FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 6, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-972
	:	A. C. No. 15-14959-03560
v.	:	
	:	Mine No. 3
BROKEN HILL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Hobart W. Anderson, President, Broken Hill Mining Co., Inc., Pikeville, Kentucky, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Broken Hill Mining Co. pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $8,000.00. For the reasons set forth below, I affirm the citation and the two orders, as modified, and assess a penalty of $3,700.00.

The case was heard on May 2, 1995, in Pikeville, Kentucky.[1] MSHA Inspector John P. Church and MSHA Ventilation Specialist Jerry Bellamy testified for the Secretary. No. 3 Mine Superintendent Freddie G. Carroll and Broken Hill President Hobart W. Anderson testified for the company. The parties also submitted briefs which I have considered in my disposition of this case.

SETTLED ORDERS

At the beginning of the hearing, the parties advised that they had agreed to settle Order Nos. 4004020 and 4015281, issued under Section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1). Both involve failure to submit valid respirable dust samples in violation of Section 70.208(a) of the Regulations, 30 C.F.R. ' 70.208(a), for which the Secretary had proposed

[1] The transcript for this case erroneously states on its cover sheet that it is for "Docket No. KENT 94-920."

civil penalties of $2,400.00 and $2,600.00, respectively. The agreement provides for the orders to be modified to Section 104(a) citations, 30 U.S.C. ' 814(a), by deleting the "unwarrantable failure" designations, and for the penalties to be reduced to $325.00 each.

Having considered the representations and documentation presented, (Tr. 6-9), I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i). Accordingly, approval of the settlement agreement is granted and its provisions will be carried out in the order at the end of this decision.

CONTESTED CITATION

On September 10, 1993, Inspector Church issued Citation No. 4015959, under Section 104(d)(1) of the Act.[2] The citation alleges a violation of Section 75.333(b)(1) of the Regulations, 30 C.F.R. ' 75.333(b)(1), because "[t]he basic ventilation plan was not being complied with in 001-0 section, in that permanent stoppings were not being maintained up to and including the 3rd

connecting crosscut outby the working faces. There were five open crosscuts on both intake and return sides of the working section." (Govt. Ex. 1.)

Section 75.333(b)(1) requires that:

> (b) Permanent stoppings or other permanent ventilation control devices

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[2] Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

constructed after November 15, 1992, shall be built and maintained--

(1) Between intake and return air courses, except temporary controls may by used in rooms that are 600 feet or less from the centerline of the entry from which the room was developed. Unless otherwise approved in the ventilation plan, these stoppings or controls shall be maintained to and including the third connecting crosscut outby the working face.

The Respondent contends that the area being mined was a "room" rather than an "entry" and that since it was less than 600 feet, it comes within the exception to the section. Therefore, the company argues that it did not violate Section 75.333(b)(1). I conclude otherwise.

The issue in this case is whether a room must be to the left or right of an entry or whether it can be at the head of an entry. Relying on the Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 941 (1968) definition of "room" as "[a] place abutting an entry or air way where coal has been mined and extending from the entry or airway to a face," Broken Hill argues that it can be at the head of an entry. This argument, however, is a misreading of both the definition and the regulation.

"Abutting" means "to touch along a border, to border on." *New Miriam Webster Dictionary* 22 (1989). (Tr. 169.) A room at the head of an entry would border on a crosscut,[3] not an entry. Therefore, a room, by definition, cannot be at the head of an entry.

Furthermore, the regulation is even clearer than the definition. It provides an exception for "rooms that are 600 feet or less *from the centerline of the entry* from which the room was developed" (emphasis added). Since the centerline goes in the same direction that the entry goes, a room could only be to the left or the right of the centerline and, thus, to the left or right of an entry.

I conclude that the regulation is clear and unambiguous and that the company violated it. However, even if it were not unambiguous, whether Broken Hill violated the regulation must be evaluated "in light of what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990) (citations omitted).

Superintendent Carroll stated that "in my opinion rooms are when you are finishing up and you drop down to like a small center, like forty by forty in this case; you whether it be

[3] A "crosscut" is "[a] small passageway driven at right angles to the main entry to connect it with a parallel entry or air course." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 280 (1968).

left, right or straight ahead, the last six hundred feet is a room." (Tr. 235.) On the other hand, both Inspector Church and Mr. Bellamy testified that a room has to make "a turn" to "the left or right." (Tr. 78, 155-58.) Mr. Bellamy further testified that the reason rooms only require temporary stoppings is that "in rooms you wouldnt want to put all your ventilating current into it. You wouldnt have to. So you would regulate some off your main current to ventilate the room." (Tr. 158.)

I conclude that the inspector and the ventilation specialist presented what a "reasonably prudent person, familiar with the mining industry" would have provided in this mine to comply with Section 75.333(b)(1). This testimony is supported by the regulation and definitions discussed above. Carrolls opinion is not supported by either, and is also not supported by anything he could provide from his prior experience.

