FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 8, 2009

SIDNEY COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2007-217-R
	:	Order No. 6643560; 02/21/2007
v.	:	
	:	Docket No. KENT 2007-218-R
	:	Order No. 6643561; 02/21/2007
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-51
Petitioner	:	A.C. No. 15-18381-125442
v.	:	
	:	
SIDNEY COAL COMPANY, INC.,	:	
Respondent	:	Taylor Fork Energy

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Ramonda C. Lyons, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, on behalf of Sidney Coal Company, Incorporated.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Sidney Coal Company, Incorporated, and a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Sidney is liable for two significant and substantial ("S&S") violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties in the total amount of $38,000.00. A hearing was held in Pikeville, Kentucky, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Sidney committed the violations, but that they were not S&S, and impose civil penalties in the amount of $20,000.00.

On February 21, 2007, MSHA inspector Terry Phillips, Jr., conducted an inspection of Sidney's Taylor Fork Energy mine, which is located in Pike County, Kentucky. Phillips had inspected the mine previously, and was familiar with its layout and operation. One of the production operations at the mine was a "supersection," which consisted of two production sections operating side-by-side in seven entries, designated MMU 005 and MMU 006. Section 005 consisted of entries #1 through #4, and section 006 comprised entries #5 through #7. They were served by intake air traveling down the #5 entry where it was split, and traveled across the sections to the returns in entries #1 and #7. Sidney was allowed to operate a continuous miner on each of the sections. There were ten miners working in the 005/006 sections on the second shift, which started at 4:30 p.m. The foreman was Tim Thornbury.

Phillips went underground about 10:00 p.m., and rode on a track mantrip with Billy May, an electrician. Upon his arrival at the mine, Phillips had indicated that he intended to inspect the belt entry. A call was made to the underground working section to notify Thornbury that there was an MSHA inspector on the property and that he would be inspecting the belt. While en route, Phillips changed his mind and decided to inspect the 005/006 sections. When the mantrip approached a switch in the track, he told May that he wanted to go to the working sections, and they proceeded in that direction. Tr. 25. They encountered an outbound supply car, which required that the mantrip back up past the switch to allow it to pass. Tr. 29. Phillips was concerned that the delay would allow the production crew to be apprised of his impending arrival. Because he wanted to "surprise them," he got off the mantrip, and continued on foot, walking down the #4 belt entry approximately 15-20 breaks to the face. Tr. 94. When he arrived at the feeder, he observed someone doing paperwork in the #3 entry near what he thought was the power center. While he could not positively identify the individual, he believed that it was Thornbury. Tr. 30-31, 94-96; Ex.G-3.

While Phillips traveled to the working section coal was moving on the belt, and he could hear the 005 section continuous miner running. Tr. 39. However, just before he arrived at the #3 entry where the miner was located, it was shut down. Within approximately two minutes he reached the face, and found the air thick with coal dust. No line curtain had been hung and there was virtually no air movement in the entry inby the last open crosscut. The miner operator and a shuttle car operator were unrolling a new roll of line curtain, apparently preparing to hang it. When Phillips approached, one of the men said, "Too late, he's here." Tr. 33; Ex. G-3. The mine's approved Ventilation Plan required that line curtain be maintained no further than 44 feet from the face and eight feet from the discharge end of the scrubber unit mounted on the rear of the miner, and it was apparent that the face had been advanced well beyond 44 feet. He and Thornbury later measured the distance from the face to the inby edge of the last open crosscut at 75 feet. Tr. 54-55; Ex. G-1, G-4 at 8.

Phillips could hear the 006 section continuous miner cutting coal in the #6 entry. Tr. 39. He suspected that the same conditions existed there. However, in less than a minute, the miner in the #6 entry was shut down. Tr. 34. Phillips told the men in the #3 entry to remain where they were. He ran to the #6 entry, and discovered virtually the same conditions that he had found in

the 005 section. Tr. 35. The entry had been driven well over 44 feet (later measured at 69 feet), no line curtain had been hung, air movement was virtually non-existent, and coal dust was thick in the air. Miners were also in the initial stages of preparing to install line curtain.

Phillips was upset with the conditions he had found, and inquired, "Where the hell is the boss?" He proceeded back toward the #3 entry and encountered Thornbury in the last open crosscut. Phillips addressed him in an emotional state, asking, "What the hell are you doing?" Thornbury indicated that he had seen Phillips in the belt entry and had tried to get up to the faces to tell the men to get line curtain up. Tr. 49, 94-95; Ex. G-3.

