

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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September 5, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-1418
Petitioner	:	A.C. No. 46-08646-249741
	:	
v.	:	
	:	
ROCK N ROLL COAL COMPANY,	:	Mine: No. 3
INC.,	:	
Respondent	:	

**DECISION**

Appearances: Eve Epstein, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;

James F. Bowman, Midway, West Virginia, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against Rock N Roll Coal Company, (“Rock N Roll”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815.<sup>1</sup> The Secretary proposed a civil penalty in the amount of \$8,000.00 for one alleged violation of his mandatory safety standards.<sup>2</sup>

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<sup>1</sup> Hilda L. Solis, the Secretary of Labor when this hearing was conducted, resigned office on January 22, 2013. Thomas E. Perez is the current Secretary of Labor.

<sup>2</sup> Prior to convening the hearing, the parties reached an agreement to settle twelve of the thirteen contested citations and, subsequently, the Secretary filed a Motion For Decision and Order Approving Partial Settlement.

Although the Secretary’s Petition proposed a penalty of \$5,080.00 for Citation No. 8119766, in light of his post-hearing position that Rock N Roll’s negligence was high rather than moderate,

A hearing was held in South Charleston, West Virginia. The following issues are before me: (1) whether Rock N Roll violated 30 C.F.R. § 75.1504; (2) whether the violation was significant and substantial; and (3) whether Rock N Roll was moderately negligent in violating the standard. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citation, as modified, and assess a penalty against Rock N Roll.

## **I. Stipulations**

The parties stipulated as follows:

1. Respondent, Rock N Roll Coal Company, is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 802(d), at its mine, Mine No. 3.
2. Mine No. 3 is a mine as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of Mine No. 3 entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent's operations at Mine No. 3 are subject to the jurisdiction of the Mine Act, 30 U.S.C. § 803.
5. Respondent is subject to mandatory safety and health regulations established by the Mine Safety and Health Administration, 30 U.S.C. § 811, *et seq.*
6. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to §§ 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823. By operation of Commission Rule 5(a), all jurisdictional facts are to be deemed admitted unless specifically denied in responsive pleadings.
7. Respondent's Emergency Response Plan, which was submitted on October 9, 2009 and approved on October 27, 2009, was in effect at the time of the issuance of Citation Number 8119766.

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he is seeking an elevated penalty. Sec'y Br. at 22. *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (remanding the case to the ALJ to consider the Secretary's post-hearing request for an elevated penalty).

8. Respondent's Mine No. 3 liberates a relatively small amount of methane.

9. Danny Justice has been continuously employed as the mine foreman at the No. 3 mine since April 24, 2000. Mr. Justice supervised the emergency evacuation drills during his employment at the mine.

10. The No. 3 mine conducted approximately 60 evacuation drills since it began operation on July 29, 1997.

11. Respondent conducted mandatory evacuation drills each quarter.

12. Respondent alternated the use of the primary and secondary escapeways each quarter.

13. Facilities assisting rapid evacuations, such as lifelines, primary and alternate escapeway maintenance, communications, SCSR caches and refuse alternatives, were not cited for any violations at the time of issuance of the citation.

14. Twelve miners were working underground at the No. 3 mine at the time of issuance of the citation.

15. The proposed penalty would not have any effect on the Respondent's ability to continue its business.

16. The R-17 Assessed Violation History Report is authentic.

17. Citation Number 8119766 was properly issued and served by an Authorized Representative.

18. Citation Number 8119766 may be admitted into evidence for the purpose of establishing its issuance, not for the purpose of establishing the accuracy of any statements asserted therein.

19. MSHA's proposed assessment data sheet accurately sets forth the number of assessed penalty violations charged to Respondent for the period stated, and the number of inspection days per month for the period stated.

20. The documents entitled United States Department of Labor MSHA Laboratories, Mount Hope, West Virginia Analysis of Air Samples dated September 5, 2008 through January 7, 2011 are authentic.

Sec'y Pre-hearing Report at 1-4; Tr. 7-10.

## II. Factual Background

Rock N Roll operates Mine No. 3, an underground coal mine located in McDowell County, West Virginia. Pursuant to Section II of the Mine Improvement and Emergency Response Act of 2006 (“MINER Act”), 30 U.S.C. § 876, Rock N Roll submitted its Emergency Response Plan (“ERP” or “Plan”) to MSHA on October 9, 2009, and it was approved by MSHA on October 27, 2009. Stip. 7. Rock N Roll’s ERP contains procedures for four distinct emergency evacuation scenarios: fire, explosion, water inundation and gas inundation, in compliance with 30 C.F.R. § 75.1502. Ex. P-3.

