FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 3, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 93-110 A. C. No. 15-06388-03605
v.	:	
	:	Congress Mine
GIVENS COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
R. Jackson Rose, Esq., Harrogate, Tennessee, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of $28,700 for four alleged violations of the mandatory safety standards in Part 75 of the regulations, 30 C.F.R. Part 75.

Two of the citations concern the March 22, 1991, fatality of Michael Keck as a result of a roof fall accident, and the respondent's rescue efforts that occurred immediately thereafter. The remaining two citations were issued as a result of the Mine Safety and Health Administration's (MSHA's) accident investigation, although the cited violations were not contributing factors in the fatality.

This case was stayed pending the resolution of a related civil suit. The stay was lifted on May 10, 1996, and this case was heard on the merits on July 30, 1996, in Pineville, Kentucky. The parties' post-hearing Proposed Findings of Fact and Conclusions of Law have been considered in the disposition of this matter.

At the hearing the parties stipulated that Givens Coal Company, Inc., was a medium size mine operator in March 1991, and, as such, is subject to the jurisdiction of the Act. In

addition, the stipulations and testimony reflect the respondent last operated a coal mine in May 1996, and that it is not currently operating any coal mine, although it anticipates reentering the coal mining business. (Gov. Ex. 1; Tr. 130-31). Givens Coal Company is a family owned corporation. The corporate stock is owned by George Givens[1] and his wife. Givens has been a coal operator since 1964.

For the reasons discussed below, the subject citations are affirmed. The respondent is directed to pay a total civil penalty of the $1,656 in satisfaction of the four citations in issue.

Background

The Congress Coal Mine is located three miles south of Middlesboro, Kentucky on Route 74. The Congress Mine was closed in December 1993. The approved roof control plan provided for entries and crosscuts with a maximum width of 20 feet. The entries and crosscuts were developed with a minimum separation of 60 feet on center. The average height of the entries was 42 inches. Overhead support was provided by mechanically anchored bolts, 30 inches on center, fully grouted rods, 36 inches on center, or tensioned rebar bolts, 36 inches on center.

The Congress Mine extraction process was accomplished with two continuous mining machines that operated one shift per day, five days per week. The coal was transported from the faces by shuttle cars to the beltline where it was conveyed to the surface. Roof supports were installed by roof bolting machines, equipped with ATRS systems.[2] The roof bolting machines were 30 inches in height and could be trammed with approximately 12 inches clearance from the roof above.

The Friday, March 22, 1991, shift began at 7:00 a.m. and was

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[1] George Givens' cousin, Mark Givens, was an employee of Givens Coal Company, Inc., who participated in the rescue efforts. Mark Givens did not testify in this matter. George Givens testified on behalf of the respondent. All references to "Givens" in this decision pertain to George Givens.

[2] An ATRS on a roof bolting machine is an automated temporary roof support system that uses structural steel to provide initial support in order to protect the bolting machine operator. ATRS support can only extend 4 feet inby the last row of roof supports. Use of this system would not have prevented Keck's accident. (Tr. 67-68).

scheduled to end at 3:00 p.m. The No. 3 section crew entered the mine under the supervision of section foreman Ronnie Partin. Shortly after the start of the shift, mine superintendent Tommy Violet assigned Partin to supervise operations in the No. 1 section. Production in the No. 3 section continued under the general supervision of Violet. Violet relied on scoop operator Charles Phelps, who had his foreman's papers, to act as the section foreman in Partin's absence.

Michael Keck and Mark Matteson were the No. 3 section roof bolting machine operators. Keck and Matteson alternately supported the face areas following the continuous miner across the section. The roof bolting machine materials were supplied to Keck and Matteson by Phelps via the scoop.

The respondent had an "inby is out" policy that miners caught under unsupported roof were subject to immediate dismissal. Red reflective warning tags were routinely hung on the last row of roof supports. Warning decals supplied by MSHA were placed on equipment, glue boxes and at various locations throughout the mine. MSHA's post-accident investigation revealed no deficiencies in the respondent's training program or disciplinary policy.

