**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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January 7, 2015

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION, (MSHA),<br>Petitioner,<br><br>v.<br><br>MARFORK COAL COMPANY, INC.,<br>Respondent. | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEVA 2014-269<br>A.C. No. 46-09091-336022<br><br><br><br>Mine: Horse Creek Eagle |

## DECISION

Appearances: Emily O. Roberts, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee for Petitioner;
Melissa M. Robinson, Jackson Kelly, PLLC, Charleston, West Virginia for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), against Marfork Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves two 104(a) citations, with a total proposed penalty of $7,981.00. Prior to hearing, Respondent filed a Motion to Withdraw Contest of Citation No. 7169668, in which the mine agreed to accept the citation and pay the penalty as assessed. As a result, only one citation is left for decision here. The parties presented testimony and evidence at a hearing held on November 5, 2014 in Charleston, West Virginia.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Horse Creek Eagle mine is an underground coal mine located in Raleigh County, West Virginia. The mine is owned and operated by Marfork Coal Company, Inc. Stip. 1. The parties stipulated at hearing that Marfork is a large operator, there are no issues of jurisdiction and the penalty as proposed will not hinder the mine's ability to continue in business. Stip. 2-6, 10. The mine operates three shifts per day, two of which are production shifts.

Inspector Clarence Short issued Citation No. 7169624 on April 24, 2013 pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1) at the Horse Creek Eagle mine. The citation alleges that the mine violated its approved roof control plan by failing to adequately support a 17 inch by 21 inch wide kettle bottom in #2 entry. Short determined that the condition was reasonably likely to result in an injury that was reasonably expected to be fatal, that the alleged violation was S&S, that one miner was affected, and that the level of negligence

was moderate. The Secretary has proposed a civil penalty in the amount of $5,080.00 for this alleged violation.

*The Violation*

Mine Inspector Clarence Short worked as an underground coal miner for 14 years prior to joining MSHA. He has been a mine inspector for six years, and had inspected the Horse Creek Eagle mine prior to the inspection discussed here. On April 24, 2013 Short was at the mine to conduct a regular inspection and planned to begin the inspection by looking at equipment. Rocky Sexton, an employee in the mine's safety department, accompanied Short during the inspection. Both men offered testimony at hearing that, after inspecting a forklift, the two traveled by way of the scoop road to the next destination. While doing so, Short observed a kettle bottom that, in the inspector's opinion, was not adequately supported. Short measured the kettle bottom to be 17 inches by 21 inches wide and 97 inches above the mine floor. Short and Sexton observed that a portion of the kettle bottom had fallen out, and additional support, in the form of a metal strap, had been installed across the opening. Short believed that, because the strap did not touch the kettle bottom, and was not positioned in a manner that would prevent the kettle bottom from falling completely out of the roof, the strap support was not adequate. Sexton believed that Short should have observed the kettle bottom from a different angle and that the strap was adequate under the circumstances. The citation was terminated by setting a post under the kettle bottom as additional support. Based upon his observations, Short issued Citation No. 7169624 to the mine for its alleged failure to follow the approved roof control plan.

The mine's roof control plan requires that when adverse roof conditions, such as kettle bottoms, are encountered, supplemental support must be installed to adequately support the roof. Sec'y Ex. G-6, p. 4, ¶ 4.[1] The mine routinely used straps and bolts as additional support. While Short agreed that straps can be an effective way to shore up a bad roof, he explained that, in this instance, the single strap, which was off-center, was not adequate. The strap observed by Short was 10 to 12 inches below the kettle bottom, and did not adequately cover the area to prevent the kettle bottom from falling. Short testified that he took a photograph of the strap and kettle bottom which demonstrated the location of the strap across the kettle bottom. Sec'y Ex. G-4. At hearing, Short and Sexton agreed that a portion of the kettle bottom had fallen before their arrival, most likely during the mining cycle. They further agreed that the T-35 channel strap was four feet in length, six inches wide, and was near to the center across the kettle bottom. However, Short explained that the strap was not located in a position to hold the kettle bottom when it inevitably fell. Specifically, he explained that, while the kettle bottom may hit the strap when it falls, the width of the hole will allow it to fall to the mine floor. Sexton, on the other hand, testified that the strap was close to the center, was strong, and would hold the kettle bottom when it fell. Both suggested that kettle bottoms are unpredictable, and can fall at any time.

Short has extensive experience with kettle bottoms, having seen hundreds of them in his career. He explained that a kettle bottom is a petrified tree trunk, of large size, that can fall at

[1] The cited page number corresponds to the page number of the roof control plan approved on October 14, 2010, and not the page number of the exhibit, which includes numerous supplements to the originally approved roof control plan.

any time. Moreover, it cannot be determined how far up into the roof a tree extends. The petrified stumps are dense, weigh about 140 pounds per cubic foot, do not adhere to the surrounding roof, and, once exposed, must be supported. Short has had training regarding kettle bottoms and the need for immediate and adequate support. While it is difficult to know exactly what will happen, Short explained that the kettle bottom will eventually fall and the strap, if left in the condition he observed, will not catch or hold the falling material. Sexton also testified generally about kettle bottoms and added that the kettle shape in the roof is formed by the petrified tree, which is hard and slick, and it is not unusual for only the root portion to fall out, leaving a void in the roof.

Sexton, who is currently the manager at another Marfork property, believed that the strap was installed after the initial partial fall of the petrified area. He took two photos of the area to illustrate the strap from a different angle. Marfork Exs. F, G. Sexton testified that the roof probably fell during the mining cycle and he assumed it was properly supported after it partially fell out. According to Sexton, the roof was adequately supported, it had resin bolts as required, and the strap provided additional support for this area. He explained that the plates were up against the roof and the strap across the kettle bottom met the requirements of the roof control plan.

The Dictionary of Mining defines a "kettle bottom," in pertinent part, as "[a] smooth rounded piece of rock, cylindrical in shape, which may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners . . . . The origin of the feature is the remains of the stump of a tree that has been replaced by sediments so that the original form has been rather well preserved." *Dictionary of Mining, Mineral, and Related Terms* 297 (2nd ed. 1997). The Commission and its judges have relied on the same, or similar, definitions when describing kettle bottoms and acknowledging the hazard presented by them. *IO Coal Co.*, 31 FMSHRC 1346, 1347 n. 4 (Dec. 2009); *Eagle Energy*, 23 FMSHRC 1107 (Oct. 2001); *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ) ("Kettle bottoms are typically round or spherically shaped rock formations that are not incorporated into the layered shale roof."); *Mountain Edge Mining*, 33 FMSHRC 1290, 1292 n. 2 (May 2011) (ALJ) ("'Kettlebottoms'[sic] are basically coal-encrusted petrified tree stumps."). The court finds, and the parties agree, that the area cited was a kettle bottom and was subject to the provisions of the mine's roof control plan.

In order for the Secretary to prove a violation of section 75.220(a)(1) he must, first, establish that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited violated the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987)). Here, the roof control plan, requires that kettle bottoms have additional, adequate support. There is no question that the area cited was a kettle bottom and that the roof control plan required additional support. Further, there is no dispute that there was a strap in place across the kettle bottom and the use of such a strap is one of the ways allowed by the plan to provide additional support. The difficulty comes in determining whether this particular strap, positioned as it was in this instance, provided *adequate* support for this kettle bottom. I find that the strap did not provide adequate support and, therefore, the mine failed to comply with its roof control plan and violated section 220(a)(1).

The Commission has explained that roof control plan provisions are enforceable as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) ("JWR"). When interpreting a plan provision a judge should apply the same law which governs the interpretation of regulatory standards. *Id.* (citing *Energy West,* 17 FMSHRC at 1317). Accordingly, when the language of the plan provision is clear, the provision should be enforced as written "unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Id.* (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)).