On January 27, 2011, Tracy Calloway, an MSHA inspector for two and a half years, conducted a regular inspection of Mine No. 3. Tr. 28-29. Prior to employment at MSHA, Calloway had been a certified electrician in the mining industry for six years. Tr. 54. In preparation for inspection, Calloway reviewed Rock N Roll’s Plan and its record of emergency evacuation drills. Tr. 29. The Record of Fire Drills (“Record”), indicated that quarterly emergency evacuation drills had been conducted on May 7, August 6, and November 8, 2010. Ex. P-4.<sup>3</sup>

The Record of May 7 states that participants “called outside put fire out travel escapeway,” indicating that a fire emergency had been simulated. Ex. P-4. The Record of August 6 states “cut into old works water,” which led Calloway to conclude that water inundation had been simulated. Ex. P-4; Tr. 39. The Record of November 8 states “cut in to [*sic*] old work no water,” from which Calloway concluded that Rock N Roll had, again, simulated water inundation. Ex. P-4; Tr. 39. Calloway determined that Rock N Roll was not in compliance with section 75.1504, requiring that operators initiate emergency evacuation drills using a different scenario each quarter. Calloway had also observed that the operator had failed to specify which escapeways were traveled during the May 7, August 6, and November 8 evacuation drills, also a violation of section 75.1504, requiring that this information be recorded. Ex. P-4; Tr. 33. Therefore, Calloway cited Rock N Roll for its failure to alternate emergency evacuation drill scenarios in compliance with its ERP, and make a complete record of each drill.

## III. Findings of Fact and Conclusions of Law

Calloway issued Citation Number 8119766 pursuant to section 104(a) of the Act, alleging a “significant and substantial” violation of 30 C.F.R. § 75.1504(a) that was “reasonably likely” to cause a “fatal” injury and was a result of Rock N Roll’s “moderate” negligence.<sup>4</sup> The “Condition

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<sup>3</sup> Mine No. 3 records all emergency evacuation drills on a form entitled “Record of Fire Drills,” irrespective of the scenario simulated. Ex. P-5 at 14.

<sup>4</sup> The citation was amended by the Secretary to allege a violation of the broader standard, section 75.1504. See Order Grant. Mot. to Modify Citation of July 27, 2012. At hearing, the

or Practice” is described as follows:

The operator has simulated the same emergency scenario (water inundation) during the past two quarterly emergency evacuation drills. Also, the escapeway being traveled during the drill is not being specified in the record book.

Ex. P-2. The citation was terminated after Rock N Roll conducted an emergency evacuation drill in the primary escapeway simulating a fire, and recorded the drill.<sup>5</sup>

## 1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Rock N Roll concedes that it violated section 75.1504(d)(1) by failing to record the escapeways traveled during the quarterly emergency evacuation drills, but contests the allegation that it violated section 75.1504(b)(3) by failing to alternate the scenarios. Tr. 18-20; Resp’t Br. at 5-6.<sup>6</sup>

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Secretary specifically alleged that Rock N Roll had violated sections 75.1504(b)(3) and 75.1504(d)(1).

30 C.F.R. § 75.1504(b)(3) requires that “[e]ach quarterly evacuation training and drill shall include the following: [a] realistic escapeway drill that is initiated and conducted with a different approved scenario each quarter . . . .” 30 C.F.R. § 75.1504(d)(1) requires that “[a]t the completion of each training or drill required in this section, the operator shall certify by signature and date . . . . [t]he names of the miners participating in the training or drill. . . . [and] the content of the training or drill component completed, including the escapeway traveled and scenario used . . . .”

<sup>5</sup> Calloway instructed Rock N Roll to abate the violation by starting the rotation anew with a fire drill, then executing the other three emergency scenarios in consecutive quarterly drills. Tr. 53.

<sup>6</sup> The Secretary also suggests that Rock N Roll failed to specify the miners participating in the drills. Sec’y Br. at 5-6; Tr. 32-33. The citation, however, does not make this allegation and, in any case, it need not be addressed, inasmuch as the violation has been established based on failure to specify the escapeways.

The Secretary takes the position that Rock N Roll conducted two consecutive water inundation emergency evacuation drills on August 6 and November 8, 2010. Sec’y Br. at 7-8. He asserts that section 75.1504(b)(3) requires the operator to alternate its quarterly drills so as to simulate, in a calendar year, the four scenarios specified in its Plan. Sec’y Br. at 9. Arguing a contrary position, Rock N Roll contends that the Record, “cut in to [*sic*] old work no water,” would be interpreted by any reasonable person, familiar with the mining industry, as indicating that a gas inundation scenario had been used in the November 8 drill. Resp’t Br. at 7-8.

Inspector Calloway was the sole witness who testified at the hearing. He stated that he had concluded that the August 6 and November 8 emergency evacuation drills had simulated water inundations based on the similarity of the records. Tr. 34-35, 81-82.

