FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

February 25, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-273
Petitioner	:	A.C. No. 15-17587-115853
	:	
v.	:	Docket No. KENT 2007-497
	:	A.C. No. 15-17587-123693
	:	
OHIO COUNTY COAL COMPANY, LLC,	:	Mine: Freedom
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melissa M. Robinson, Esq., William B. King, II, Esq., Jackson Kelly, PLLC, Charleston, West Virginia, on behalf of Ohio County Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions 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 Petitions allege that Ohio County Coal Company, LLC, is liable for six violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and propose the imposition of civil penalties in the total amount of $20,281.00. Prior to the scheduled hearing, the parties filed motions to approve settlements of Citation Nos. 8988718 and 6695143 in Docket No. KENT 2007-497. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. At the commencement of the hearing, the parties moved for approval of a settlement agreement resolving the remaining two violations in Docket No. KENT 2007-497. The proposed settlements will be approved herein. For the reasons set forth below, I find that Ohio County committed the two violations alleged in Docket No. KENT 2007-273, and impose civil penalties in the total amount of $1,800.00 for those violations.

Findings of Fact - Conclusions of Law

Ohio County operates the Freedom Mine, located in Henderson County, Kentucky. Ohio County's controlling entity is Patriot Coal Corporation. On December 12, 2006, Anthony Fazzolare, an MSHA inspector, conducted an inspection of the mine. The citations remaining at issue were issued during that inspection. Ohio County timely contested the violations and the assessed civil penalties.

Citation No. 6692136

Citation No. 6692136 alleges a violation of 30 C.F.R. § 75.342(a)(4), which requires that methane monitors be maintained in "proper operating condition and shall be calibrated with a known air-methane mixture at least once every 31 days."

The violation was described in the "Condition and Practice" section of the Citation as follows:[1]

> The machine-mounted methane monitor on the Joy Continuous Miner, Co. No. M-12, located in MMU 001-0, was not being maintained in an operable condition. When tested with a known amount of CH4 (2.5%), the monitor would only read 2.1% CH4. These monitors must read the exact amount of CH4 present while cutting coal. This is a known problem at this mine, and several meetings have been held with company officials and MSHA inspectors to discuss the problem. This is the 19th violation of this standard at this mine since 01/01/2006.

Ex. RG-1.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $5,100.00 was proposed for this violation.

The Violation

Most of the methane liberated in the process of mining coal is liberated where coal is being cut, which at the Freedom mine is the cutting head of a continuous mining machine. Continuous miners are required to have methane monitors mounted in a location "as close to the working face as practicable" and in the primary flow of air away from the cutting head. 30 C.F.R. § 75.342. They are to sound an audible warning when they detect a methane concentration of 1%, and to cut power to the miner if the concentration reaches 2%. Operators of continuous mining machines are also required to conduct methane checks with a hand-held monitor every 20 minutes. They typically carry their monitors in an exposed pouch on the chest of their coveralls. The monitors remain activated, and will provide a visual and audible warning when they encounter a methane concentration of 1%.

As noted in the citation, the Freedom mine had a history of problems maintaining calibration of methane monitors on its continuous mining machines, and had received numerous citations over the course of many months for monitors that did not provide accurate readings

[1] Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

when tested by MSHA inspectors. Eighteen of the previously issued citations were introduced into evidence. Ex. G-3. The problem was not unique to the Freedom mine. Two other mines operated by Patriot, the Dodge Hill and Highland mines, also used monitors manufactured by General Monitors, and were encountering similar problems. Safety managers at Dodge Hill had been in extended discussions with MSHA officials, including inspectors and representatives of MSHA's Directorate of Technical Support, in an effort to solve the problem.

Walter Wood became manager of maintenance at Freedom in January 2006. From past experience, he knew it was difficult to maintain calibration on machine mounted methane monitors, and implemented a policy requiring that the monitors be calibrated weekly. Around May or June, after several citations had been issued, he was aware that the calibration problems continued. He required that calibration be performed every other day. He also made adjustments to the calibration procedure over the course of several months, and consulted with MSHA inspectors, his cohorts at Dodge Hill and Highland, and with representatives of the manufacturer. Nevertheless, it proved extremely difficult to maintain calibration of the monitors, and the monitor tested by Fazzolare on December 12 was not in calibration.

Ohio County does not contest the fact of violation. It argues that the violation was not S&S and that its negligence was less than high, and requests a corresponding reduction in the assessed penalty.