Phillips and Thornbury proceeded to the #3 entry and took measurements. They determined that the distance from the outby side of the last open crosscut to the most inby row of roof bolts in the entry was 69 feet (49 feet from the inby side of the crosscut), and that the miner had cut another 26 feet into the coal seam. Phillips attempted to measure the quantity of air moving in the entry, but it was insufficient to register on his anemometer. They also took measurements in the #6 entry, and found that the entry had been advanced a total of 89 feet from the outby side of the last open crosscut, 20 feet past the last row of bolts. Thornbury, who assisted in taking the measurements, agreed that they were accurate. Tr. 172.

Phillips issued Citation No. 6643560 and Order No. 6643561, alleging that Sidney failed to follow its approved Ventilation Plan. Sidney timely contested the Citation and Order and the proposed penalties.

Citation No. 6643560

Citation No. 6643560 alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators develop and follow a Ventilation Plan approved by the MSHA District Manager.

The violation was described in the "Condition and Practice" section of the Citation as follows:

> The section foreman was not following the approved Ventilation Plan on the #2 section in that the left miner (005 MMU) was cutting coal in the #3 entry face without any ventilation controls in place. The distance from the corner to the last row of roof bolts was measured at 69 feet and the miner had already cut 26 feet for a total distance of 95' with no line curtain and no air movement. There was no air movement in this #3 face area and suspended float coal dust was easily seen in the air. Therefore foreman violated the plan by having no line curtain hung and not having sufficient air in the face. Foreman Thornbury engaged in aggravated conduct constituting more than ordinary negligence in that he allowed this miner to cut coal in the #3 face with no ventilation controls exposing his crew of men to an explosion hazard and breathing of coal dust and rock dust. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Phillips determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that ten persons were affected, and that the operator's negligence was high. The Citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A specially assessed civil penalty in the amount of $17,500.00 was proposed for this violation.

Order No. 6643561

Order No. 6643561 also alleges a violation of 30 C.F.R. § 75.370(a)(1), on virtually the same facts with respect to the #6 entry in the right side of the supersection (006 MMU). Ex. G-2. Phillips similarly determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that ten persons were affected, and that the operator's negligence was high. The Order was also issued pursuant to section 104(d)(1) of the Act. A specially assessed civil penalty in the amount of $20,500.00 was proposed for this violation.

The Violations

The alleged violations are virtually identical, and the critical facts and analysis of gravity, whether they were S&S and the result of the operator's unwarrantable failure are the same. Accordingly, they will be considered together. Sidney concedes that it violated its approved Ventilation Plan as alleged in the Citation and Order. Resp. Br. at 3. The #3 and #6 entries had previously been advanced a minimum of 49 feet each, and roof bolts had been installed. They had then been advanced another 26 and 20 feet, respectively, and no line curtain had ever been hung. As Thornbury admitted, "as soon as they started cutting, they should have had [line curtains] up." Tr. 191-92. Sidney challenges the S&S and unwarrantable failure designations.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the 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." A violation is properly designated S&S "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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> 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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to hang line curtains in conformance with the requirements of the Ventilation Plan. Phillips cited the violations as S&S because he believed that it was reasonably likely that a spark from the cutting heads of the continuous miners would ignite the suspended coal dust, causing an explosion that would, in a "worst case scenario," result in fatal injuries to all ten miners working on the sections.[1] Tr. 102. There is little question that an explosion would result in immediate fatalities to at least the miner operator, and any other miner working in the entry. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event – here, an explosion.

Phillips testified that "four sides of the pentagon for explosion" were present – oxygen, confinement, suspension and fuel – and that the only missing factor was an ignition source. Tr. 62. As to that factor, he was aware that exposure levels to dust had been reduced at the mine because of the presence of quartz or silica, an indication of the presence of sandstone, which

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[1] Phillips also mentioned that miners inhaling the dust could contract "black lung or silicosis." Tr. 80. However, no dust samples were taken that day, and that aspect of potential injury was not pursued further. Tr. 129-30. Line curtain was required only as the face was advanced beyond 44 feet. Any exposure to excessive dust attributable to the violation would have occurred for a relatively short duration, as the faces were advanced to the next break. While respiratory diseases associated with dust exposure are serious injuries, the evidence does not support a finding that the violations were reasonably likely to cause a respiratory disease.

could cause sparks when struck by a miner's cutting head. Some 10-12 inches of rock was being cut in the subject headings, and Phillips posited that a spark would supply the missing element for a disastrous explosion. Tr. 73. He did not identify any other potential ignition sources. Tr. 82.

