

CCASE:  
SOL (MSHA) V. L E L CONSTRUCTION  
DDATE:  
19891120  
TTEXT:

~2312

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-274-M  
A.C. No. 05-04057-05505 K2M

v.

Gold King Mine

L.E.L. CONSTRUCTION,  
RESPONDENT

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Russell E. Yates, Esq., Yates & Davies, Durango,  
Colorado, for Respondent.

Before: Judge Lasher

This matter was commenced by the Petitioner's filing of a Proposal for Penalty on August 29, 1988, seeking assessment of civil penalties for two alleged violations (T. 91) described in two Citations (numbered 2636419 and 2636420) issued by MSHA Inspector Royal B. Williams on April 12, 1988.

At the close of hearing on June 21, 1989, Petitioner moved to withdraw its prosecution of Citation No. 2636420 (alleging Respondent's alteration of a fatal roof-fall accident scene in violation of 30 CFR 50.12) and such motion was granted on the record (T. 218-220). Accordingly, this Citation will be vacated by subsequent order herein.

The remaining Citation, No. 2636419, as modified, was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801, et seq., and charges Respondent with an infraction of 30 CFR 57.3200, as follows:

On March 13, 1987, a fatality occurred from a fall of ground in the Gold King No. 7 drift. Shortly after this fatality two supervisors took a miner into the area for the sole purpose of retrieving a rock drill and jackleg

to prevent it from being caved on. The supervisors were aware that the fatality had occurred from a fall of ground. The roof where the rock drill and jackleg was, had not been barred down or supported after the fatality. Supervision knew that the condition created an imminent danger to themselves and the miner. This is an unwarrantable failure to comply with a mandatory standard.

30 CFR 57.3200, pertaining to "Correction of Hazardous Conditions," provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

#### BACKGROUND

Shortly after the fatal accident, MSHA issued two enforcement documents to Respondent, Order No. 2634865 and Citation No. 2639864. These two violations were the subject of an earlier proceeding and a Decision approving the parties' settlement thereof - with penalties totalling \$6,020.00 - was issued October 21, 1988, by another Judge (See Ex. C-1). The record indicates that during the original MSHA investigation following the accident there was no indication that anyone had re-entered the mine following the fatality (T. 50-53, 134; Ex. P-2).

Thereafter, and some 9 or 10 months following the accident, MSHA initiated a second-special-investigation pursuant to Section 110(d) of the Act to determine if a wilful violation had been involved (T. 75). MSHA Special Investigator Benjamin M. Johnson conducted this investigation (T. 71, 74, 76). While Mr. Johnson was unable to interview Supervisor Boyd L. Hadden or miner Jody Booker (T. 76-80), he did conduct a tape-recorded interview and obtain the statement of Fred M. "Ted" Yates (T. 76).

~2314

In this interview, apparently for the first time, Yates made - according to Mr. Johnson - the following disclosure:

A. In my interview with Mr. Yates, he disclosed to me that after the fatality had occurred, at approximately 1400 hours, that he and Boyd Hadden and Jody Booker had returned to the mine to remove the jackleg and drill that was at the accident site.

(T. 76-77)

Based on his Section 110 investigation, Special Investigator Johnson recommended the issuance (by Inspector Williams) of the two enforcement documents involved in this proceeding (T. 80, 82, 89, 90). Since, as above noted, Mr. Johnson was unable to interview Mr. Hadden because of Mr. Hadden's refusal to be interviewed, and was unable to locate Jody Booker or to interview Mr. Larry Luzar, the owner of Respondent (T. 77-78), it thus appears that the determination to issue these two Citations was primarily based on information submitted by Mr. Yates approximately one year after the accident occurred (T. 76-80, 82, 83, 95).

#### ISSUES AND CONTENTIONS

Citation No. 2636419 charges that two supervisors(FOOTNOTE 1) took a miner(FOOTNOTE 2) into the area where a fatality (to miner Donald Goode) had occurred from a ground fall for the "sole purpose" of retrieving a rock drill and jackleg "to prevent it from being caved in on." The Citation also charges that the roof in this area had not been barred down or supported after the fatality and that supervision knew that the condition created an imminent danger to themselves and to the miner.

~2315

Respondent contends in its post-hearing brief that an entry into the mine by Yates was contrary to the direct order of the mine owner, Larry Luzar, and thus unknown to management, thus raising the question whether a violation (if one occurred) by shift boss Yates is attributable to Respondent.