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 properly maintain the methane monitor. An injury to a miner resulting from a methane ignition would most likely be reasonably serious. Therefore, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The Secretary argues that the violation was reasonably likely to result in a methane ignition causing smoke inhalation and/or burns to the continuous miner operator. Conceding that very little methane is liberated at Freedom, the Secretary nevertheless maintains that the violation was S&S because on one day in 2001 an abandoned oil well was encountered at Freedom releasing enough methane to shut power to a continuous miner, and because "all mines are capable of producing methane." Sec'y. Br. at 4-5. Charles Jones, an MSHA supervisory mine inspector, was present at the Freedom mine in 2001 when a continuous miner encountered an abandoned oil well that was not shown on the mine map. Tr. 91-93. Methane was released in sufficient quantity to cut power to the miner. The methane did not ignite and was quickly dissipated by the mine's ventilation system. Later that day, another well was struck, but it is unknown whether a significant quantity of methane was liberated. Jones also believed that there were other wildcat wells in the vicinity of the Freedom mine that would not be shown on the mine map, and that there is "no such thing as a non-gassy mine." Tr. 95-96. Fazzolare, too, believed that there were wildcat wells in the area, and that "all mines are gassy." Tr. 109, 121. Both conceded, however, that very little methane was liberated at Freedom, dangerous levels of methane had never been found, and there had not been any methane ignitions at the mine. Tr. 97-98, 121-22.

Approximately 12,000 to 13,000 cubic feet of methane was liberated at the Freedom mine in a 24-hour period. In contrast, the Dodge Hill and Highland mines liberated close to 500,000 cubic feet of methane, and were subject to 15-day spot inspections under the Act. Tr.

123. James Nichols, a safety professional at Freedom, testified that the reason that the oil wells were struck in 2001 was that an engineering firm had failed to activate a "layer" in a computer-based mine mapping program and, as a result, the wells were not depicted on the mine map at that time. Tr. 133,138. Freedom had since done extensive surveying and testing to identify abandoned wells, and he was confident that there were no wells, whether metal cased or not, that were not reflected on the mine map. Tr. 133-37.

While the cutting head of a continuous miner would present an ignition source, there would have had to have been a significant quantity of methane present to result in an explosion or fire. Methane typically is explosive in concentrations of 5%-15%. Fazzolare testified that it may ignite at a concentration as low as 3% in the presence of coal dust, and that there typically is more coal dust in mine atmospheres during winter months, because they are dryer. However, he did not identify the basis for that statement, which was not reflected in the citation or his notes. Nor did he indicate that such dust was, in fact, present in the Freedom mine. Nichols testified that the mine operates on a blowing ventilation system, which makes it less susceptible to drying during cold weather. Tr. 134. The monitor in question gave a reading of 2.1% when exposed to a 2.5% mixture. Of the previously issued monitor calibration citations, 15 of 18 were not rated as S&S. Fazzolare had issued 14 of the prior citations, only one (a reading of 1.1%) as an S&S violation, and also had rated as non-S&S a permissibility violation issued five days earlier because of the low levels of methane at the mine. Tr. 114-15; Ex. G-3. Jones who had cited three monitor calibration violations, two S&S and one non-S&S, explained that one of the S&S determinations was made because the monitor read less than 1% when exposed to the 2.5% mixture, i.e, it was essentially non-functional. Tr. 101. The other two violations were virtually identical, and were issued on March 1 and May 22, 2009. The March violation, which was issued during a winter alert period, was rated as non-S&S, and the May violation was rated as S&S. Jones did not explain why those violations were treated differently.

Considering the uniformly low levels of methane encountered at the Freedom mine, it was unlikely that a fire or explosion would result from the violation. MSHA inspectors, including Fazzolare and Jones, had reached the same conclusion on the vast majority of previously issued citations, under virtually identical circumstances. Additionally, the fact that the monitor was examined frequently, was calibrated at least every other day, and was reading only 0.4% less than the actual concentration of methane, makes it unlikely that the monitor would not have provided a warning and cut power to the miner in the unlikely event that dangerous levels of methane were encountered.

The Commission and courts have observed that an experienced MSHA inspector's opinion 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). Fazzolare certainly qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur, as opposed to could occur. *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). Accordingly, I find that the violation was not S&S, and that it was unlikely that the violation would result in a lost work days or restricted duty injury.