Keck was last seen by Violet the morning of the accident. Phelps last saw Keck at approximately 1:00 p.m. when Phelps used the scoop to load Keck's roof bolter with bolting materials. Keck was last seen alive by another miner at approximately 2:15 p.m.

It was normal operating procedure late in the Friday shift to secure the working areas and remove equipment from the face in preparation for the weekend. At approximately 2:45 p.m., Violet went across the section on a buggy and met Matteson in an adjacent entry. Matteson retreated from the face by tramming his roof bolting machine to the No. 7 right crosscut. Violet looked down the crosscut and noticed that Keck had not moved his roof bolting machine from the face into the crosscut for the weekend.

Violet and Matteson traveled in the buggy to the next break to check on Keck. They observed Keck's bolting machine crossways in the entry with the lights on. Matteson exited the buggy and approached the bolting machine. Matteson hollered to Violet that Keck was inby roof supports under rock. It was ultimately determined that Keck was approximately seven feet inby the roof supports under a rock the size of a car's hood. Violet testified that he sounded the roof inby the supports with a piece of steel from the roof bolting machine. After sounding the roof Violet

concluded, “what was going to fall had fell (sic).” (Tr. 142).

Violet and Matteson proceeded several feet inby into the unsupported roof area. They determined Keck was not conscious. Violet and Matteson tried to free Keck but they could not move the rock. Violet sent Matteson for help. While Matteson was gone, Violet moved the roof bolter out of the way because it was blocking the entry. Matteson returned with crew members Rodney Harrell, a continuous miner operator who testified for the Secretary, Mark Givens, Larry Poore and Grant Wilson. They attempted to lift the rock, but to no avail. Violet sent someone back for a jack that was located at the power center, approximately 250 feet from the accident site. They jacked up the rock and removed Keck.

Violet administered CPR but did not get a response. Violet placed Keck on the buggy and continued CPR until Keck was transferred to ambulance personnel at the surface. Keck was taken to the Middlesboro Appalachian Regional Hospital where he was pronounced dead at 4:02 p.m.

Preliminary Findings of Fact

Ronald Russell, then MSHA acting field office supervisor, arrived at the Congress Mine at approximately 4:30 p.m., shortly after Keck was removed from the scene. Russell seized the mine shift examination books and issued an Order pursuant to 103(k) of the Act, 30 U.S.C. § 813(k), requiring the cessation of production pending completion of an accident investigation.

MSHA investigators James W. Poynter and Daniel Johnson arrived at the mine on Monday, March 25, 1991. The investigators observed the scene of the accident which had not been disturbed. Through measurements, they determined the accident occurred approximately 7 feet inby the last row of roof supports in an entry 42 inches in height. The size of the rock that caused the fatality was 5'6" wide by 7'6" long. The thickness of the rock varied and it had a feather edge (approximately 10 inches thick) at one end. The roof in the accident area was scaled, somewhat broken, and appeared to be composed of unconsolidated shale. Poynter observed a piece of roof material with a lifting jack under one side and three crib locks positioned under the rock inby the roof jack. Poynter also observed a slate bar and some blood evidence.

Keck was found under the draw rock with his slate bar under

him.[3] Given Keck's position and his proximity to the slate bar, it appeared that Keck was fatally injured when he tried to remove hanging draw rock that may have interfered with the 12 inch clearance between the roof bolter and the roof.

As a consequence of his investigation Poynter issued imminent danger Order No. 3824102[4] and two citations for violations of the mandatory safety standard in 75.202(b), 30 C.F.R. § 75.202(b). This mandatory standard prohibits persons from traveling or working under unsupported roof. The first citation, Citation No. 3824103, was issued for Keck's exposure to unsupported roof. The second citation, Citation No. 3824104, was issued as a consequence of the recovery efforts that also occurred under unsupported roof.

As a result of their investigation, Johnson also issued two citations that were unrelated to the fatal accident. Johnson issued Citation No. 3837521 for the respondent's alleged failure to conduct an on-shift examination on the accident day in apparent violation of section 75.304,[5] 30 C.F.R. § 75.304. Johnson also issued 104(d)(1) Citation No. 3837522, charging the respondent with a high degree of negligence constituting an unwarrantable failure, after he determined that methane tests were not being performed at 20 minute intervals as required by section 75.307,[6] 30 C.F.R. § 75.307.