Based on either the plain meaning of the regulation or the "reasonably prudent person" standard, it is apparent that in this instance, Broken Hill violated Section 75.333(b)(1) of the Regulations. Accordingly, I so conclude.

Significant and Substantial

The citation alleges that the violation was "significant and substantial." A "significant and substantial" (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."[4] 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria for determining whether a violation is S&S. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *affg Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). 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 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As in most S&S cases, whether the violation was "significant and substantial" depends on whether the Secretary has shown that the third *Mathies* element, that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, was present. In this connection, the Secretary presented evidence that there were several cables lying on the wet mine floor, that the cables were frequently rubbed on the corners of ribs, that as a result shorts in the cable could develop causing a small cable fire with resulting smoke

[4] See fn. 2, *supra*.

and that the line curtains that had been hung as temporary stoppings in the area were poorly hung and could easily be dislodged either by miners or equipment going through them. In addition, there was evidence that methane is always a danger in mines.

Against this, the company contends that the air circulation at the face was within requirements, that methane had never been detected in the mine and that no mishaps of the nature suggested by the Secretary had occurred when the citation was issued. However, considering this violation, not just at the time it was cited, but assuming continued mining operations, I find that the flimsy nature of the ventilation controls present and the constant movement of the cables makes it reasonably likely that a serious injury would result. Accordingly, I find that the violation was "significant and substantial."

Unwarrantable Failure

The citation also alleges that Broken Hill was highly negligent in permitting this violation to occur and that the violation resulted from the company's "unwarrantable failure" to comply with the regulation. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more that ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence indicates that on August 17 and September 2, 1993, Inspector Church issued citations for the same violation in the same entries as the instant citation. After each citation, and particularly after the second one, Inspector Church stressed to company officials the importance of complying with Section 75.333(b)(1). The evidence also shows that when this citation was issued, the foreman to whom it was issued admitted to the inspector that he knew permanent stoppings were required.

Although not specifically argued in the Respondent's brief, implicit in its presentation in this case is the assertion that the violation was not an "unwarrantable failure" because the company believed it came within the "room" exception to the regulation. This contention is rejected for two reasons.

First, to be a defense to "unwarrantable failure" the company would have had to have had the belief at the time the violation was committed. Instead, the evidence is to the contrary since no mention was made of the exception at the time the citation was issued or at the time a conference with the company was held concerning the citation. In fact, as late as the filing of its answer to the petition for civil penalty on August 18, 1994, the company admitted that a violation existed

and made no claim of a "room" exception.[5] Thus, it appears that the company's defense to the citation was not arrived at until sometime later.

Secondly, to be a defense to "unwarrantable failure," Broken Hill's belief that it was mining a room would have to be in good faith and reasonable. *Wyoming Fuel* at 1628; *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). As the evidence in this case amply demonstrates, it was neither.

I find that Broken Hill's failure to establish permanent stoppings up to and including the third connecting crosscut outby the working face, after twice being cited for the same violation, and after admissions by its agents that they were aware of the requirement constitutes at best indifference or a lack of serious care. Accordingly, I conclude that by such aggravated conduct, the Respondent unwarrantably failed to comply with Section 75.333(b)(1) of the Regulations.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $3,000.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984). Considering the six criteria, with particular emphasis on the degree of negligence, I conclude that a $3,000.00 penalty is appropriate for this violation.

ORDER

Order Nos. 4004020 and 4015281 are MODIFIED to Section 104(a) citations by deleting the "unwarrantable failure" designations and are AFFIRMED as modified. Citation No. 4015959

is AFFIRMED. Broken Hill Mining Company is ORDERED TO PAY a civil penalty of $3,700.00 within 30 days of the date of this decision. On receipt of payment, this proceeding is DISMISSED.

[5] Broken Hill stated "[a]s to Citation No. 4015959, the Respondent claims that even though a Citation existed, we cannot agree that it should be a 104-D-1 type, because temporary brattices were installed in the crosscuts, up to and including the second crosscut outby the faces on the intake and return side of the section."

T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATION (MSHA),	:	Docket No. KENT 94-972
Petitioner	:	A. C. No. 15-14959-03560

v.	:	
	:	Mine No. 3
BROKEN HILL MINING COMPANY, INCORPORATED,	:	
Respondent	:	

ORDER CORRECTING DECISION

In the last sentence of the first paragraph and the second to last sentence in the concluding paragraph of the September 1, 1995, Decision in the captioned case, the amount of penalty assessed is incorrectly stated as "$3,700.00." The amount of penalty should be "$3,650.00."

Accordingly, it is **ORDERED**, pursuant to Commission Rule 69(c), 29 C.F.R. ' 2700.69(c), that the last sentence in the first paragraph of the decision is **CORRECTED** to read: "For the reasons set forth below, I affirm the citation and the two orders, as modified, and assess a penalty of $3,650.00." Similarly, it is **ORDERED** that the second to last sentence in the final paragraph of the decision is **CORRECTED** to read: "Broken Hill Mining Company is **ORDERED TO PAY** a civil penalty of $3,650.00 within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge