CCASE:
SOL (MSHA) V. R B COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-244
	:	A.C. No. 15-08293-03556
v.	:	
	:	Docket No. KENT 93-608
R B COAL COMPANY, INC., Respondent	:	A.C. No. 15-08293-03563
	:	No. 4 Mine

DECISION

Appearances: Donna E. Sonner, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Richard D. Cohelia, Safety Director, R B Coal Company, Pathfork, Kentucky, for the Respondent

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging R B Coal Company, Inc. (R B) with three violations of mandatory standards and seeking civil penalties of $7,700 for those violations. The general issue is whether R B violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Docket No. KENT 93-608

At hearing the Secretary moved for approval of a settlement agreement for the one Section 104(d)(1) order at issue in this case, Order No. 3829445. The operator agreed to pay the proposed penalty of $2,600 in full. I have considered the representations and documentation of record in support of the motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The order following this decision will incorporate that settlement.

Citation No. 3832908, issued pursuant to Section 104(d)(1) of the Act,(Footnote 1) alleges a "significant and substantial" violation of the mine operator's roof control plan under the standard at 30 C.F.R. 75.220 and charges that "the approved roof control plan was not being complied with in No. 4 right brake [sic] where the depth of the cut was measured 26 feet deep." Order No. 3832910, also issued under Section 104(d)(1) of the Act, similarly alleges a violation of the roof control plan and charges that "the approved roof control plan was not being complied with in No. 3 entry of 001 section the depth of the cut was 24 feet deep from the last row of roof bolts." The violations were alleged to have occurred on August 29, 1992.

It is undisputed that the relevant roof control plan provides that "continuous miner runs shall not exceed 20 feet in depth" (Gov't Exhibit No. 4, p. 7). It is also undisputed that the admitted continuous miner runs of 26 feet and 24 feet were in violation of the roof control plan. R B maintains, however, that the violations were neither "significant and substantial" nor the result of its "unwarrantable failure."

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1 Section 104(d)(1) of the Act provides as follows:

> "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, 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, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Roger Dingess, a roof control specialist for the Mine Safety and Health Administration (MSHA), has significant roof control experience and, in the mining industry, has been a roof bolter and supervisor. Pursuant to a code-a-phone complaint on August 28, 1992, the MSHA District office manager directed Dingess to conduct an investigation at the R B No. 4 Mine. The mine was not operating on August 28 so Dingess returned the following day and observed two miners working underground. Mine Superintendent Paul Goins accompanied Dingess as they proceeded to the No. 5 face. Dingess measured with a tape a place that had been cut on the left hand side and found it to be 26 feet deep. Thereafter proceeding to the No. 3 entry Dingess measured a cut on the left side at 24 feet. Noting that the roof control plan allows for a maximum 20 foot cut, Dingess proceeded to issue the citation and order at bar.

Dingess concluded that the violations were "significant and substantial." He noted that the mine roof in both areas consisted of thick "draw rock" and the roof was fractured. Dingess described "draw rock" as a massive rock layer between the mine roof and coal seam which tends to "let loose and fall out." Because of these conditions Dingess opined that it was highly likely for fatal injuries to occur to the roof bolter operator and to a miner operator operating from the deck. According to Dingess the roof bolter would be particularly vulnerable as he would be the next person to enter the excessively deep entries in the mining cycle.

Dingess testified the roof was so bad in some areas outby the deep cuts that some roof had fallen and had been rebolted. Even Superintendent Goins acknowledged that there had been cracks appearing between the roof bolts and they had "bad roof." Goins testified that "you never know when it's [the roof in this mine] is going to go bad."

A violation is properly designated as "significant and substantial" if, based on 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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
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> See also Austin Power Co. v. Secretary, 862 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 1021 (1987) (approving Mathies criteria).
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> The third element of the Mathies formula requires that the Secretary establish a reasonable likelihood that the hazard contribute to will result in an event in which there is an injury. (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Within this framework of law and evidence it is clear that both violations herein were "significant and substantial" and quite serious. I reach this conclusion based on a combination of factors, including the excessively deep cuts, the undisputed fractures and "draw rock" in the mine roof and the previous recent history of problems with "draw rock" in this area of the mine. I have also considered the Mine Superintendent's acknowledgement of the existence of bad roof in this mine and the unpredictability of roof falls therein.