Negligence

The Secretary argues that Ohio County's negligence was high because it was well aware that the monitors were not maintaining calibration and did not take adequate steps to address the problem.[2] Fazzolare determined that Ohio County's negligence was high because he believed that it was not doing enough to address the calibration problem, which had been ongoing for several months, and had resulted in the issuance of numerous violations. Tr. 106-07. He originally testified that he "was aware of the steps being taken," but later acknowledged that he did not know "everything they were doing." Tr. 105, 120. He knew that calibration was required every shift at Dodge Hill and every day at Highland, and believed that Freedom was not calibrating the monitors often enough. Tr. 109. However, he acknowledged that problems persisted at Highland, that only limited improvement was realized at Dodge Hill, and that both of those mines liberated substantially more methane than Freedom. Tr. 122.

Ohio County was certainly well aware that the monitors were not maintaining calibration. Wood knew of the problem when he became maintenance manager in January of 2006. Calibration of monitors was his responsibility throughout the pertinent time period, and he was

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[2] The Secretary raised two arguments that proved to be in the nature of red herrings. She placed emphasis on the fact that Freedom did not seek to use monitors made by a different manufacturer. However, Wood testified that, in his experience, the monitor made by the only other available manufacturer was less reliable than General Monitors'. Tr. 41. The Secretary did not seek to introduce any evidence to challenge that assertion, or to demonstrate that another viable option was available. She suggested that Freedom could have petitioned for a modification of the requirement for placement of the monitors, or sought to amend its ventilation plan to move the monitors. However, she did not seek to introduce evidence to establish that relocating the monitors may have offered a solution, and Fazzolare testified that neither Highland, nor Dodge Hill, which was working with MSHA's technical support group, had proposed a petition or amendment. The Secretary did not seek to introduce evidence to establish that any permissible change in location could have improved the situation. In any event, monitors are required to be located as close as possible to the face and in the primary stream of air passing from the cutting head. Patriot's maintenance director was informed of developments at Dodge Hill, and would have been aware of any suggestion by MSHA or General Monitors, to change the location of the sensor. Obviously, none of the involved parties believed that such a change would be beneficial, because none was advanced. For the Secretary to rely on the fact that Freedom did not seek such a change is disingenuous at best. Fazzolare opined that changing the location of the monitor would not have improved the calibration problem, which was attributable to a defective cap design. The retrofit of the calibration cup eventually resolved the issue many months later.

aware of all pertinent developments with respect to monitor calibration, including the issuance of citations by MSHA. While the steps he took did not resolve the problem, it is not at all clear that they amounted to high negligence.

Freedom's response to the problem was incremental. Based on his previous experience, Wood implemented a policy in January 2006 requiring that monitors be calibrated every week, rather than every 31 days as required by the regulation. Around May or June he was aware that there were still problems, and he directed that calibrations be performed every other day. Tr. 14. Over the course of the next few months, he consulted with the chiefs of maintenance on each shift to check on the status of monitor calibrations. He implemented changes to the calibration procedure, requiring that specific personnel perform the calibrations, and that they be performed after the machines had warmed up. Efforts were made to better guard the monitors, and more comprehensive records were kept of calibration problems and performance. Tr. 30. In addition to calibration, bump tests were required to verify the accuracy of monitor readings, a procedure later required by MSHA.[3]

Wood talked to MSHA inspectors about the problems, and was advised to consult the manufacturer and his counterparts at other mines. Tr. 59. He contacted representatives of General Monitors, and implemented suggestions that they made, including cleaning and replacing the sniffer caps, modifying the sniffer caps, and checking the power sources and the resistence of the cables for the monitors. Tr. 47-48. General advised Freedom to wash the sniffer caps frequently. However, Freedom found that washing was ineffective, so the caps were replaced, rather than re-used. Wood set up a meeting at the mine with General Monitors' field service representative, to discuss the issues. Fazzolare attended, at Wood's invitation. All four continuous mining machines were checked, and Freedom's procedures were reviewed. General's representative concluded that, "everything we [Freedom] were doing was proper and right."
Tr. 47-48.

Wood was also in communication with Steve Withers, Patriot's chief maintenance director, who was responsible for three mines, Freedom, Highland and Dodge Hill. Wood was

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[3] In order to calibrate the monitor, a calibration cup is placed over the monitor's sniffer cap. Air with no methane content is passed through the monitor for 2-5 minutes. A magnet is then placed on the monitor's "read" switch, which puts it into calibration mode. Air containing 2.5% methane is then passed through the monitor. When the monitor has calibrated itself, i.e., sets its reading at 2.5% for the known mixture, the display flashes "cc," indicating that calibration is complete. This process does not indicate whether the monitor was providing accurate measurements of methane content prior to being calibrated. In order to test whether a monitor is providing accurate readings, it is subjected to a "bump test." Air with 2.5% methane content is passed through the monitor, and the monitor's display is observed over a period of time. If the monitor displays a reading between 2.3% and 2.7%, within six minutes of exposure, it is determined to be in calibration.

aware, through Withers, that Dodge Hill was working with MSHA's technical support group in attempting to resolve the calibration problems. Dodge Hill had implemented a policy of calibrating the monitors every shift, but it continued to have problems, although not as many. Tr. 122. Highland required calibration every day, which proved of little help in addressing the problem. Tr. 108, 122. Wood was aware of the progress, or lack thereof, that all parties were making on resolving what was uniformly viewed as a problem with the sniffer cap and/or calibration cup design. Withers had representatives of General visit the Freedom and Dodge Hill mines to attempt to resolve the calibration issues. Their only suggestion was to attempt to dry the monitor's sensing unit for a longer period prior to doing a bump test. Tr. 48-50. Freedom responded to that suggestion, which proved to be unavailing.

The inability of methane monitors manufactured by General Monitors to maintain calibration was an ongoing and widespread problem, for which there was no simple solution. The operators, the manufacturer and MSHA's technical support personnel were working to resolve the problem during the pertinent time period, without much success. As Fazzolare indicated, the problem was believed to be related to the design of the sniffer cap and/or calibration cup. Tr. 129. Miner operators were required to check the monitor cap after mining one place, and to change the protective cap after mining two places. Fazzolare conceded that nothing could have been done to assure that the monitors remained in calibration. Tr. 122. Almost a year after the subject citation was issued, the calibration cup was re-designed and the calibration procedure was modified to require a bump test to verify the accuracy of the calibration. MSHA issued a Program Information Bulletin in November of 2007 informing mine operators of the retrofit program.[4] Throughout the process, MSHA did not retract its approval of the General monitors.

The problem was largely resolved by a re-design of the calibration cup. Apparently, efforts to improve the design of the sniffer cap are ongoing. Tr. 51, 63. Throughout the latter part of 2006, the efforts of General, MSHA and the operators to solve the problem were unsuccessful. There is no evidence that Freedom failed to implement any measures that were suggested by those involved in the process that had proved to be effective. The only thing being done differently, was that at Dodge Hill calibrations were done every shift, with some improvement, and at Highland, calibrations were done every day, with little or no improvement. As previously noted, those were gassy mines, and both continued to have problems.

I find Ohio County's negligence with respect to the violation to have been no more than low.

Citation No. 6692140

[4] MSHA Program Information Bulletin No. P07-27, "General Monitors Model 420, 420d, S500, and S800 Machine Mounted Methane Monitoring Systems," November 2, 2007. Ex. R-3.

Citation No. 6692140 alleges a violation of 30 C.F.R. § 75.380(d)(7)(i), which requires that a "continuous directional lifeline or equivalent device" be "installed and maintained throughout the entire length of each escapeway."

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

> The operator failed to install and maintain a continuous directional lifeline or equivalent device in the primary escapeway for MMU 001-0. The closest continuous directional lifeline or equivalent device was located on the 1st West Sub Mains, more than 1,000 feet from the working unit. If a fire were to start on any of the Intake air courses, the miners attempting to evacuate the unit could easily become disoriented in the smoke and become lost in their attempt to escape the mine.

Ex. G-4.

Fazzolare determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial ("S&S"), that eleven persons were affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $8,400.00 was proposed for this violation.

The Violation

Prior to 2006, there was no federal requirement that coal mines have directional lifelines in escapeways.[5] As a result of well-publicized mine disasters in January 2006, regulations were promulgated and legislation was enacted requiring their installation in all underground coal mines. The first requirement, an Emergency Temporary Standard ("ETS"), was published by the Secretary on March 9, 2006. 71 Fed. Reg. 12251. The ETS amended 30 C.F.R. § 75.380(d) by adding sub-paragraph (7), establishing a requirement for continuous directional lifelines throughout escapeways. 30 C.F.R. § 75.380(d)(7)(i), 71 Fed. Reg. 12269. It was recognized in the ETS that mine operators would have difficulty obtaining lifelines, and other newly required equipment. It provided that "MSHA will accept as good faith evidence of compliance, purchase orders or contracts to buy lifelines or SCSRs." 71 Fed. Reg. 12258.