A second matter important to determination of this case is resolving a conflict of testimony between Yates and Hadden as to Hadden's participation in the alleged violation and assessing the degree of weight and reliability to be attributed to their accounts of critical happenings.

#### FINDINGS

On March 12, 1988, the day before the accident, Fred M. "Ted" Yates, who has a total of 32 years prior mining experience, was working as "lead miner" with two other miners, Grady Colby and Jody Booker on the 4 p.m. to midnight (swing) shift (T. 27, 29-30, 210). After the shift, Mr. Yates left a note in the shop (a van truck) outside for the morning shift advising them to watch the left rib as it was peeling (T. 30, 31, 205). According to Yates, the condition was "bad" meaning the rib "was peeling, slabbing, some small rocks was falling" (T. 29-31, 35).

The following day, March 13, 1988, the day of the accident at approximately 3:15 p.m. (T. 37) Yates and Jody Booker, a miner, stopped at the home of the mine owner, Larry Luzar, for the following stated purpose:

"We was going to talk to him to see what he wanted to do, what we was going to do there that night, because we figured that we was -- didn't want to work there without timbering it or bolting it, or something to secure it."

(T. 32)

Luzar was not home and Mrs. Luzar advised Mr. Yates and Jody Booker that there had been an accident at the mine. Yates and Booker proceeded toward the mine where, approximately 5 miles therefrom they encountered the ambulance to which Donnie Goode was being transferred (T. 36-37, 209-211). Mr. Goode was in a stretcher beside the ambulance and was being administered CPR by Mr. Luzar. Mr. Luzar and Grady Colby, one of the swing shift crew, then left together with Mr. Goode in the ambulance to proceed to Durango (T. 37-38).

~2316

Yates' Version of the Violation. Although Mr. Yates, as lead miner, was paid at the same rate as regular miners (T. 30), it nevertheless appears that he was in charge of the 4 p.m. to midnight shift, and that he made necessary management decisions and told the crew what to do (T. 30, 178, 205, 210-211). According to MSHA Investigator Johnson:

"During the interview with Mr. Yates, he told me that he was in a lead miner position, and that he supervised individuals on the night shift. He had the responsibility of instructing them where to work and how to work, he had the responsibility to see that they put in a full shift."

(T. 83)

It is concluded that Mr. Yates, at material times, was a supervisor.

According to Yates, and the subject of important disagreement in the record, he, Jody Booker - and Boyd Hadden - went back to the mine after the accident "to pick up the outside man." (T. 38). The "outside man" was identified in the record as Jody Morris (T. 67). Mr. Yates testified that "All three of us decided to go in and look and see what happened. I wanted to go in and see what had happened." (FOOTNOTE 3) (T. 39). This was at approximately 5 p.m.

Using Exhibit C-2, a drawing of the mine he rendered during the hearing to depict the accident scene, Mr. Yates gave his version of what constituted the alleged violation:

A. Yes, where the work was going on. Okay, and I seen that the rock that had killed Donnie was laying there, it was right approximately two feet from the left rib of the old drift.

Q. Okay.

A. The machine was laying approximately five feet back, laying down in the bottom of the drift.

~2317

Q. Five feet back from the rock?

A. Yes, from the rock.

Q. And what machine was that?

A. That was a jackleg.

Q. Okay. And was there a drill nearby or a jack leg --

A. Of course it's all hooked together. The leg and the machine is all together, and the hoses are hooked to the machine.

Q. Okay.

A. And at that time Boyd picked the machine up and set it against the left rib, approximately five feet back.

Q. So he picked up the machine?

A. We never unhooked the hoses or nothing. And me and Jody Booker was right here, to the right rib of the -- of where the machine was, right there.

Q. How close was the machine to where the actual spot where Mr. Goode was killed?

A. It was three to four feet, it was right there.

Q. And how close did you come to that spot?

A. Probably 15 feet, me and Jody Booker stood right over here on the right rib.

Q. You were on the right rib?

A. Yes.

Q. About 15 feet?

A. Uh-huh.

Q. And what did Mr. Hadden do?

A. He moved the machine from -- picked it up out of the drift and set it up against the rib, back from -- about five feet back.

