

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

November 8, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2009-173
Petitioner,	:	A.C. No. 46-08993-165542
	:	
v.	:	
	:	Mine: Coalburg Number One Mine
NEWTOWN ENERGY, INC.,	:	
Respondent.	:	

**DECISION**

Appearances: Jessica R. Hughes, Esq., Office of the Regional Solicitor, Arlington, Virginia, on behalf of the Petitioner  
Christopher D. Pence, Esq., Allen Guthrie and Thomas, PLLC, Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Newtown Energy, Inc. (“Newtown”). The matter arises under sections 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”). 30 U.S.C. §§ 815(a), 820(a). In the petition, the Secretary alleges Newtown violated a mandatory safety standard requiring the roof, rib, and face of areas where persons work or travel be supported so as to protect those persons from the hazards relating to the falls of the roof, ribs, or face. The standard is set forth in Part 75, Section 202(a), Title 30, Code of Federal Regulations. 30 C.F.R. Part 75.202(a). The Secretary alleges that the company violated the standard on October 30<sup>th</sup>, 2007 when the roof of a travel way used to examine an unsealed and worked out area was not supported so as to protect persons from roof falls. She further alleges that the violation was a significant and substantial contribution to a mine safety hazard (“S&S”), that the violation was due to the company’s high negligence, and because of the violation, one miner was reasonably likely to be fatally injured. She proposes an assessment of \$12,900 for the alleged violation.

Following the issuance of the citation, the company contested the validity of the citation and the proposed assessment. After the Secretary’s penalty petition was filed, Newtown answered, denying the Secretary’s allegations, and in particular challenging the S&S finding and the negligence assertion of the inspector.

The matter was assigned to me, and I issued an Order directing Counsels to confer to determine whether they could settle the case. When the parties, following diligent efforts, advised me that they were unable to agree to a settlement, I scheduled the case to be heard in Charleston, West Virginia. At the hearing, the parties presented testimonial and documentary evidence regarding the alleged violation. Also at the hearing, the parties presented stipulations and offered them as a joint exhibit. Tr. 14-15.

### STIPULATIONS

The stipulations are as follows:

1. This case involves one underground bituminous coal mine known as Coalburg No. 1 Mine, which is owned and operated by Newtown.
2. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1997 (“the Act”).
3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.
4. Newtown is an “operator” as defined in § 3(d) of the Act, 30 U.S.C. § 803(d), at the coal mine at which the citation at issue in this proceeding was issued.
5. The parties stipulate to the authenticity of the examination reports and inspector’s notes, but not to the relevance or truth of the matters asserted therein.
6. Newtown’s operations affect interstate commerce.
7. True copies of each citation at issue in this proceeding were served on Newtown or its agent as required by the Mine Act.
8. The citation contained in Exhibit A attached to the Secretary’s petition [is an] authentic [copy] of the citation that is at issue in this proceeding with all appropriate modifications or abatements, if any.
9. The individual whose signature appears in Block 22 of the [citation] . . . was acting in [his] official capacity and as an authorized representative of the Secretary of Labor when the [citation was] issued.
10. The proposed penalty will not affect Newtown’s ability to remain in business.
11. Newtown demonstrated good faith in abating the cited conditions.

12. The Violator Data Sheet contained in Exhibit A attached to the Secretary's petition accurately sets forth:

[A.] The size of Newtown, in production tons or hours worked per year,

[B.] The size in production tons or hours worked per year, of the coal or other mine at which the citation . . . at issue in this proceeding [was] issued,

[C.] The total number of assessed violations for the twenty-four (24) months preceding the month of the referenced citation . . . , and

[D.] The total number of inspection days for the twenty-four (24) months preceding the month of the referenced citation[.]

Jnt. Exh. 1.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
7276088	10/30/07	75.202(a)	\$12,900

The citation states in part:

The travelway being used to examine the first left panel unsealed worked-out areas was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, or ribs [,] and coal or rock bursts. Numerous locations have rock fallen away from permanent roof supports that have made the bolts not effective at spads 2726 (34 bolts), 2767 (40 bolts), 2585 (4 bolts), and 2948 (5 bolts).

The operator endangered the areas off to travel.

Gov't. Exh. 3.

In pertinent part, section 75.202(a) requires "[t]he roof . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards relating to falls of the roof."

Following the conclusion of the testimony, the submission of the evidence, and counsel's closing arguments, I delivered an oral bench decision. Pertinent parts of the decision follow. Editorial changes have been made for clarity's sake.

I stated:

The fundamental issue in this case is whether the company violated section 75.202(a), and I find that it did. The Commission has made clear that to prove a

violation of a standard, the Secretary must establish the operator acted other than in a way a reasonably prudent person would under the circumstances . . . I am persuaded that here a reasonably prudent operator would not have acted as Newtown did. I accept [the mine inspector's] description of the roof conditions[.] The inspector was forthright and he was credible. I have no doubt the conditions existed as he indicated on [the] citation and in his testimony. And this includes . . . [places] where the roof had fallen two to three feet above the roof bolt plates.

