that "we believe that the inspector's independent judgment is an important element in making significant and substantial findings which should not be circumvented." I do not take this statement, however, to mean that the Inspector's determination must govern or is binding as a general rule. It can be rebutted. However, on the record in this case and considering the inherent nature and extreme hazards posed by roof falls generally, I see no reason not to accept the Inspector's testimony with respect to the seriousness of the violation in question and the likelihood of the occurrence happening. This is particularly true in view of the condition of the roof in the unsupported area in question even though the same was actually ascertained after the Inspector made his determination. I conclude that the Secretary in this case has carried its burden of proof with

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respect to its "substantial and significant" allegation based upon the various factual findings which I have previously indicated including the length of time Hawkins spent under unsupported roof and the condition of the roof at the time Hawkins was under it. I thus find that there did exist a reasonable likelihood that the hazard was significantly and substantially contributed to by the violation and that there was a reasonable likelihood that the hazard, had it come to fruition, would have resulted in a reasonably serious injury to Hawkins.

Whether the instant violation was the result of an unwarrantable failure of the operator to comply with the roof control requirement contained on Page 56 of the Plan depends on whether the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

I have previously found with respect to Old Ben's indifferent approach as to compliance with safety standards and condonation of violations of roof control provisions. Based upon the testimony of Mr. Hawkins and MSHA Supervisory Inspector Mike Wolfe, whose testimony I do credit, I find that Old Ben exhibited a negligent approach toward insuring compliance with the Roof Control Plan in question. The statements of section foremen to Mr. Hawkins on occasions when he was under unsupported roof advising him not to get caught and indicating that he was not being observed--when in fact he was and knew he was--created a climate of enforcement where Old Ben should reasonably have foreseen that Hawkins would continue to violate the Roof Control Plan and the particular provision thereof involved in this proceeding. I thus conclude that this is a pure application of the governing definition of unwarrantable failure and that the mine operator knew of violations and failed to abate the practices constituting such violations, and indeed to some extent the participation of agents of the mine operator (in this case the foremen) involved condonation of violations similar to the ones actually committed by Hawkins in this case. Accordingly, I conclude that the operator through these foremen engaged in, as a minimum, indifference, and, as a maximum, a willful disregard of the safety requirements which in a significant and substantial way contributed to the occurrence of the violation charged. I thus find no merit in the application for review in this proceeding.

#### Penalty Assessment

I have previously found Old Ben to be a large coal mine operator. It is not one of the giants of the industry. It has an unsatisfactory history of previous violations. It proceeded in good faith to achieve compliance with the safety standard violated upon being notified thereof and in accordance with the abatement terms specified by the issuing Inspector. Payment of a penalty appropriate to the violation will not jeopardize its ability to continue in business. I find that the violation in question was extremely



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serious and resulted from the negligence of management personnel to adopt a reasonable enforcement climate with respect to safety matters at its No. 26 mine in general. No specific negligence in connection with this violation is attributable to any specific management person or supervisor. In this connection, I note that the six statutory assessment factors are necessary to be considered but they are not all-inclusive.

I consider that the primary factor shown on the record in this proceeding which would militate for a lessening of the penalty was the testimony of MSHA's Inspector/Supervisor, Wolfe, to the effect that in terms of "incidents" (lost time accidents, etc), the No. 26 mine has a commendable record in that such incidents are below the national average.

Considering these various factors, I conclude that the \$3,000.00 penalty urged by the Secretary in its narrative of findings for a special assessment contained in Docket No. LAKE 82-85 is appropriate and it is so assessed.

ORDER

Citation No. 1222957 is affirmed and the contest of the Citation (Docket No. LAKE 82-66-R) is dismissed.

In Docket No. LAKE 82-85, Old Ben is ordered to pay a civil penalty of \$3,000.00 to the Secretary of Labor within 30 days from the date of this decision.

Charles C. Moore, Jr.  
Administrative Law Judge

FOOTNOTE START HERE-

1 The unsatisfactory attitudes of Old Ben's management were credibly described by MSHA's Inspector Supervisor Mike Wolfe who characterized the same as a "lack of sincere desire to comply." This characterization based upon some 12 years' familiarity was supported by the condonation of Hawkins' infractions over a period of time, the computerized History of Previous Violations (Exhibit P-5) submitted in this proceeding, and the statement hereinabove referred to made by John Zimmerman to Inspector Melvin following his determination to issue the Citation in question.