~2318

Q. Did he tell you why he was doing this?

A. To keep from getting buried right there.

Q. Do you recall what he said to you?

A. To keep it from getting hit.

Q. Okay. Now, what did Mr. Hadden do then?

A. We left the mine.

Q. Okay. How long were you actually in the mine at that time?

A. Just the time it took to walk 2,600 feet, and we was in there probably 10 to 15 minutes, and then went back out.

Q. Did either you or Mr. Jody Booker lend any assistance in moving this machine?

A. No, we didn't.

Q. Can this machine be moved by one person?

A. Yes. It's a one-person machine.

Q. All right. And approximately how many feet did he move the machine?

A. I'd say five feet."(FOOTNOTE 4) (T. 40-42)

Hadden's Version. Boyd Hadden, who was actually present in the capacity of supervisor (T. 165-167) when the ground fell on Mr. Goode, denied later returning to the accident scene with Mr. Yates and Jody Booker (T. 175, 190).

After describing the accident itself in some detail (T. 167-172), and the trip from the mine in a Suburban to the place in



~2319

the road where Mr. Goode was transferred to the ambulance, Mr. Hadden gave this account of what happened:

Q. Okay. Did Ted Yates appear on the scene?

A. Yes, he did.

Q. When did that happen?

A. This was shortly after the ambulance showed up.

Q. And did you have any discussion with Ted Yates, or did Mr. Luzar, in your presence?

A. The only thing I remember saying to Ted was he asked me what happened, and I said, "A rock fell on him." His partner jumped in the ambulance, he was -- he --

Q. Who was his partner?

A. Grady Colby.

Q. Okay.

A. He offered -- he just volunteered himself without really speaking, he jumped in and went to work on Donnie Goode. Larry was still there working on him even after he was transported from the ground into the ambulance.

They was working on him, but Larry had told Ted and Jody Booker to go shut down the fans, lock it up, and go home. Gary Woggen and I had the Suburban, and I was the number one driver of the Suburban. I took care of it, I was the mechanics on the job, I was also the bus driver, I drove the Suburban.

Q. Were you present then when Larry Luzar gave that order?

A. Yes, I was.

Q. Okay. Now, what did you do after that -- I assume the ambulance left with Donnie Goode?

A. Yes.

Q. And then what did you do?

A. I took Gary Woggen home in the Suburban. I dropped him off at his house, I turned around at his house, and headed across town, Doug Taylor stopped me at the Bengal Trailer Park, asked me what had happened, I said, "Donnie Goode got hit in the head with a rock." He said, "How bad?" And I said, "It didn't look very good."

And I was upset, and I went straight home.

Q. Did you go back to the mine?

A. No, I didn't.

Q. Did you move the jack leg?

A. No, I didn't.

Q. Did you order anyone else to go in the mine?

A. No, I didn't.

Q. Why did Ted Yates -- do you know why --

A. Ted Yates went in that mine on his own, him and Jody Booker, just to look to see the scene. What happened there, there, I don't know.

Q. How do you know that? How do you know he went in there?

A. He told me first off, he had told me that he had gone in and looked at it -- this was later -- he had told me that they had gone in and looked at it.

Not only that, there was a loader outside that they had taken under and they had parked in the entryway of that new drift. That was one dry drift that didn't have a lot of copper arsenic leaking in it, which eats still up the loaders, and that will eat them up. They took that loader and parked it in there. And whenever we come back the loader was right there." (Emphasis supplied)

(T. 172-176)

~2321

Credibility Resolutions. In determining whether Mr. Hadden returned to the accident scene with Mr. Yates and Jody Booker, it is to be noted that neither Mr. Booker, Gary Woggan (mentioned by Mr. Hadden in his testimony), or Jody Morris (a part-time mechanic who was left at the mine after the accident) were available as witnesses at the hearing to break the deadlock between Mr. Hadden and Mr. Yates. Thus, determination of the issue rests on whether Mr. Yates' or Mr. Hadden's testimony should be given the greater weight. On this record, it is concluded that Mr. Hadden's testimony that he was not present when Mr. Yates and Booker went back in the mine should be credited. Mr. Yates' recollection of events is subject to some question since there was a significant inconsistency in his testimony. Thus, he denied speaking with owner Larry Luzar on the road when Mr. Goode was transferred to the ambulance (T. 44-45). Yet, in the written statement given to Investigator Johnson (Ex. R-1), he indicated that Luzar told him, Booker and Hadden "to return to the mine, lock up the mine and bring the outside man, Jody Morris, down from the mine." (Ex. R-1; T. 44-46, 66-67, 214-215).