I find that the plan provision is clear. Marfork argues that the provision is not ambiguous, and that the mine may support adverse roof conditions with the type of strap used in this instance. Marfork Br. 8,10. I agree with Marfork that the plan language is unambiguous, and that straps may be used to support kettle bottoms. However, Marfork fails to account for the plan's requirement that the additional support "adequately support the roof." Sec'y Ex. G-6, p. 4, ¶ 4. "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The dictionary defines "adequate," the adjective form of the adverb at issue, as "sufficient for a specific requirement[.]" *Webster's New Collegiate Dictionary* 14 (1979). The Secretary, in his brief, does not directly address whether the language of the plan is ambiguous, and instead only advances a dictionary definition of the term "adequate." Sec'y Br. 3. He argues that the dictionary definition of the term, in the context of mine roof control, requires "support that would prevent roof material from falling on a miner. Support that would not prevent such an occurrence is inadequate." *Id.* While I agree with the Secretary's analysis, I base my analysis on the dictionary definition supplied here.

In the context of the roof control plan provision at issue, the additional support provided by the strap must be sufficient to satisfy the specific requirement of preventing roof falls. In this case, and as more fully discussed below, the cited strap, while an approved supplemental support device, was not positioned to provide adequate support. If the condition were left uncorrected, kettle bottom material would fall out of the openings on the side of the strap, or hit the strap, then fall. In either case, the support was inadequate and material would fall into an area where miners traveled.

Commission judges have found violations under similar circumstances where kettle bottoms were determined to be inadequately supported. In *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ), Judge Zielinski found that the presence of multiple unsupported, or only partially supported, kettle bottoms, ranging in size from approximately 14 to 20 inches in diameter to smaller, violated section 75.202(a). While some kettle bottoms had support, the judge found that it was not adequate because the support would not prevent the entire area from falling. Moreover, in *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ)[2], Judge Barbour

[2] While the Commission granted review of this case, it only addressed the judge's findings regarding the mine operator's alleged unwarrantable failure to comply with the standard. The

affirmed a violation of section 75.220(a)(1) where a mine operator failed to comply with a roof control plan provision that required kettle bottoms to be addressed with supplemental support in addition to the primary support already required. There, the judge credited the testimony of an experienced inspector that he saw multiple unsupported kettle bottoms. *Id.* at 865-866.

There is no dispute that the roof control plan in place at the time required additional support in the area of this kettle bottom. The mine attempted to meet the requirements of the plan by installing the strap across the area. The violation occurred, however, because this single strap was not enough to adequately support the area. I credit the testimony of Short that the strap was off-center and the remaining petrified stump would have fallen out through the area that was not strapped, or would have hit the strap and then fallen. While I agree with Marfork that its roof control plan does not require the strap to be centered, here, I credit the inspector's testimony that the position of *this* strap did not adequately support *this* particular kettle bottom. While a different "off center" strap may provide adequate support for a different kettle bottom under other circumstances, my finding in this case is based on the credible testimony of the inspector that this strap, positioned as it was, did not provide adequate support for the kettle bottom. In any event, I find that the Secretary has demonstrated that the kettle bottom was not adequately supported and a violation of the roof control plan occurred as cited.

*Gravity and S&S*

Short observed the size of the kettle bottom area, and the fact that the area was traveled regularly by various miners on equipment and on foot. He testified that, given the uncertain nature of kettle bottoms, the fact that they fell in large pieces, and the fact that the area was traveled on each shift, he believed that the violation was S&S.

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 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon 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 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> 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;

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Commission did not address the judge's findings regarding the fact of violation or the S&S nature of the violation. *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the 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., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal,* 33 FMSHRC 2357, 2365 (Oct. 2011).