The MINER Act, which became effective on June 15, 2006, amended the Mine Act and addressed many of the requirements of the ETS. It included a requirement that mine operators develop emergency response plans that provided for directional lifelines in escapeways. Ohio County complied with the Act, providing in its August 2006 emergency response plan that escapeways would have lifelines. On December 8, 2006, the Secretary promulgated the

[5] Three states, Kentucky, West Virginia and Virginia, had required directional durable lifeline cords in escapeways for many years. 71 Fed. Reg. 12257 (March 9, 2006).

Emergency Mine Evacuation Final Rule ("Final Rule"). 71 Fed. Reg. 71429. The Final Rule reconciled the ETS with applicable provisions of the MINER Act, and made permanent the amendments to the regulation at issue here. Because the ETS was scheduled to lapse on December 8, the Department of Labor found good cause to waive the 60-day effective date requirement for major rules, and made the Final Rule effective on the date of publication. 71 Fed. Reg. 71450. The Final Rule provided for good faith compliance for certain specified equipment and training requirements, but, it did not include a good faith compliance provision for installation of lifelines. 71 Fed. Reg. 71431.

On May 3, 2007, MSHA published guidance to operators on compliance with the Final Rule. Emergency Mine Evacuation Final Rule Questions and Answers ("Q&A"), May 3, 2007. Ex. R-12. Question numbered 3 of the Q&A read as follows:

> Q3. When does the final rule take effect?
>
> A. The final rule was effective immediately upon publication in the Federal Register on December 8, 2006. There are specific compliance dates for certain items, such as 60 days from the date of publication to submit revised training plans. For certain equipment not addressed in the specific compliance dates, such as SCSRs, multi-gas detectors, etc., that may be in short supply and back ordered, the mine operator must have executed a purchase order to procure this equipment within 30 days of publication and must make a good-faith effort to obtain and deploy this equipment as soon as practicable.

Ex. R-12 at 1.

In response to the ETS, Ohio County had purchased and installed lifelines in its primary and secondary escapeways. Blue/white reflective lifeline was used in its primary escapeways, and green/white lifeline was used in its secondary escapeways. In mid-November 2006, Ohio County's supply of lifelines was becoming depleted. Tr. 155. On November 28, it ordered 20 units of blue/white lifeline from its supplier, United Central Industrial Supply. Tr. 156-57; Ex. R-10, R-11. Normally, United Central delivers supplies within two days of receiving an order. Tr. 156-57; Ex. R-10. However, United Central did not have the lifeline in stock. The Affidavit of Charles Fuller, manager of United Central's Madisonville, Kentucky facility, states that there was an industry-wide shortage of continuous directional lifelines in November and December of 2006. Ex. R-10. United Central ordered 20 units of blue/white lifeline from its supplier on December 7. It delivered 10 units of lifeline to Ohio County on December 12, and the remaining 10 units on December 15. Ex. R-10, R-11. Ohio County receives supplies at its warehouse, verifies the items received, stocks the material, and notifies the mine foreman or the safety department of receipt so that installation can be scheduled. Tr. 158. While the lifeline was received in the warehouse on December 12, it had not been installed at the time of the inspection, and Fazzolare issued the citation at 8:45 p.m., on December 12.

Ohio County argues that the Final Rule "provides the same good faith compliance provisions as did the ETS." Resp. Br. at 29. It relies on the May 2007 Q&A published by MSHA as evidence that the good faith compliance provision was intended to be extended to lifelines as well in the Final Rule. Since Ohio County had issued a purchase order for lifelines on November 28, it contends that it was in full compliance with the good faith provision, and cannot be found in violation of the Final Rule. The Secretary argues that lifelines were required to be installed "on or before December 8, 2006," i.e., that the Final Rule did not include a good faith compliance provision for lifelines. Sec'y. Br. at 6. The Secretary concedes that the Final Rule became effective only "a few days" before the citation was issued, but argues that Ohio County was on notice of the lifeline requirement since publication of the ETS in March, 2006. Sec'y.
Br. at 7. The Secretary objected to admission of the Q&A, noting that Ohio County could not have relied on the May 2007 publication.