The Commission has provided a framework for analyzing whether a fire or explosion is reasonably likely to occur.

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.,* 12 FMSHRC 965, 970-71 (May 1990) ('*UP&L*'); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

The Secretary argues that the *Enlow Fork* factors were satisfied for each violation, and relies on assertions that methane was present. She asserts that "The mine has a history of methane," and "Four of five elements for an explosion were present in this entry: oxygen, confinement, dust suspension, and fuel (coal, coal dust, and methane)." Sec'y Br. at 6. That methane is highly explosive at concentrations between 5% and 15% has been well-documented. However, the Secretary's attempt to cast the analysis in terms of a potential methane explosion finds virtually no support in the record.

Phillips testified that there was no methane in the subject entries, and he did not identify the presence of methane as a factor in his description of the explosion hazard. Tr. 62-63, 106. He also related that Sidney's continuous miners were equipped with scrubbers, whereas, those in mines that liberated appreciable quantities of methane were not, because of the potential explosion hazard presented by the scrubber motors. Tr. 56. The "history of methane" evidence was elicited by the Secretary on re-direct questioning of Phillips, where he indicated that an unspecified quantity of methane had been detected, apparently on one occasion, in bottle samples taken at two evaluation points on a longwall panel bleeder system. Tr. 136-37. Thornbury detected no methane during his preshift examination, which was conducted shortly before the alleged violations. Tr. 162; Ex. R-1. He believed that the methane detected in bottle samples taken by Phillips was the first indication of methane in the mine, and was of low concentration. Tr. 176-77. Had the evidence established the presence of any significant quantity of methane in the #3 and #6 entries, there would be little question that the violations were S&S. However, there was no methane present.

The nature of the hazard posed by coal dust suspended in air is more difficult to evaluate. It is apparent that coal dust, in general, does not pose nearly the explosion hazard that methane does. Moreover, if the dust posed such a hazard, it could be expected that there would have been a number of fires or explosions occurring in the mining process. Yet, as Phillips acknowledged,

he was aware of none. Tr. 106. Nor was Thornbury. Tr. 176. The Ventilation Plan required that line curtain be hung no more than 44 feet from the face, and eight feet from the scrubber discharge. Presumably, the ventilation air current would be drawn back out the entry after passing the end of the curtain. Consequently, the area in proximity to a miner's cutting head, where the sparks postulated by Phillips would occur, would typically be filled with coal dust. If the suspended dust posed a serious hazard, as the Secretary contends, it would seem that ignitions at the face would not be unusual occurrences. The absence of evidence of such ignitions, raises a serious question about the likelihood of coal dust being ignited by a spark.

It may be that suspended coal dust, under certain circumstances, can pose an explosion hazard comparable to that of methane. Here, however, there is no evidence of concentrations or other characteristics that would render it a serious explosion hazard, or whether such conditions existed in the area of the violations. Without more, the presence of coal dust in the entries, and the possibility that a spark would be generated by the miner's cutting head, do not establish that an injury-causing event was reasonably likely to occur.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Phillips certainly qualifies as an experienced MSHA inspector. However, I find that the Secretary has failed to carry her burden of proving that it was reasonably likely that an injury producing event would occur, as opposed to could occur. Accordingly, I find that the violations were not S&S. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur).

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each

> case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Citation was issued pursuant to section 104(d)(1) of the Act, which requires that the violation be both S&S and the result of an unwarrantable failure. 30 U.S.C. § 814(d)(1). The violations alleged in the Citation and Order have been held not to have been S&S. Consequently, it is unnecessary to decide the unwarrantable failure issue. However, it is necessary to address the issue of Sidney's negligence, which is alleged to have been high. Because the S&S findings herein may, or may not, become final, the issue of unwarrantable failure will be addressed for the sake of judicial economy.

The Secretary argues that the violations were the result of Sidney's unwarrantable failure and high negligence primarily because its agent, Thornbury, knowingly permitted the violations. Sec'y Br. at 7. Sidney contends that Thornbury did not knowingly permit the violations, because he discovered them shortly before Phillips arrived and instructed his miners to take corrective action. It also argues that the violations were not extensive, had existed for only a short period of time, were promptly abated, and it had not been put on notice that greater compliance efforts were needed. The violations were abated promptly, and their gravity was not as serious as charged. They were reasonably extensive in that they involved both of the entries on the supersection in which mining was being done. They existed for only 20 minutes or so because of Phillips' arrival. I find that, had he not traveled to the faces, they would have existed for a considerably longer period of time, most likely until the entries had been driven up to the location of the next crosscut. Sidney had not been put on notice by MSHA that additional compliance efforts were needed. However, Thornbury had previously experienced problems with the hanging of curtains in the 006 section, which should have put Sidney on notice of an increased potential for violations in that area. Tr. 181.

