FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 29, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-23
Petitioner	:	A.C. No. 15-16020-03521
v.	:	
	:	Docket No. KENT 97-73
COSTAIN COAL INCORPORATED,	:	A.C. No. 15-16020-03523
Respondent	:	
	:	Smith Underground No. 1 Mine

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Charles E. Lowther, Esq., Mitchell, Joiner, Hardesty & Lowther, Madisonville, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Costain Coal Incorporated, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege two violations of the Secretary's mandatory health and safety standards and seek penalties of $1,500.00 . For the reasons set forth below, I affirm the citation and order and assess penalties of $1,500.00.

A hearing was held on June 3, 1997, in Evansville, Indiana. The parties also submitted post-hearing briefs in the cases.

Background

Costain Coal's Smith Underground No. 1 mine is located in Webster County, Kentucky. On July 23, 1996, MSHA Inspector Robert Sims was conducting a quarterly inspection at the mine when he observed that only the front tips of the arms of the automatic temporary roof support (ATRS) system on the twin-boom roof bolter were in contact with the mine roof. Consequently, he issued Citation No. 4067761, alleging a violation of section 75.220(a)(1) of the regulations, 30 C.F.R. § 75.220(a)(1), because he: "Observed 2 roof bolt operators operating the Lee Norris Double Boom Bolter in the number 1 entry of the South West Panel 001 unit and the rear tips of both ATRS's were not pressurized against the mine roof. They were in the process of

installing roof bolts on their normal bolt spacing and had not reduced the support patterns to a 2' by 4' pattern as required on page 8 of the Roof Control Plan." (Govt. Ex. 5.)

On July 25, he witnessed a similar violation in the No. 7 entry and issued Order No. 4067768. It states: "Observed 2 roof bolt operators operating the Lee Norris Double Boom bolter in the number 7 entry intersection on 002 unit in the South West Panel. The ATRS would not pressurize against the mine roof and the bolt spacing was not reduced to a 2 x 4 pattern as required on page 8 of the approved Roof Control Plan." (Govt. Ex. 7.)

Findings of Fact and Conclusions of Law

Section 75.220(a)(1) provides, as pertinent to this case: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The Respondent's roof control plan requires that: "When the ATRS will not be set due to height limitations, bolts will be installed on a two by four pattern or the roof will be supported by roof bolts spaced in such a manner which will permit the operator to work under permanently supported roof at all times." (Govt. Ex. 2, at 13.)

Costain concedes that in both instances the company violated section 75.220(a)(1) and that the violations were "significant and substantial." (Tr. 11.) Therefore, the only issue to be determined is whether the violations resulted from the Respondent's "unwarrantable failure" to comply with the regulation. I conclude that they did.

The Secretary argues that the following factors support a finding that the company unwarrantably failed to follow section 75.220(a)(1). Prior to the violations, the company had been put on notice that it had to follow its roof control plan when the ATRS did not set against the roof. The Company did not train its roof bolters how to recognize when the roof control plan required a two by four bolting pattern until after the July 25, 1996, violation. The violations should have been obvious to the roof bolters. Finally, the mine had a significant roof fall problem.

The Respondent asserts that it reacted immediately to correct the problem. After the company was cited for a violation in March 1996, it began efforts to modify the equipment so that the ATRS could be set when the roof was higher than ten feet. Further, Costain contends that it is difficult to tell by looking at the roof whether bolts are in a two by four pattern. Finally, the company argues that it did not violate the regulation intentionally.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than 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).

With regard to determining whether a violation has resulted from an operator's "unwarrantable failure," the Commission has stated:

> We examine various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

Amax Coal Co., 19 FMSHRC 846, 851 (May 1997).

In this case, several of these factors lead to a conclusion of "unwarrantable failure." The company had clearly been put on notice that greater efforts were necessary for compliance. MSHA Field Office Supervisor Ted Smith first noticed the problem of the ATRS not reaching the roof in November 1995, pointed the problem out to the mine foreman while in the mine, and further discussed corrective measures with the foreman and the superintendent when they got outside. On March 25, 1996, Smith and Inspector Sims were at the mine and issued a citation for failing to comply with the roof control plan by not bolting on a two by four pattern when the ATRS would not set against the roof. (Govt. Ex. 3.) The very next day, Sims issued an order for the same problem.[1] (Govt. Ex. 4.)

While the company did take some action as a result of the March violations, it was mainly in the area of attempting to modify the equipment to operate in areas with a higher roof. Little or no guidance was given to roof bolters in determining when the ATRS was set against the roof or what a two by four bolting pattern looked like. According to the roof bolters who testified, it was not until after the July 25 order that they were given direction in what set against the roof meant and how to recognize it.