Inspector Richard Gibson, an inactive MSHA employee who is currently on disability, testified on behalf of the respondent. On April 3, 1991, Gibson terminated the unsupported roof citations and the citation concerning on-shift examinations. Gibson did not participate in the March 25, 1991, accident

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[3] A slate bar is a steel bar approximately 48 to 60 inches in length. It is used to remove loose roof material.

[4] At trial the Secretary moved to dismiss imminent danger Order No. 3824102 because no miners were exposed to unsupported roof at the time the order was issued. The Secretary's motion was granted and the subject order has been vacated in this decision.

[5] The pertinent provisions of section 75.304 are now contained in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1).

[6] The pertinent provisions of section 75.307 are now contained in section 75.362(d)(1)(ii), 30 C.F.R. § 75.362(d)(1)(ii).

investigation. His testimony evidenced a lack of knowledge with respect to the extent of the respondent's efforts to make the requisite on-shift or methane examinations on March 22, 1991.

Citation No. 3824103 -- The Victim Under Unsupported Roof

It is undisputed that Keck violated the respondent's policy that prohibited personnel from traveling inby under unsupported roof. The respondent asserts, in essence, that it should not be held responsible for Keck's actions because Keck disregarded basic safety procedures as well as company policy.

Resolution of the unsupported roof citations requires the application of three distinct concepts that are essential in determining the extent of an operator's liability for violations of mandatory safety standards caused by the negligent acts of its employees or management personnel. These concepts are strict liability, negligence and imputed negligence.

With respect to the misconduct of Keck as a defense to liability, the Commission and the Courts have consistently held that operators are strictly liable for the misconduct of their employees, even when such conduct involves violations of mandatory standards created by employee sabotage. Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112 (July 1995).

In Fort Scott, the Commission stated:

> It is well established that operators are liable without regard to fault for violations of the Mine Act. E.g., Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982) Allied Products Co. v. FMSHRC, 666 F.2d 890-94 (5th Cir. 1982); Western Fuels-Utah, Inc., 10 FMSHRC 256, 260-61 (March 1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989); Asarco, Inc., 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in Allied Products, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation ...; the operator is liable." Id. at 894. Similarly, in Ideal Cement Co., 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the

> liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." See also Mar-Land Industrial Contractor, Inc., 14 FMSHRC 754, 757-58 (May 1992). Id. at 1115.

Thus, employee misconduct does not preclude operator liability. However, for penalty purposes, it is relevant to consider whether the operator's own negligence contributed to the empoyee misconduct. In this regard, the Commission has stated:

> The operator's fault or lack thereof is also a factor to be considered in assessing a civil penalty. Asarco, Inc., 8 FMSHRC at 1636. The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982). Rather, the operator's supervision, training, and disciplining of those miners is relevant. Id.; Western Fuels-Utah, Inc., 10 FMSHRC at 261. Id. at 1116.

As threshold matters, the respondent concedes that Keck's fatality occurred because he traveled under unsupported roof. Thus, the fact of occurrence of the section 75.202(b) violation cited in Citation No. 3824103 and the significant and substantial (S&S) nature of this violation are self evident. Therefore, as noted above, the respondent is strictly liable for this violation.

With respect to determining the appropriate civil penalty to be imposed, the Secretary concedes that Keck was a rank-and-file employee with no management responsibilities. Thus, Keck's reckless conduct is not imputable to the respondent for negligence purposes. However, the inquiry does not end here. The respondent is subject to a significant civil penalty if its supervision, training, or disciplinary policies contributed to Keck's misconduct.