Danny Justice, the mine foreman responsible for conducting evacuation drills at Mine No. 3, was deposed on January 11, 2012. He admitted that he had “used water cutting into old works two times in a row.” Ex. P-5 at 5, 9. He also acknowledged that, while he had used water inundation and fire scenarios for “years and years,” he had never conducted an emergency evacuation drill with a gas inundation or explosion scenario. Ex. P-5 at 8-10.

Justice’s deposition testimony corroborates Calloway’s assessment that the drill scenarios were the same. He establishes the violation several times by emphatically discounting ever having simulated gas inundation or an explosion to initiate an emergency evacuation drill. In advancing its position that the November 8 drill involved gas inundation, except for its representative’s bare assertion, Rock N Roll presented no witnesses or documentary evidence to support its argument, electing to let “the record [*speak*] for itself.” Tr. 15-17, 82-83, 89; Resp’t Am. Pre-hearing State. at 1-2. The record in its entirety overwhelmingly supports a conclusion that Rock N Roll used water inundation scenarios in two consecutive emergency evacuation drills, in contravention of the standard and its ERP requiring use of four different scenarios in a calendar year.<sup>7</sup> Therefore, I find that Rock N Roll violated section 75.1504(b)(3).

## **2. Significant and Substantial**

To prove that a violation is “significant and substantial” (“S&S”) under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 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. *Mathies*, 6 FMSHRC 1, 3-4; *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y*

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<sup>7</sup> Section 75.1504(b)(3)(i) requires that all four scenarios be used in a calendar year. *Emergency Mine Evacuation*, 71 Fed. Reg. 71430-01, 71440 (Dec. 8, 2006).

*of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding that violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation itself will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). When the alleged violation is of an emergency safety standard, as is the case here, a state of emergency must be presumed. *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1026-27 (D.C. Cir. 2013), *aff'g* 33 FMSHRC 2357 (Oct. 2011). Therefore, it is not the likelihood of an emergency occurring that should be evaluated, but rather the likelihood of injury upon occurrence of an emergency. *Id.*

The fact of violation has been established, and miners were unprepared to respond appropriately in the event of gas inundation or explosion emergencies. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, *i.e.*, whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

The Secretary contends that, because the miners lacked training in effective life-saving responses to gas inundation and explosion, they were simply unprepared to react properly and, therefore, subjected to the possibility of dying. Sec’y Br. at 15.

Rock N Roll argues that miners were adequately trained to evacuate the mine in the event of an emergency because it regularly conducted drills, and the evacuation routes and procedures specified in its ERP are exactly the same for all four scenarios. Resp’t Br. at 10. Therefore, it contends that this alleged violation was not likely to result in injury. Resp’t Br. at 11-12. In support of its position, Rock N Roll cites *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 595-97 (Aug. 2006), in which the Commission upheld an ALJ’s finding that the operator’s failure to conduct required fire drills was not reasonably likely to lead to unprepared miners in the event of a fire, because they had been adequately trained otherwise. In the instant case, however, miners at Mine No. 3 were never trained to respond to gas inundation or explosion emergencies and, as will be discussed, the record reflects that Rock N Roll’s fire emergency training left much to be desired.

Calloway concluded that this violation was likely to result in serious injury because lack of emergency training has been a significant factor in many mine fatalities. Tr. 51. He gave extensive credible testimony regarding the potential effect of each emergency on the mine, and the different reactions required for each situation. Tr. 41-44. In his opinion, in the event of gas inundation or explosion, miners would likely die as a result of not being task-trained to respond to those emergencies. Tr. 52. Justice, on the other hand, testified that in the event of an emergency, his only concern was evacuating the mine, and that preparing miners to respond to gas inundation and explosion was unnecessary because Mine No. 3 liberates no methane. Ex. P-5 at 9; see Stip. 8. Justice’s obvious disagreement with the scenario-specific focus of Rock N Roll’s ERP, however,

does not justify his disregard of its requirements.

Miners lacking life-saving task-training, specifically tailored to address gas inundation and explosion, would likely panic and become confused or disoriented; these conditions are likely to impede efficient evacuation, if necessary, and result in serious burn and respiratory injuries, or even death. Therefore, I find that Rock N Roll's violation of section 75.1504 is S&S.

#### **IV. Negligence**

Calloway testified that he found Rock N Roll to be moderately negligent because, although the operator should have been adhering to the requirements of section 75.1504(b)(3) and its ERP to alternate four drill scenarios, it was, at least, regularly conducting quarterly drills. Tr. 52. The Secretary, however, argues that Rock N Roll's negligence was "high" rather than "moderate," because Justice acknowledged that he was aware of the requirements of section 75.1504, but made a conscious decision to disregard them. Sec'y Br. at 20-21.