Judged by the traditional factors reiterated in *Lopke Quarries*, whether Sidney's negligence rose to the level of unwarrantable failure would present a close question. However, as noted therein, the involvement of an agent of the operator is an important consideration. On the facts of this case, the issue turns on foreman Thornbury's actions.

Some of the pertinent facts are not in dispute. Thornbury testified that he traveled to the #3 and #6 faces, found mining being done in violation of the Ventilation Plan, and told the miners to get line curtain up. Tr. 164. His presence at the faces immediately preceded Phillips', because the miners were shut down a minute or two before Phillips arrived. Thornbury testified that he did not know that Phillips was on the section, that he did not know that the Ventilation Plan was not being complied with until he arrived at the faces, and that he took immediate corrective action. Tr. 164. Phillips believed that Thornbury saw him as he came down the belt line, and hurried to the faces because he knew that the Ventilation Plan was not being complied with. The evidence supports Phillips' version of those events.

When Phillips arrived at the #3 face, one of the miners preparing the line curtain said, "Too late, he's here." Phillips' testimony in that regard is consistent with his field notes, and is unrebutted.[2] The statement strongly indicates that the miners were not only told to erect line curtain, but that an MSHA inspector's arrival was imminent. There is no evidence that anyone other than Thornbury went to the faces and communicated with the men. Consequently, Thornbury must have been aware of Phillips' presence on the section, and his impending discovery of Sidney's noncompliance with the Ventilation Plan. While it is possible that the statement could have been made if Thornbury had simply passed on the fact that he knew an inspector was on the property, I find it more consistent with Thornbury's having actual knowledge of Phillips' presence. Thornbury's having seen Phillips approaching is also a somewhat more likely explanation for the timing of his and Phillips' visits to the faces.[3]

Phillips testified that Thornbury told him that he saw him go past the feeder and he tried to get up to the faces to tell the men to get their curtain up. Tr. 49. Thornbury denied making that statement. Tr. 168. However, the statement was recorded by Phillips in the notes that he made contemporaneously with the inspection and issuance of the Citation and Order. Tr. 48-49; Ex. G-3. I find that Thornbury made the statement, and that he saw Phillips approaching and hurried to the section faces because he knew that the crews were not complying with the Ventilation Plan.

As noted above, supervisors, like foreman Thornbury, are agents of the operator and are held to a high standard of care. Thornbury's knowing toleration of the violations easily satisfies

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[2] Thornbury testified that he did not hear the statement. Tr. 171. However, he was not in the area at the time, having left to warn the miners in the #6 entry.

[3] Thornbury testified that he traveled to the faces after completing his preshift examination, over an hour after he had been told that an inspector was on the property.

the Secretary's burden of proving that the operator's negligence was high, and that the violations were the result of its unwarrantable failure.

The Appropriate Civil Penalties

Sidney is a medium-sized operator, with a medium-sized controlling entity. The assessment data reflects that it had 271 violations over 136 inspection days during the applicable period, a relatively high incidence of violations. Sidney does not contend that payment of the proposed penalty will affect its ability to continue in business. The violations were abated within minutes. Phillips used a "worst case scenario" in determining that ten persons would be affected by the violations. Tr. 102. His reasoning was that, in the event of an explosion, the continuous miner and shuttle car operators working in the subject entry would be killed immediately, and other personnel working on the section would become disoriented in the smoke and could eventually succumb to the conditions as their self-contained self-rescuers exhausted their capacity. However, he testified that he did not believe that an explosion would actually result in ten fatalities. Tr. 102. In the event of an explosion, it is reasonable to expect that miners in the immediate area would suffer fatal injuries. However, while others on the supersection might also be injured, it is unlikely that all ten would suffer an injury. I find that four miners were affected by each violation, two fatally, and two with injuries resulting in lost work days or restricted duty.

Citation No. 6643560 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of $17,500.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of $10,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Order No. 6643561 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of $20,500.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of $10,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation No. 6643560 and Order No. 6643561 are **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of $20,000.00, within 30 days of this decision.

Michael E. Zielinski

Senior Administrative Law Judge

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