With respect to the first element of supervision, although Violet last saw Keck in the early morning on March 22, 1991, Keck was observed by Phelps, the acting section foreman, throughout the day. There is no evidence of any history of actions by Keck with respect to the company's "inby is out" policy that would have alerted management that Keck required extraordinary supervisor scrutiny. Employees cannot be under the watchful eye of management at all times. The fact that the respondent was unaware that Keck had gone under unsupported roof does not,

alone, provide a basis for concluding he was inadequately supervised. The Secretary admits that Keck was not directed by management to go under unsupported roof. The uncontroverted testimony of Harrell, Phelps, Violet and Givens reflects that Keck's actions violated company policy and training directives. Thus, there is no probative evidence that Keck was inadequately supervised.

Turning to the second element concerning training, as noted above, a post-accident investigation of the respondent's training program, performed by MSHA investigator Ronnie Deaton, revealed no training violations or other deficiencies. The respondent's testimony that miners were frequently cautioned that "inby is out" was uncontradicted and corroborated by former employee Steve Harrell, a witness called by the Secretary. There was also unrefuted testimony that there were warning signs posted throughout the mine cautioning miners about the dangers of unsupported roof. Consequently, there is no evidence that Keck's misconduct was attributable to a lack of training.

Addressing the final element concerning discipline, there is no evidence that the respondent lacked a relevant disciplinary policy, or, that its disciplinary policy was ineffective. While the testimony of Violet and Givens that miners caught under unsupported roof were subject to immediate termination was self-serving, their statements were confirmed by Harrell. (Tr. 27-28). Moreover, there is no evidence that MSHA investigator Deaton found the respondent's discipline policy lacking. Accordingly, there is nothing to reflect that Keck's accident was a consequence of inadequate discipline.

Thus, the Secretary has failed to establish the respondent's supervision, training, or discipline, materially contributed to Keck's violative conduct. In reaching this conclusion it is helpful to compare this case to Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982), where the Commission found a supervisor's negligent acts were responsible for a fatal roof fall accident. In Southern Ohio, the foreman left an area after directing the decedent to remove an inby row of temporary roof supports so that equipment could be brought in to remove coal. Id. at 1460. By contrast, Keck traveled inby roof supports against the advice, and without the knowledge, of management.

An operator cannot guarantee that an employee will always follow safety instructions. While, in hindsight, more frequent supervisory contact with Keck on the day of the accident may have been warranted, it is doubtful that such contact would have prevented this accident. To the extent that the respondent's

supervisory efforts were negligent, if at all, it was for failing to observe Keck immediately prior to his entry under unsupported roof. Such negligence is relatively low and warrants a civil penalty amount similar to that which should be imposed under strict liability.[7]

The Secretary, however, proposes a civil penalty of $9,500.00 for Keck's March 22, 1991, violation of section 75.202(b) based, in substantial part, on allegations that the respondent was moderately negligent. The moderate negligence charged in the citation was reduced from high negligence after the Secretary determined the company prohibited Keck's action. As noted above, as an employee, Keck's reckless conduct is not imputable to the respondent for penalty purposes. With respect to the respondent's actions, the Secretary's own post-accident investigation failed to reveal deficiencies in the respondent's supervision, training or discipline. Thus, this record, at best, demonstrates low negligence, rather than the moderate degree of negligence advanced by the Secretary.

With due regard to the serious gravity of this violation, I conclude the absence of more than low negligence by the respondent, and, the respondent's moderate operator size, are significant mitigating factors. Accordingly, a civil penalty of $500.00 is assessed for the violation of section 75.202(b) cited in Citation No. 3824103.

[7] Poynter's analysis of the degree of the respondent's responsibility was consistent with the doctrine of strict liability. Poynter stated that an "operator has a strict importance to instruct its employees and have knowledge of their working practices," and that a supervisor is "responsible for all actions of [his] employees." (Tr. 57, 73-77).

Citation No. 3824104 -- The Rescuers Under Unsupported Roof

Citation No. 3824104 was issued by Poynter for the recovery team's violation of section 75.202(b) in that they attempted to rescue Keck without first installing temporary roof supports. As previously discussed, it is undisputed that six individuals risked their lives by going under unsupported roof in an effort to save Keck. Consequently, the fact of occurrence of the cited violation and its S&S nature are beyond dispute. Given the strict liability regardless of fault imposed on operators for violations of mandatory safety standards, the respondent is liable for the cited violation. The extent of the respondent's liability, as manifest by the amount of civil penalty, is, in significant part, dependent on the degree of negligence to be imputed from Violet to the respondent.