Justice acknowledged knowing that he was required to alternate between all four emergency scenarios in conducting quarterly evacuation drills and that he could have done so, but "just didn't do it." Ex. P-5 at 9. He also revealed that at the time of his deposition, nearly a year after Citation No. 8119766 had been issued, he had yet to simulate gas inundation and explosion, believing them to be a "waste of [his] time." Ex. P-5 at 9-10.

Rock N Roll's ERP requiring fire, explosion, gas inundation, and water inundation emergency drills has been in place since October 27, 2009. For more than a year prior to being cited, however, Justice had been aware that alternating the four scenarios was required, but clearly chose to disregard the Plan. Furthermore, for another year after Rock N Roll was cited for failing to satisfy the scenario rotation requirement, by Justice's own admission, he deliberately continued to simulate two scenarios only. Ex. P-5 at 9.

I find that Justice's prolonged non-compliance with section 75.1504 was willful and, because he was the foreman responsible for task-training miners in emergency-specific life-saving techniques, his negligence was high and imputable to Rock N Roll. To make matters worse, as was alluded to earlier, there is credible evidence that the fire emergency drills were lacking in quality and effectiveness, and that miners interviewed by Calloway were unable to specify their duties in response to that emergency. Tr. 53, 121.

#### **V. Penalty**

While the Secretary has proposed a civil penalty of \$8,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).



Applying the penalty criteria, I find that Rock N Roll is a medium-size operator, whose violation history is not an aggravating factor in assessing a penalty. Ex. P-1, P-7; Sec’y Br. at 22. The parties stipulated that the proposed civil penalty will not affect Rock N Roll’s ability to continue in business. Stip. 15. I find that Rock N Roll demonstrated good faith in abating the violation.

The remaining criteria involve consideration of the gravity of the violation and Rock N Roll’s negligence in committing it. It has been established that this serious violation was reasonably likely to result in fatal injuries to twelve miners, and that Rock N Roll was highly negligent in committing it. Indeed, the operator’s conduct was deliberate in failing to prepare its miners for emergencies that rank amongst the leading causes of death for underground coal miners and, respecting preparation for fire emergencies, it short-changed its workforce in the training that it did provide. Therefore, applying the civil penalty criteria, I find that a penalty of \$10,000.00 is appropriate.

**VI. Approval of Settlement**

The Secretary has filed a Motion for Decision and Order Approving Partial Settlement as to twelve of the thirteen citations. A reduction in penalty from \$8,420.00 to \$4,735.00 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8119757	\$ 745.00	\$ 300.00
8119758	\$ 1,944.00	\$ 900.00
8119762	\$ 117.00	\$ 117.00
8119763	\$ 117.00	\$ 117.00
8119764	\$ 117.00	\$ 117.00
8119765	\$ 117.00	\$ 117.00
8119767	\$ 1,304.00	\$ 100.00
8119771	\$ 392.00	\$ 300.00
8119772	\$ 117.00	\$ 117.00
8119773	\$ 392.00	\$ 300.00
8119781	\$ 2,473.00	\$ 1,850.00
8119782	\$ 585.00	\$ 400.00
TOTAL:	\$ 8,420.00	\$ 4,735.00

I have considered the representations and documentation submitted in the case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**ORDER**

**WHEREFORE**, it is **ORDERED** that the Secretary **MODIFY** Citation Number 8119766 to increase the degree of negligence to “high;” Citation No. 8119757 to reduce the level of gravity to “unlikely” and “non-significant and substantial,” and the degree of negligence to “low;” Citation No. 8119758 to reduce the level of gravity to “lost workdays or restricted duty” and “1 person affected;” Citation Nos. 8119762, 8119763, 8119764 and 8119765 to reduce the level of gravity to “permanently disabling;” Citation No. 8119767 to reduce the level of gravity to “unlikely,” “lost workdays or restricted duty” and “non-significant and substantial,” and the degree of negligence to “low;” Citation No. 8119771 to remove the “significant and substantial” designation; Citation No. 8119773 to reduce the degree of negligence to “low;” Citation No. 8119781 to reduce the level of gravity to “unlikely,” “permanently disabling” and “non-significant and substantial;” Citation No. 8119782 to reduce the level of gravity to “unlikely” and remove the “significant and substantial” designation; and that Rock N Roll **PAY** a civil penalty of \$14,735.00 within 30 days of the date of this Decision.<sup>8</sup>

/s/ Jacqueline R. Bulluck \_\_\_\_\_

Jacqueline R. Bulluck  
Administrative Law Judge

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JRB/mjc

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<sup>8</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.