Also, Mr. Yates, at the bottom of his written statement (R-1) saw fit to give a qualifying wrap to his rendition of the events constituting the violation:

"It has been a long time since the accident happened and this is as close to the way I remember it. I am being truthful in this statement as I can remember (sic) it, I am not trying to cause any problems for anyone."

On the other hand, Mr. Hadden's testimony is more convincing and emphatic, and is more consistent even though he was subjected to a higher degree of cross-examination at hearing (T. 189-201). Accordingly, it is concluded that only one supervisor (Mr. Yates) and Mr. Booker returned to the accident scene. The question next arises whether the ground conditions they traveled under created a hazard and whether such had been supported after the accident.

Ground Condition. The accident occurred on a Friday. On the following Tuesday, March 17, 1987, Dennis J. Tobin, an experienced MSHA inspector, while making an inspection - and as he approached the accident site approximately 2,500 feet into the drift near the intersection of the old drift - encountered "a drastic change in ground conditions." (T. 126). He observed "several intersecting cracks" in the ground conditions and "there was considerable evidence of fractured ground, not only on the left-hand rib but overhead." (T. 127). The ground conditions

~2322

were so dangerous that Inspector Tobin issued a withdrawal order which included not only the area of the accident scene but also included an additional area of 150 feet of ground up to the area in issue (T. 130-131, 133, 135, 140).

In his accident report (Ex. P-2) Inspector Tobin described the subject area as follows:

There was evidence of several ground failures the full length of the new drift. There was an estimated 3-tons of loose piled rock in the vicinity where Goode was injured. The air and water hose to the jackleg drill also had been partially buried for a distance of about 10 feet. This area was still spalling rock when the investigation team was examining the scene. There was no evidence there had been any attempt to support the ground for the entire 150 feet of the new drift and fault area. Luzar stated that no one had been in the mine since the accident.

With respect to the condition of the ground in the subject area, Mr. Yates testified that when he went back into the area shortly after the accident he was concerned that other ground might fall and that "it was dribbling a little." (T. 68). This, of course, follows on the heels of the fatal ground fall as well as Mr. Yates' considerable concern (described above) immediately before the accident that the conditions were "bad."

Supervisor Hadden, also made the concession that in the 4-6 hours following the accident, the ground conditions would not have improved:

Q. And did you do anything to improve the ground conditions in that mine in the next four days?

A. Absolutely not.

Q. Okay.

A. We wasn't working there.

Q. So the ground conditions were serious enough to kill Mr. Goode at approximately 2:45 on March 13, 1989; is that not correct?

A. Yes, sir.

Q. Okay. So you would agree with me then that those conditions are not going to improve in the next four to six to eight hours; is that not right?

A. Absolutely not.

Q. So in the event that Mr. Yates is telling the truth, and that people actually did go into that accident site, they went into an accident site where ground conditions were dangerous.

If what he says is true, you would have to assume that, would you agree with me on that?

A. I can't agree with you there, sir, because I don't agree with what Mr. Yates said to begin with.

Q. I said "assume" that just for the purpose of my question.

A. If Mr. Yates went in there then the conditions wasn't any better, I'll agree.

(T. 182-184)

#### CONCLUSIONS

Occurrence. It is therefore concluded from the foregoing evidence that when Mr. Yates and Jody Booker entered the mine and went to the affected area after the fatal ground fall that, in terms of the standard, ground conditions were present there that created a ground fall hazard (T. 86) which had not been taken down or supported (T. 87). This constitutes a violation of the regulation cited. Respondent's contention (Respondent's Brief, Pgs. 4, 6, 7) that no violation occurred because Mr. Luzar was unaware that Mr. Yates and Booker went back in the mine and that such entry was contrary to his instructions is rejected as a defense. Mr. Yates is a supervisor and Respondent is bound by his actions, and in any event a mine operator is liable without regard to fault for the occurrence of a violation. Sec'y. v. Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982); Western Fuels Utah, Inc., 10 FMSHRC 256 (March 1988).

Significant and Substantial. I further conclude that the violation was significant and substantial (S & S).

A violation is properly designated 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 (April 1981).

~2324

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S & S violations:

In 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.