The Secretary proposes a civil penalty of $12,000 for Citation No. 3824104. The amount of the proposed penalty is based on the respondent's allegedly high negligence and the fact that the violation exposed six individuals to the hazard of unsupported roof. To support the high negligence allegedly attributable to Violet, Poynter explained that upon initially finding Keck, Violet and Matteson acted on impulse as a consequence of their anxiety. Thus, Poynter, in essence, considered Violet's initial behavior to be excusable. Poynter further opined that after Violet and Matteson were unable to lift the rock, Violet should have assessed the risk and reflected in order to avoid exposing others to danger.

Thus, Poynter concluded Violet's instructions to Matteson to get additional help, before installing temporary roof supports, removed any mitigating factors with respect to the degree of Violet's negligence. (Tr. 83-84). Consequently, Violet's behavior was deemed to be highly negligent. Poynter testified that, in issuing the citation, he relied on information provided to him by Harrell who was called upon to assist in the rescue.

In analyzing the degree of Violet's negligence, several factors must be considered. At the outset, while it is clear Violet was desperately seeking additional help, it is not so clear Violet actually ordered his subordinates under unsupported roof. In raising this question, I am not unmindful of the not so subtle pressure of a supervisor's request, under normal circumstances, for the services of a "volunteer." However, these were not normal circumstances. Under these exigent conditions, it is understandable that a miner would voluntarily disregard danger in an effort to save the life of a fellow worker.

The conclusion that Violet did not direct others to go inby is not mere speculation. Harrell, who was called by the Secretary, testified that he was running a continuous miner when he was informed by Matteson about the accident. Harrell stated he immediately "went over there" and "tried to lift the rock off [Keck]" with everybody else. (Tr. 25-26). Harrell indicated, upon arriving at the accident scene, he did not know the extent of Keck's injuries although he could see Keck's waist was crushed. (Tr. 30-31). Harrell acted spontaneously and he stated no one directed him to go under unsupported roof. Harrell recalled:

> [we] just saw him under the rock and everybody just went over. We just looked up and made sure nothing was hanging, just went and got the rock -- tried to get the rock off of him. We thought he was alive. (Tr.31).

Consistent with Harrell's testimony, Violet testified:

> Everybody reacted. Okay. It was just a response. A man covered up, you know, they was going to help. There wasn't nobody directing nobody to come out there and do that. (Tr. 145).

Violet was asked if, in hindsight, he thought it was a good idea to go under unsupported roof. Violet responded without hesitation, "I'd do it again. To help somebody out, yeah." (Tr. 166).

Thus, the evidence does not adequately demonstrate that Violet directed subordinates to go under unsupported roof. Violet's own negligence in exposing himself to danger cannot be imputed to the respondent. See Nacco Mining Co., 3 FMSHRC 848, 849-50 (April 1981). Consequently, there is no negligence to be imputed to the respondent.

Assuming, *arguendo*, the evidence does support the Secretary's contention that Violet's actions were responsible for exposing the five other rescuers to the hazards of unsupported roof, Table VIII in section 100.3(d) of the Secretary's civil penalty criteria, 30 C.F.R. § 100.3(d), provides "considerable mitigating circumstances" as a guideline for a finding of "low negligence." Poynter testified it is essential to administer emergency first aid as quickly as possible, stating that any delay cuts into what rescuers refer to as the "golden hour." (Tr.47). Violet testified that it would have taken 30 minutes to cut and install roof timbers prior to rescue efforts. Johnson testified it would take approximately 15

minutes to install temporary timbers. However, Johnson's estimation did not appear to include the time required for transporting timbers to the accident site. Regardless of the time required to install supports, installation of temporary supports in a roof fall accident is problematical. While surrounding areas can be supported, it is difficult, if not impossible, to support roof directly over a victim, as it would require setting temporary supports on the debris sought to be removed. (Tr. 200-01, 263-66).

In the final analysis, while the facts support a finding of liability as a matter of law, there are "considerable mitigating circumstances" as a matter of equity. The propriety of Violet's actions must not be judged retrospectively. Rather, his behavior must be evaluated based upon his reasonable beliefs at the time of the accident -- that the roof conditions were stable, that Keck was alive, and, that further delay might result in Keck's death. Thus, on balance, Violet's actions, when viewed in a light most favorable to the Secretary, evidences no more than very low negligence even if Violet directed others to go inby roof supports. Thus, only a very low degree of negligence may be imputed to the respondent for penalty purposes.

In conclusion, because of compelling mitigation, a civil penalty of $6.00 shall be imposed for the section 75.202(b) violation cited in Citation No. 3824104. Despite this *de minimus* penalty, I wish to note that I share Inspector Poynter's concern that all reasonable precautions must be taken to ensure that rescuers do not suffer the same fate as the victim of a roof fall. However, there is an inadequate basis for imposing a significant civil penalty for the rescue efforts in this case under these circumstances. Moreover, an insignificant penalty in this instance is not inconsistent with a primary goal of the Mine Act that seeks to ensure that safety concerns are not subordinated to concerns related to productivity.

Citation No. 3837521 - On-Shift Examination

A preshift examination is conducted each shift, prior to personnel entering the mine, by a certified person designated by the operator. This examination is intended to identify and correct all hazards before the shift begins. The mandatory safety regulations also require at least one on-shift inspection of each working section by a certified person designated by the operator during each shift. The operable safety standard in effect for on-shift examinations in March 1991 was section 75.304, 30 C.F.R. § 75.304. On-shift examinations are intended to identify hazards that occur as a result of changing conditions

once coal production on a shift begins, such as methane or coal dust accumulations, adverse roof conditions, and ventilation problems.

During the course of Inspector Johnson's accident investigation, Violet advised Johnson that he had not conducted an on-shift examination in all working headings on the day of the accident on March 22, 1991, because he had stayed with the continuous miner and shuttle car operators that day. Consequently, Johnson issued 104(d)(1) Citation No. 3837521 alleging a violation of section 75.304.

Johnson opined it was reasonably likely that serious injury will occur as a result of a problem with undiscovered draw rock, similar to the roof condition that caused Keck's fatality[8]. Johnson also noted that coal dust and/or methane accumulations could go unnoticed without remedial rock dusting or ventilation curtain adjustments. It was reasonably likely such hazardous conditions occurring during a shift will result in a methane ignition or coal dust explosion that will expose miners to serious or fatal injuries. Therefore, Johnson characterized the violation as S&S.

Johnson also concluded the violation resulted from the respondent's high negligence attributable to an unwarrantable failure. The citation was subsequently modified to a 104(a) citation associated with moderate negligence when it was learned that on-shift examinations had been performed in most, but not all, of the working places. (Tr. 104).

Violet testified that he had assigned Phelps to conduct the on-shift examinations as Phelps drove the scoop from heading to heading supplying the roof bolters and cleaning coal dust that had accumulated behind the dusters. Violet confirmed that he had not done the on-shift examinations on March 22, 1991. When asked if he had informed MSHA that Phelps had done the on-shifts, Violet testified:

> I felt -- you know, after the inquiry and all this they asked me if I done it, I said -- you know, I told them, no, I didn't do it, which I didn't. They didn't ask me if anybody else done it. They just asked me if I done it. So I told them I didn't do it. But as far as it

[8] There is no evidence that the cited violation contributed to the fatal accident. It is doubtful that an on-shift examination would have prevented Keck's disregard of company policy.

being done, Charles Phelps done it and I showed [MSHA supervisor] Ronnie Russell where he had done it. (Tr.147-48).

Phelps testified that he informed MSHA investigators on the Monday following the accident that he had performed on-shift examinations on March 22, 1991. Phelps stated that he showed the inspectors three different places that he had examined on the section. (Tr. 172). However, Johnson stated there are seven working headings in the No. 3 section. (Tr. 104).