Although the Respondent implies that the contrary is true, the violations were obvious.

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[1] Though the problem was the same, Sims cited a different regulation, 30 C.F.R. § 75.202(b), because he did not want to be accused of "double dipping." (Tr. 26.)

Inspectors Smith and Sims spotted the violations just by looking at the ATRS and whether it was pressed against the roof. The company's roof bolters could have made similar observations by looking at each other's ATRS, but they apparently were not instructed to do so. The inspectors were also able to tell that a two by four bolting pattern was not being used by observation, even though they verified it by measurement just to make sure. The obvious difference in the two patterns is graphically demonstrated by pictures furnished by the company which show that the bolt plates are almost touching one another in a two by four pattern and are spread far apart in the normal four and one-half foot advance pattern. (Resp. Ex. D, pictures 1- 3.)

Finally, the violations posed a high degree of danger. The mine had experienced unfavorable roof conditions. It had sustained 74 roof falls in 1996, one of which was a 350 foot fall which had occurred within 400 feet of the No. 1 entry. In addition, the mine map projection indicated a possible washout,[2] and a linear line[3] across six of the ten entries being worked on at the time, both of which indicate that bad roof may be encountered. (Govt. Ex. 6.) Furthermore, the preshift examination on July 22 had found water coming into the No. 7 entry. As a result, the intersections and crosscuts had to be collared before mining could be done. Lastly, if this were not enough, when the ATRS is not properly set against the roof, the drill vibrates and shakes thereby making it more likely that pieces of the roof will come down.

The danger with the ATRS not setting against the roof is that the bolters are working under unsupported roof. That is why the roof control plan calls for a two by four pattern when the ATRS does not set. By drilling only two feet out, the bolter can remain under supported roof. The danger of working under unsupported roof is so great by itself, that the Commission has in the past relied

> upon the high degree of danger posed by roof control plan violations as a basis for finding unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994) (allowing work under unsupported roof was result of unwarrantable failure where installation of temporary roof supports, as required under roof control plan, was "necessary for safe mining practice"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where "roof conditions were highly dangerous"); *Youghiogheny & Ohio Coal* Co., 9 FMSHRC 2007, 2011 (December 1987) (temporary roof support violation resulted from unwarrantable failure where prior history of roof falls "placed [operator] on notice that heightened scrutiny to assure compliance with its roof

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[2] A "washout" is a "channel cut into or through a coal seam at some during or after the formation of the seam, generally filled with sandstone--or more rarely with shale--similar to that of the roof." Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1217 (1968).

[3] A "linear line" is drawn based on satellite photographs of heat emanations from the earth which may indicate slips, faults and possible bad top areas underground. (Tr. 36-37.)

control plan was vital"). *See also Lion Mining Co.*, 18 FMSHRC 695, 700-02 (May 1996) (vacating judge's finding that roof control plan violation was not unwarrantable).

Faith Coal Co., Docket No. SE 91-97, etc., slip op. at 12 (August 6, 1997).

While it is evident that the Respondent did not deliberately violate its roof control plan, the violations were obvious, the company had been placed on notice that greater efforts were necessary for compliance, its response to that notice was inadequate, and the danger was great. Accordingly, I conclude that the degree of negligence involved in these violations was "high" and that they resulted from Costain's unwarrantable failure to follow its roof control plan and the regulations.

Civil Penalty Assessment

The Secretary has proposed civil penalties of $1,500.00 for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 FMSHRC 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with those criteria, the parties have stipulated that: (1) the Smith Underground No. 1 mine is a large mine producing approximately 989,000 tons of coal per year; (2) Costain Coal Inc. is a large company which generates 10,000,000 tons of coal per year; and (3) a reasonable penalty will not affect the company's ability to remain in business. (Govt. Ex. 1.) The *Assessed Violation History Report* indicates that both the company and the mine have a low history of prior violations. (Govt. Ex. 8.) The gravity of the violations was serious and the company's negligence was high. Finally, the evidence indicates that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

Balancing all of this together, I conclude that the penalties of $600.00 for Citation No. 4067761 and $900.00 for Order No. 4067768, proposed by the Secretary, are appropriate. Accordingly, I will assess penalties of $1,500.00 in these cases.

ORDER

Citation No. 4067761 in Docket No. KENT 97-23 and Order No. 4067768 in Docket No. KENT 97-73 are **AFFIRMED**. Costain Coal Incorporated is **ORDERED TO PAY** civil penalties of **$1,500.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
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