Short testified that part of the kettle bottom had already fallen out, and the remainder would eventually fall. Sexton agreed that he did not know when the remainder would fall from the roof, but it could happen at any time. Sexton also agreed that there could be a very heavy tree trunk remaining in the roof and a fall of the material could strike and kill a miner. Sexton, however, believed that the strap would catch and hold any part of the kettle bottom that fell. Short, on the other hand, stated that, given the location of the single strap, the roof fall would not be stopped, leaving a large, heavy piece of roof to fall to the ground. If any person were in the area when that heavy piece of roof fell, it would most certainly cause a serious injury or death. Short testified that he relied on his experience and has observed kettle bottoms that fell and hit the floor with a great force, crushing everything under it. He explained that a roof fall could also result in severe lacerations or, given the weight of the falling material, crush and kill a miner. The area was traveled regularly, thereby exposing miners to the roof fall. The examiner was in the area daily, and the kettle bottom was near an area were rock dust and other supplies were stored. While the scoop and front end loader have canopies, miners were often on foot, particularly when loading and unloading supplies. I find that, while the supplies may not be accessed every shift, it is fair to expect daily vehicle and foot traffic in the area. I credit the testimony of Inspector Short and find that, if the kettle bottom were left in this condition, it would fall, resulting in a serious injury or death.

The mine installed a post to add adequate support to this particular area of the roof and to abate the violation. According to Sexton, the post created an obstacle to maneuver around and made it difficult for equipment traveling in the area. However, Short explained that the post was needed to sufficiently support this area of the roof.

Roof, face and rib falls are one of the leading causes of injuries and death in underground coal mines. Safety Standards for Roof, Face and Rib Support, Final Rule, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998). To combat these hazards, Congress directed that mine operators develop and follow roof control plans tailored to the roof conditions and mining system of each mine. *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The Commission, in echoing the concerns of Congress and the Secretary, has stated that the intent of the roof control provision is to provide broad protection

against roof falls, which are the leading cause of injury and death in underground coal mines. *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005).

The Commission and its judges have recognized the hazardous, S&S nature of kettle bottoms. *Eagle Energy*, 23 FMSHRC 1107 (Oct. 2001); *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ); *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ). In *Big Ridge Inc.*, 34 FMSHRC 2668, 2700 (Oct. 2012) (ALJ), the judge, in finding that the violation was S&S, cited the discrete safety hazard presented by an unsupported kettle bottom, being struck by a falling kettle bottom, and that a rock 14 to 20 inches in diameter "could easily result in broken bones or lost workdays, injuries that would be reasonably serious." *Id.* at 2701. In discussing the likelihood of an injury as it relates to the S&S analysis, the judge relied upon evidence that the kettle bottoms were in an active working section where miners were exposed to the condition. *Id.* at 2702. Further, in *IO Coal Co.*, 30 FMSHRC 847 (Aug. 2008) (ALJ), Judge Barbour upheld the Secretary's S&S designation where he found that eight miners worked and traveled in the area of the kettle bottoms. *Id* at 868.

I have found that there is a violation of a mandatory standard. I find that the violation creates a safety hazard, that of a fall of very heavy material from the roof in an area where miners work and travel. The hazard of a roof fall of this size will lead to a very serious injury, and even death. Therefore, I find the violation to be significant and substantial.

*Negligence*

Inspector Short found that the violation was the result of moderate negligence. He did so based primarily on the fact that the mine had made an attempt to correct the condition and adhere to its roof control plan. He explained that the condition most likely existed since the area was first mined, about 2-4 weeks prior to the citation. While the mine installed a strap at that time, the strap did not provide adequate support. The strap should have either been up against the kettle bottom, or better positioned to block the fall of material. The mine could have used two or more straps in this large of an area. Given the inspector's testimony, I accept his designation that the citation was the result of moderate negligence.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires that, in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion that includes a consideration of the penalty

criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In this case, the operator is large, has no unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was moderate and, given the facts discussed above, I agree. I have discussed the gravity above and I assess a penalty of $5,080.00 for Citation No. 7169624.

On October 27, 2014 Respondent filed a Motion to Withdraw Contest in which it sought to withdraw its contest of Citation No. 7169668, accept the citation as issued, and pay the originally proposed penalty of $2,901.00. The Secretary does not oppose this motion. Accordingly, Respondent's motion is **GRANTED**.

## III. ORDER

Given my findings, I assess a total penalty of $7,981.00 for both the citation addressed at hearing, Citation No. 7169624, and Citation No. 7169668, which Respondent has agreed to pay as issued. The Respondent, Marfork Coal Company, is hereby **ORDERED** to pay the Secretary of Labor the sum of $7,981.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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