MSHA's belatedly published Q&A certainly appears to announce that, at least as of May 3, 2007, the Secretary would employ a good faith compliance rule in enforcing the lifeline requirement. However, there is no such provision in the text of the Final Rule, and I am compelled to accept the Secretary's argument that the Final Rule terminated the ETS's good faith compliance rule immediately upon its publication.[6] Operators, like Ohio County, that had outstanding purchase orders for lifelines that needed to be installed, and were in full compliance with the ETS on December 7, were in violation of the Final Rule on December 8, 2006. I find that Ohio County violated the standard, as alleged.[7]

S&S

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[6] In publishing the Final Rule, the Department of Labor noted that "SCSRs and lifelines were proven technologies long available in the marketplace and already installed and used in the underground coal mining industry." 71 Fed. Reg 71448. Ohio County does not contend that enforcement of the Final Rule is barred by lack of fair notice of elimination of the good faith compliance rule, or that the Secretary's finding of good cause to waive a delay in the effective date of the Rule was ineffective.

[7] Ohio County argues that the Secretary did not prove that there was no "equivalent device" in the escapeway and, thus, cannot establish a violation. While Fazzolare could not describe an equivalent device, he correctly noted that it would have to be a "continuous directional lifeline." Tr. 147. The ETS and Final Rule cited as examples of equivalent devices "a pipe or handrail." 71 Fed. Reg 12257,71436. There is no evidence that there was anything in the escapeway that could have been considered an equivalent device, and Ohio County does not so contend. I reject Ohio County's argument on both factual and legal grounds. Ohio County was free to attempt to prove that it had installed an equivalent device that would meet the requirements of the standard. For obvious reasons, it chose not to do so.

Fazzolare determined that the violation was S&S because a miner attempting to use the primary escapeway in the event of a fire would easily become disoriented in smoke and could not tell where he was going. Tr. 145. He had issued the violation for the defective methane monitor, which he had also determined to be S&S, and he felt that that was "significant." Tr. 153. However, that violation was found to be not S&S because it was unlikely that a methane ignition would occur. The Secretary did not prove that there was any other type of fire that was reasonably likely to occur in the mine.

Moreover, even if a fire had occurred, the occurrence of a reasonably serious injury would have been unlikely. The Freedom mine operates on a blowing ventilation system, and the main intake air flow is inby in the primary escapeway, i.e., miners attempting to evacuate the mine would travel upstream in the intake air. Once they had traveled 1,000 feet, they would have encountered a proper lifeline. In the event of a fire, it was highly unlikely that there would be smoke in the primary escapeway. There were virtually no potential fire sources in the intake entry. Nichols explained that the only thing located in the intake entry was a well-insulated high voltage cable, and that rock dust was applied throughout. Tr. 179-80. Smoke generated by a fire elsewhere in the mine would not enter the escapeway, but would travel out the return. Tr. 177. Permanent stoppings separate the intake entries from other entries. Tr. 179. While Fazzolare believed that smoke could enter the escapeway if a ventilation control was not in place, e.g., a man-door had been left open, that does not seem likely. The higher air pressure in the intake would cause fresh air to flow through an open man-door into the return. It would not allow smoke-filled air to enter the escapeway.

The Secretary has not carried her burden of proving that an injury causing event was reasonably likely to have occurred as a result of the violation. I find that the violation was not S&S, and that it was unlikely that the violation would result in a permanently disabling injury.

Negligence

From the perspective of compliance with applicable standards, it is difficult to fault Ohio County for its failure to have lifeline installed in the last 1,000 feet of the primary escapeway on December 12. When its supply of lifeline was low, it placed an order with its supplier. Having issued the purchase order, it was in full compliance with the ETS. Under normal circumstances, it would have received the lifeline by November 30. Through no fault of Ohio County's, the lifeline was not received until December 12. Ohio County was in compliance with the applicable standard through December 7. On December 8, it was no longer in compliance, because the Final Rule became effective.

