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SOL (MSHA) V. RB COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-853
Petitioner : A. C. No. 15-13362-03616
v. :
: RB No. 3 Mine
RB COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
David J. Partin, Engineer, RB Coal Company, Inc.,
Pathfork, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (Secretary) 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 RB Coal Company, Inc. (RB) with two violations of the mandatory standards and seeking civil penalties of \$4500 for those violations. Pursuant to notice, the case was heard in London, Kentucky, on January 6, 1994. Both parties have since filed post hearing submissions with proposed findings and conclusions and I have considered them in the course of my adjudication of this matter.

The two citations at bar, Citation Nos. 3829472 and 3829473, were both issued by Inspector Roger Dingess of the Mine Safety and Health Administration (MSHA) as a result of his inspection at the RB No. 3 Mine on April 8, 1993. The citations were issued pursuant to section 104(a) of the Act and allege "significant and substantial" violations of the standards cited therein, which are 30 C.F.R. 75.220 and 30 C.F.R. 75.202, respectively. The former charges that: "The approved roof control plan was not being complied with on 001 Section where second mining was being preformed. Breaker Post Q were not set prior to lift 17 which was cut and lift 18 was taken out." And the latter alleges that: "The roof of the No. 3 entry was not adequately supported where

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persons were traveling. Dislodged conventional roof bolts which had not been replaced. An area 12 X 20 was unsupported and second mining was being conducted."

Inspector Dingess issued Citation No. 3829472 to RB because he found an area that the operator had just finished cutting, where the Q breaker post(s) were not set on either side of the intersection prior to lift 17. He further testified that the approved roof control plan in effect at that time provided for these breaker posts to be installed prior to lift 17.

While second, or pillar mining is being performed, the purpose of these breaker posts is to insure safe access from this area while the pillar supports are being removed and to prevent roof falls from occurring in the intersection.

Inspector Dingess opined that this was a "significant and substantial" violation because second mining was being performed on this section and the roof in the area was popping and moving, already in the process of breaking up, as it started to take the weight from the pillar removal. Coal ribs were also bursting off in places in that particular area. In his opinion, with some 14 years experience as a roof control specialist, the inspector believed that the lack of proper breaker posts as called for in the roof control plan exposed the continuous miner operator to a roof fall hazard, and that the failure to so comply with that provision of the roof control plan was highly likely to lead to a fatal injury to the miner operator.

The operator concedes the violation of the roof control plan. It only remains to decide the "significant and substantial" issue and set a penalty for the violation.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "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 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and

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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 United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further 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, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Based on the record evidence -- including the admission by the operator of the underlying violation, I accept and credit as modified below the inspector's expert opinion and find that in the normal course of continued mining, it was at least reasonably likely that a roof fall accident would have occurred, and in that event, injuries of a reasonably serious nature or even a fatal injury, would have been reasonably likely to occur. Accordingly, I conclude that the cited violation was "significant and substantial" and serious.

The Secretary has specially assessed this citation at \$2000. I think this is plainly excessive taking into consideration all the section 110(i) criteria, particularly the fact that this is a medium-sized operator and the RB No. 3 Mine is now closed, having been sealed since July 1993. Accordingly, I am going to affirm the citation, but reduce the civil penalty to \$1000.

Inspector Dingess issued Citation No. 3829473 because he found that the roof in the No. 3 entry was not adequately supported in that draw rock had fallen out around the conventional roof bolts, resulting in a 12 foot by 20 foot area being unsupported. The inspector testified that there was draw rock laying against the rib where the continuous miner had pushed or

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cleaned it up, and that roof bolts were hanging down approximately 12 inches from the mine roof. The draw rock in this area ranged from 2 to 18 inches thick, and the mine roof was popping and cracking because they had just pulled a pillar in the area close to this one at the time of the inspector's visit.

The inspector opined that this violation was "significant and substantial" because of the presence of draw rock in the unsupported roof and the fact that miners were required to travel through this area to get to their work place. He stated that in his experience, miners had been killed by roof falls involving no more than 3 or 4 inches of draw rock while traveling in areas which had not been adequately supported.

The operator does not contest the proposed finding that Citation No. 3829473 recites a "significant and substantial" violation of the cited standard, and I accordingly find it to be such. The citation will therefore be affirmed. I further find that this citation involved circumstances where a potentially life-threatening situation existed and I therefore consider it a serious violation.

Turning once again to the civil penalty, I find the Secretary's proposed assessment of \$2500 to be excessive under all the circumstances presented in this case. This operator is a medium-sized one and this particular mine has been shut down and sealed since July 1993. Accordingly, taking into consideration all of the statutory criteria contained in section 110(i) of the Act, I find that a civil penalty of \$1600 is appropriate, reasonable, and in the public interest.

ORDER

1. Section 104(a) Citation No. 3829472 IS AFFIRMED. Respondent is directed to pay a civil penalty of \$1000 for the violation found.
2. Section 104(a) Citation No. 3829473 IS AFFIRMED. Respondent is directed to pay a civil penalty of \$1600 for the violation found.
3. Respondent is ORDERED TO PAY the above civil penalties (\$2600) within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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Distribution:

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