That the conditions found by the inspector were hazardous . . . is patently obvious . . . . The entire entry . . . itself was made hazardous by the defective bolts, especially where two feet to three feet of the roof was missing . . . . Further, the standard requires that miners work or travel in the affected area, and clearly this was the case. All of the witnesses agree that although [active] . . . mining had ceased on the first level panel, the second area was subject to a weekly examination. Thus, as Inspector Nelson found, one person, the weekly examiner, was subjected to the hazards inherent in the inadequately supported roof.

[T]he company recognized how hazardous it was for the examiner by using two senior management persons, Mr. Asebes and Mr. Harper, to conduct the examinations . . . . The fact that they could avoid traveling under the damaged bolts by staying to the right of the entry does not defeat the violation, because the evidence establishes that . . . roof sloughage . . . compromised the safety of the roof in the . . . crosscuts and across the entire entry. The evidence [also] establishe[s] that both Mr. Asebes and Mr. Harper, [the two senior management persons], walked the route traveled by [the mine inspector]. I [therefore find] that [the two senior management persons] . . . traveled under inadequately supported roof in violation of the standard.

I . . . [further] find the violation was significant and substantial. First, there was a violation of [the] standard. Second, the violation created a discrete safety hazard, the . . . danger that the cited areas of the roof would fall on the weekly examiner. Third, the hazard was reasonably likely to come to fruition. I must view the violation not only in terms of when it was cited, but also in terms of ongoing mining . . . . It is clear Newtown was awaiting the agency's approval to seal the first left panel. It had no apparent plans to move the evaluation point. [The] plans did not materialize until after the violation was cited. Thus, in terms of continuing mining, I find that . . . the weekly examinations would have brought the examiner under a seriously compromised roof. Making the situation even more dangerous is the fact that all of the witnesses agree and I find that roof conditions were deteriorating as time went on, a situation that subjected the examiner to an increasingly greater hazard. [T]he inspector rightly noted that the hazard could reasonably be expected to result in a fatal injury. Roof falls continue to be leading causes of death in the nation's underground coal mines.

The violation also was very serious. I evaluate its gravity not in terms of [if the hazard] was reasonably likely, but in terms of what [could have] happened if . . . [a roof fall] . . . occurred. And a roof fall under these circumstances [easily] could have seriously injured or killed an examiner. [S]o[,] with regard to the violation, its [S&S] nature and its gravity, I affirm the inspector in all respects.

However, I take issue with [the inspector's] negligence finding. It is clear to me that the company was caught in an unfortunate situation that was not entirely of its . . . making. Newtown was trying to get permission to seal the first left panel in the wake of two major disasters [at other mines] involving . . . seals. MSHA's resulting consideration of regulatory changes to . . . the standard involving seals and the agency[']s . . . [desire] to "get it right," led to delays in approvals to seal areas. The company had the misfortune of getting caught in [such a] delay. I credit Mr. Hartsog's testimony that he was genuinely surprised . . . how long it was taking to get the seals approved. [T]his [together] with the fact that . . . it would have been extremely impractical for the company to . . . [rehabilitate the roof, and] . . . testimony regarding the laborious nature of such work emphasized why the company did not seriously consider [that] option.

Rather, than try to change the evaluation point, the company waited for MSHA's approval to seal the area, and it coupled this with sending only highly experienced miners to conduct the weekly examination. It changed its examination procedure because it recognized the hazard. It used its judgment to address the danger.

As it turned out, the company's choice of a remedy did not meet the standard of care required, but given the situation in which [the company] found itself, . . . [its approach] was not . . . illogical[.] I conclude that the company's lack of care was more moderate than high, and I will modify the citation to reflect this conclusion. In [reaching] this conclusion, I . . . accept as entirely factual [the company's counsel's] observation that absolutely nothing in the record supports finding that the company's approach to the situation was financially motivated. Tr. 232-238.

### **CIVIL PENALTY ASSESSMENT**

Having found the alleged violation exists, I must assess a civil penalty taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). I must consider the very serious nature of the violation, the company's moderate negligence, its good faith abatement, its size, as stipulated by the parties, and the fact that the penalty [will not] affect its ability to continue in business. I also will be especially mindful of the small applicable history of prior violations, which may well reflect [the MSHA inspector's] observation that management at the mine was good and cared about compliance. [Tr. 71.]

I stated at the hearing:

Given all of the civil penalty criteria, I assess the civil penalty at \$6,000[.]  
Tr. 239.

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**ORDER**

Within 40 days of the date of this decision, the Secretary **IS ORDERED** to modify Citation No. 7276088 by reducing the negligence level from high to moderate. In addition, Newtown **IS ORDERED** to pay civil penalties totaling \$6,000 in satisfaction of the violation in question. Upon modification of the citation and payment of the penalty, this proceeding **IS DISMISSED**.

David F. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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