The Secretary points to the fact that one of the Patriot mines apparently made its own lifeline, and argues that the Freedom mine could also have done so. Tr. 168. However, there is no evidence as to the length of time it would have taken to fabricate lifeline, or whether necessary materials were available. In any event, the Final Rule was published on Thursday, December 8, 2006, and the lifeline was delivered the following Tuesday, December 12. Assuming that Ohio County was aware of the publication, I find that it was not unreasonable for

Ohio County to have relied on its procurement system, and its pending order, to secure a supply of lifeline manufactured in compliance with MSHA's requirements.

The Secretary also argues that Ohio County made estimates of how much coal it was going to mine six months in the future, and that it should have predicted how far its entries would have been advanced and how much lifeline it would have needed sufficiently in advance that it should not have exhausted its supply. The Secretary's argument has some appeal, but it fails to consider the regulatory framework. While Ohio County's claim that it had sufficient supplies of lifeline when it placed the November 28 order is open to question, by issuing the purchase order it was in full compliance with the ETS, the only applicable standard.[8] It was not obligated to assure that it never exhausted its stock of lifeline, which was in short supply. If lifeline had been readily obtainable, it would have received the lifeline within a day or two, and it most likely would have been installed before publication of the Final Rule, and the December 12 inspection. It was the Final Rule's summary elimination of the good faith compliance provision for lifelines that rendered Ohio County in violation. As previously noted, it was not unreasonable for Ohio County to have relied on its procurement system, and its pending order, to secure a supply of lifeline manufactured in compliance with MSHA's requirements.

The Secretary also cites, as evidence of negligence, that Ohio County knew that lifeline had to be installed in the escapeway before December 12, but did not assure that the lifeline delivered that day was installed prior to issuance of the citation at 8:45 p.m. Ohio County points out that there is no evidence of the time that the lifeline was delivered. There is also nothing to indicate that it was on notice to expect a delivery that day. Ohio County's procedure for handling deliveries of supplies at its warehouse was that shipments were examined to verify the material and quantity, records were updated to show that the material was in stock, and appropriate personnel were notified so that installation could be scheduled. The process appears appropriate from a business standpoint, and appears to be consistent with the Q&A guidelines later published by MSHA, wherein it is noted that mandated equipment on back order was to be deployed "as soon as practicable." Ex. R-12 at 1. The fact that Ohio County did not implement a special procedure to assure that lifeline was installed immediately upon delivery does not significantly increase the level of Ohio County's negligence.

Upon consideration of all of these factors, I find Ohio County's negligence with respect to the violation to have been no more than low.

The Appropriate Civil Penalties

[8] Nichols testified that there was sufficient lifeline in stock when the order was placed. Tr. 155. However, mining advanced approximately 70 feet per day, and it would have taken close to two weeks to have advanced 1,000 feet. Tr. 175-76. November 28, the date of the order, was 14 days prior to December 12, the date the citation was issued.

Ohio County is a large operator, with a very large controlling entity. The assessment data reflects that it averaged 1.6 violations per inspection day during the relevant period, a relatively high incidence of violations. Ohio County does not contend that payment of the proposed penalties will affect its ability to continue in business. The violations were promptly abated.

Citation No. 6692136 is affirmed. However, the gravity of the violation was less serious than alleged. It was not S&S. In addition, the operator's negligence was low. A specially assessed civil penalty of $5,100.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and informed by the Secretary's then-applicable penalty assessment regulations,
I impose a penalty in the amount of $300.00.

Citation No. 6692140 is affirmed. However, the gravity of the violation was less serious than alleged. It was not S&S. In addition, the operator's negligence was low. A civil penalty of $8,400.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and informed by the Secretary's then-applicable penalty assessment regulations, I impose a penalty in the amount of $1,500.00.

The Settlements

Through two written motions, and an oral motion made at the hearing, the parties sought approval of negotiated settlement agreements resolving the four alleged violations in Docket No. KENT 2007-497. Ohio County has agreed to withdraw its contest and pay the assessed penalties as to Citation Nos. 6692607, 6695143 and 6695144, and the parties propose that the penalty for Citation No. 9898718 be reduced from $4,500.00 to $3,000.00. I have considered the representations and evidence submitted and conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motions for approval of settlement are **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $6,281.00 for the citations that are the subject of the settlement agreements.

ORDER

Citation Nos. 6692136 and 6692140 are **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of $1,800.00 for those violations.

Respondent shall pay civil penalties in the total amount of $8,081.00 for the settled and contested violations within 30 days.

Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Julia K. Shreve, Esq., and Melissa Robinson, Esq., Jackson Kelly, PLLC, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456