Ronnie Russell testified in this proceeding. He was never asked to corroborate Violet's account about being shown evidence of on-shift examinations. Significantly, Russell does not recall seeing any on-shift examination entries in the examination book for March 22, 1991. Russell recalled the entries in the examination book for March 22, 1991, were incomplete.

George Givens attempted to explain the reasons for the incomplete March 22, 1991, examination book entries, and the inaccurate information provided to MSHA investigators on March 25, 1991. Givens testified:

> ... the day of the investigation was the day of the funeral. And the men -- all the men -- the men were all wanting to go to the funeral. They were going to have an investigation. Nobody was right at that time, Your Honor. Nobody even paid any attention to what was going on. If some -- you know, I mean, it just was a situation I've never been in before. I never had a fatality before and the behavior of the men and what went on. And what was going on in the investigation didn't seem important to a lot of people at that time. Because a lot of people that worked there were personal friends and related to Michael Keck. (Tr. 244-45).

While grief over the death of a fellow worker may have interfered with the accuracy of the information provided to the MSHA investigators, I must make findings on the evidence presented. Section 75.304 required on-shift examinations in "each working section" during each coal-producing shift. Even Phelps did not allege that he informed MSHA that he had performed the on-shift in <u>each</u> working section. Moreover, there is no evidence that the examination book contained entries documenting that a complete on-shift had been conducted. Finally, Violet never clearly communicated to investigators that an on-shift had been done.

The belated exculpatory testimony of Violet and Phelps that a complete on-shift examination had in fact been performed on March 22, 1991, is self-serving and must be afforded little probative value. Consequently, the Secretary has established, by a preponderance of the evidence, that the cited section 75.304 violation in fact occurred.

A violation is properly designated as S&S, if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). See also Mathies Coal Co., 6 FMSHRC 1 (January 1984); Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving S&S criteria in Mathies).

Whether a particular violation is significant and substantial must be based "on the particular facts surrounding the violation...." Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In Manalapan Mining Company, Incorporated, 18 FMSHRC __ (August 30, 1996), the Commission recently noted the significant hazards created by a violation caused by the failure to perform a preshift examination. In fact, in Manalapan, Chairman Jordan and Commissioner Marks, in a concurring opinion, suggested "violations of the preshift standard are presumptively S&S." Id., slip op. at 21. Consistent with Manalapan, I conclude that it is reasonably likely that serious or fatal injuries from fire or explosion will occur in the absence of complete on-shift examinations because of undetected hazardous conditions, such as methane build-up, that occur during the mining process. Accordingly, the S&S characterization in Citation No. 3837521 is affirmed.

In considering whether the $6,000 civil penalty proposed by the Secretary for Citation No. 3837521 is appropriate under section 110(i) of the Act, I note that the respondent is a moderate operator that is not currently engaged in mining operations. Although the gravity of the violation is serious, the degree of negligence attributable to the respondent must be considered to be less than moderate given the Secretary's concession that many of the working sections were examined. Accordingly, a civil penalty of $350 is assessed for Citation No. 3837521.

Citation No. 3837522 -- Methane Examinations

The pertinent mandatory safety standard in effect in

March 1991, concerning methane examinations was section 75.307, 30 C.F.R. § 75.307. This mandatory standard required examination for methane at the start of each shift and at intervals of not more than 20 minutes during the operation of energized electric equipment.

On March 25, 1991, during the course of his accident investigation, Johnson determined Violet was the only person on the section with a hand held monitor. In this regard, Johnson learned, although hand held monitors were stored at the surface, neither roof bolt operators Keck and Matteson, nor continuous miner operator Harrell, had hand held methane monitors with them while operating their equipment at the face on the day of the accident. Since Keck was not seen by Violet for several hours prior to his discovery at 2:30 p.m., and as Violet was the only person on the section with a portable methane monitor, Johnson concluded the requisite methane tests were not being taken at 20 minute intervals.

As a result of his findings, Johnson issued Citation No. 3837522 for an alleged violation of section 75.307. Johnson characterized the violation as S&S because sparks caused by the continuous miner drill bits, or arcing in a defective piece of permissible electric equipment, are likely ignition sources that could initiate an explosion of undetected methane.