In the United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985) the Commission expounded thereon as follows:

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., 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 Company, Inc., 6 FMSHRC 1866, 1968 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It has been previously found that a violation occurred. On the basis of prior findings I also conclude that a measure of danger to safety was contributed to by the violation and there existed a reasonable likelihood that the hazard contributed to would result in a serious injury or fatality. Thus, not only was the inspector's opinion as to the "significant and substantial" nature of the violation (T. 85-87) left largely unrebutted, but the evidence demonstrates that the exposure of two miners to the hazardous conditions present occurred within approximately 2 hours of a fatal fall. Further, the unsafe conditions were shown to exist after the fall, and that there had been no barring down (T. 93, 112) or supporting the ground (T. 182) at the time of or before the exposure of these two miners, Yates and Booker, to serious injury or death (T. 86-87, 183). Finally, Mr. Hadden conceded that the conditions would not have been any better when Yates and Booker re-entered the area than they were when the fatal fall occurred (T. 183-184). The four prerequisite burdens of the Mathies formula are thus found to have been met by the Petitioner.

~2325

Unwarrantable Failure. In connection with his opinion that the violation resulted from an "unwarrantable failure" of Respondent to comply with the standard, Inspector Johnson testified:

"Your Honor, I designated this as an unwarrantable failure violation because information given to me proved that company officials knew -- had reason to know that a violation had existed, that a hazard was imminent, and they chose to ignore those conditions, thus endangering the lives of three more employees." (T. 87)

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), appeal dismissed per stipulation, No. 88-1019 (D.C. Cir. March 18, 1988), and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history, and judicial precedent. Whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable failure is conduct that is "not justifiable" or is "inexcusable."

From Mr. Yates testimony, we see quite clearly that although he was deeply concerned about the safety of the ground conditions before the fatal accident and that even though after the accident he had received instructions from the owner, Luzar, to lock up the mine and go home, he nevertheless either took or accompanied a rank-and-file miner, Booker, into the hazardous area. Further, knowing that the ground was dangerous and that a serious accident had just occurred, no precautions such as barring down or putting up support were taken. This conduct was inexcusable and I see no basis for not imputing to the mine operator this aggravated conduct of its supervisor, Yates. See *Southern Ohio Coal Company*, supra; *Quinland Coals, Inc.*, 10 FMSHRC 705 (June 1988) (where mine foreman's awareness of dangerous roof conditions was chargeable to the mine operator). It is therefore concluded that the conduct of Mr. Yates was properly cited under Section 104(d)(1) as aggravated, and beyond mere negligence, and that Respondent's non-compliance with the standard was the result of this unwarrantable failure.

PENALTY ASSESSMENT

This small non-coal mine operator (Ex. C-1, T. 203) had a history of 2 violations (Ex. P-5) prior to the occurrence of the subject violation. Petitioner makes no contention that the violative condition (practice) was not immediately abated (T. 146) and Respondent makes no contention that payment of a penalty even at the level initially proposed by Petitioner (\$1000) would jeopardize its ability to continue in business (T. 146).

I have previously found that this was a significant and substantial violation which resulted from an unwarrantable failure on the part of Respondent to comply with the standard cited. Therefrom it is concluded that this violation was of a relatively high degree of seriousness which resulted from a high degree of negligence (unwarrantable failure) on the part of Respondent's supervisor. In addition to the exposure of the supervisor himself to the hazard of serious injury or death from a ground fall, a rank-and-file miner was also exposed to such hazard, thus removing the so-called Nacco defense, 3 FMSHRC 848 (April 1981) from applicability to this situation where the conduct of the supervisor (Yates) was unforeseeable. Wilmot Mining Company, 9 FMSHRC 684 (April 1987); Southern Ohio Coal Company, supra, fn. 7. In mitigation of the amount of penalty to be found appropriate, the record indicates that this is a small mine, that the owner of the mine immediately after the accident directed that the mine be shut down, that the supervisorial employee for some reason disregarded such instruction, and that apparently all concerned were significantly shaken up by the trauma of the tragic event. It also appears that the culpability of the violation was less than originally gauged by the investigating agency. Thus, contrary to the charge in the Citation, 2 supervisors did not take a miner into the area of hazard for the purpose, much less the sole purpose (T. 46, 61-62) of equipment retrieval. Respondent has previously paid significant penalties arising out of the fatal accident itself. In consideration of the foregoing, a penalty of \$400.00 is found appropriate and here assessed.

ORDER

Citation No. 2636420 is VACATED.

Citation No. 2636419, including the special findings of "unwarrantable failure" and "significant and substantial" designated thereon, is AFFIRMED except for the modifications noted in the "Penalty Assessment" section hereinabove.