The Secretary also alleges that the violations were the result of the operator's "unwarrantable failure" to comply with the cited standard. Inspector Dingess concluded that both conditions should have been observed by the foreman during the course of his preshift examination. It is not disputed that, in fact, no preshift examination had been performed prior to the shift in which the violations were discovered by the inspector. It is further undisputed that the roof had been cut on the evening shift of August 28 and that a preshift examination, if required for the shift at issue (the 6:00 a.m. to 2:30 p.m. day shift) should have been performed between 3:00 and 6:00 a.m. on the morning of August 29.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (1997), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991). The Commission has also stated that use of a "knew or should have known test by itself would make unwarrantable failure indistinguishable from ordinary

negligence," and accordingly the Commission rejected such an interpretation. See Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103 (1993).

In support of his "unwarrantable" findings the Secretary first argues that the miners working on the shift during which the deep cuts were made were not task-trained on the specific continuous miner used to create those cuts. This argument is apparently advanced to rebut R B's contention that the continuous miner used to cut these deep cuts, a Simmons Rand 500 model, was about 18 inches higher and four feet longer than the miner the crew was familiar with and that its controls were two feet further away from the cutter head. According to R B the continuous miner operator was unaware of the two-foot difference in the machines and while using the remote control misjudged the depth of the cuts.

While I agree with the Secretary that the absence of appropriate task training may have been a factor in this misjudgment, it is unclear whether the position of the controls in relation to the cutter head of the machine would necessarily be covered in such training and, in any event, I do not find that such failure amounts to such an aggravated omission as to constitute "unwarrantable failure." While the Secretary also maintains that the deep cuts were readily visible to the continuous miner operator, the evidence is inconclusive in this regard. Moreover, the negligence of the miner operator alone could not under the circumstances be imputed to R B.

The Secretary also maintains that the failure of R B to have performed a preshift examination of the cited entries, amounted to such an aggravated omission as to constitute "unwarrantable failure." The Secretary maintained at hearing that under the standard at 30 C.F.R. 75.303(Footnote 2) the operator was required to inspect during the preshift examination, among other areas, the cited entries. The failure to perform such an examination of the cited entries was, according to the Secretary, therefore a particularly aggravated omission constituting "unwarrantable failure."

R B maintains, however, that only two miners were underground at the time and that those miners were working on brattice at the tailpiece outby the section. R B argues that since no one was scheduled to work that shift in the area of the cited faces, there was no need to perform a preshift examination of those face areas. R B's position is clearly correct. Nothing in 30 C.F.R. 75.360 requires that the

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2 The preshift examination requirements under 30 C.F.R. 75.303 were superseded effective July 1, 1992 by 30 C.F.R 75.360

face areas at issue in this case be subject to a preshift examination when persons are neither working nor expected to work there during the shift. Accordingly, the failure to have conducted a preshift examination of the cited face areas may not be considered as a basis for "unwarrantable failure" or high negligence findings.

While the Secretary further argues that the cited conditions should also have been discovered by management during an on-shift examination, it is not disputed that, even if an on-shift examination was required in the cited areas, the time for conducting such an exam had not yet expired when the conditions were cited. Accordingly, the argument is vacuous.

In the absence of any other evidence of unwarrantability or high negligence, I conclude that the Secretary has failed to meet her burden of proof in this regard. Accordingly, the citation and order at bar must be modified to citations under section 104(a) of the Act.

Considering the criteria under Section 110(i) of the Act, the penalties noted in the following order are deemed appropriate.

ORDER

Citation No. 3832908 and Order No. 3832910 are hereby modified to citations under Section 104(a) of the Act. R B Coal Company, Inc. is hereby directed to pay civil penalties of $500 each for the violations charged in these citations within 30 days of the date of this decision. In addition, Order No. 3829445 is affirmed and R B Coal Company, Inc. is directed to pay a civil penalty of $2,600 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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