Johnson attributed the violation to the respondent's unwarrantable failure because only Violet had a methane detector and there was a continuous miner, two roof bolting machines and an electric scoop on the section that were operated without the requisite methane testing.

Violet testified that Johnson was mistaken in his belief that Violet was responsible for the methane testing. Violet stated he had assigned Phelps to perform the required methane testing on March 22, 1991. (Tr. 149). However, Violet's testimony is inconsistent with the information provided by Phelps at the hearing. Although Phelps stated he obtained the required methane readings, he also testified he departed the mine at 2:15 p.m. when he took the scoop outside. Mining operations were scheduled to continue until 3:00 p.m. Moreover, Phelps testified he last saw Keck at 1:00 p.m. Thus, even Phelps' testimony reveals no methane testing at the No. 7 heading between 1:00 p.m. and Phelps' departure at 2:15 p.m. It is apparent, therefore, that scoop operator Phelps, given his varied duties of cleaning and supplying bolters, was not in a position to take methane readings at each working face within 20 minute intervals.

Givens' testimony that a hand held methane detector was found on Keck's roof bolting machine is inconsistent with MSHA's investigation findings. It is also inconsistent with Violet's statement that Phelps had the only methane tester in the section. Givens was not underground on the day of the accident and he does not have the first hand knowledge of Violet who was in charge. Accordingly, I credit the testimony of Phelps and Violet which reflects neither roof bolting machine operators Keck nor Matteson, had methanometers on the day of the accident.

Finally, it is apparent that the provisions of section 75.307 contemplated that equipment operators are best suited to take the mandatory methane readings at frequent intervals during their equipment operation. In this regard, the respondent admitted that hand held monitors are made available on the surface for each equipment operator at the beginning of each shift. Thus, the evidence supports the fact of a section 75.307 violation.

With respect to the S&S issue, although the Congress Mine was not classified as a gassy mine, the liberation of methane at the face is a constant hazard that requires constant monitoring to ensure proper ventilation. Undetected methane concentrations, in the presence of potential ignition sources from electric powered equipment and sparks generated by the continuous miner extraction process, create the likelihood of an explosion and fire that will result in serious or fatal injuries[9]. Accordingly, the record also supports Johnson's S&S designation.

Johnson also attributed this violation to the respondent's unwarrantable failure. Unwarrantable failure constitutes aggravated conduct that exceeds ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987). 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 Corp., 13 FMSHRC 189, 194-94 (February 1991). When an operator allows roof bolter operators and continuous miner operators to enter a mine without hand held methanometers that are stored at the surface, it does so at its own risk. Under these circumstances, the systematic failure to take methane readings at the face at a minimum of 20 minute intervals as required by the mandatory safety standard manifests a "serious lack of reasonable care" evidencing an unwarrantable failure. Consequently 104(d)(1) Citation No. 3837522 is affirmed.

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[9] Johnson conceded the cited violation was not a contributing cause of Keck's death. (Tr. 120-21).

The Secretary seeks a $1,200 civil penalty for this citation. Given the moderate size of the respondent as well as the other penalty criteria in section 110(i) of the Act, I find that a civil penalty of $800 is appropriate. This penalty amount recognizes the respondent's high degree of negligence. It also reflects the serious gravity of the violation and the absence of special circumstances, in that the cited violation did not contribute to the fatal accident.

ORDER

In view of the above, the Secretary's Motion to Dismiss Imminent Danger Order No. 3824102 **IS GRANTED. ACCORDINGLY, IT IS ORDERED** that Imminent Danger Order No. 3824102 **IS VACATED. IT IS FURTHER ORDERED** that 104(a) Citation Nos. 3824103, 3824104 and 3837521 **ARE AFFIRMED**. IT IS **ALSO ORDERED** that 104(d)(1) Citation No. 3837522 **IS AFFIRMED**. **CONSEQUENTLY**, the respondent shall pay a total civil penalty of $1,656 to the Mine Safety and Health Administration in satisfaction of the citations in issue. Payment shall be made within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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