

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-129
Petitioner	:	A. C. No. 15-12564-03573
v.	:	
	:	
LEFT FORK MINING INC.,	:	
Respondent	:	Straight Creek No. 1 Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Terry Nelson, Jr., Safety Director, Left Fork Mining, Brookside, Kentucky, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Left Fork Mining Incorporated (Left Fork). The petition seeks to impose a \$581.00 civil penalty for three alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary’s regulations governing underground coal mines. All of the alleged violations were characterized as significant and substantial (S&S) in nature. These matters were heard on January 23, 2002, in Pineville, Kentucky. The parties’ post-hearing proposed findings and conclusions have been considered in the disposition of this matter.

I. Statement of the Case

The Mine Act imposes on the Secretary the burden of proving the fact of occurrence of the cited violations by a preponderance of the evidence. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Commission has articulated that the Secretary satisfies her preponderance of the evidence burden by demonstrating “that it was more likely than not” that the cited violation occurred. *Enlow Fork Mining Company*, 19 FMSHRC 5, 13 (January 1997). While the Secretary may satisfy her burden of proof by relying on reasonable inferences drawn from indirect (circumstantial) evidence, such inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek*, 11 FMSHRC at 2153 *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138.

This case concerns three citations issued by Mine Safety and Health Administration (MSHA) Inspector Alexis Goins on October 18, 2000, at Left Creek’s Straight Creek

No. 1 Mine. Inspector Goins did not go underground at any time during the course of her October 18, 2000, inspection. (Tr. 123). Rather, Goins inferred that two of the three cited violations occurred underground based on her observations on the surface. For the reasons discussed below, the Secretary has failed to demonstrate that it was more likely than not that these two violations in fact occurred. The Secretary failed to prove these violations because the inferences sought to be drawn by the Secretary were overcome by the direct evidence presented by Left Fork through the testimony of its mine foreman and assistant foreman who had direct knowledge of the events in issue because they were underground. Consequently, two of the three subject citations shall be vacated. In addition, the significant and substantial designation in the remaining citation shall be deleted.

II. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial violation. A violation is properly designated as S&S in nature 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). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

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 Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Applying the general statutory penalty criteria, Left Fork is a subsidiary of Manalapan Mining, a large mining company with approximately 400 employees. (Tr. 15). However, Left Fork employs only two individuals at its inactive Straight Creek No. 1 facility who perform maintenance and rehabilitation duties. Left Fork also uses the services of a contract security guard who is stationed in a security shack at the mine's surface. (Tr. 20). Left Fork has stipulated that it is subject to the jurisdiction of the Mine Act. (Tr. 14). The Secretary does not contend that Left Fork has a poor compliance history, or, that the subject citations were not abated in a timely manner. (Tr. 17). Finally, it is not contended that the \$581.00 civil penalty proposed by the Secretary will have a negative impact on Left Fork's ability to continue in business. (Tr. 16).

III. Findings of Fact

The Secretary stipulated that Left Fork's Straight Creek No. 1 Mine has been in inactive non-producing status since 1996. (Tr. 17). When it was operational, the mine was subject to more frequent MSHA inspections because it had been classified as a "gassy mine" under section 103(i) of the Mine Act, 30 U.S.C. § 823(i), because, during active mining, it liberated excessive amounts of methane. However, the mine is no longer subject to a section 103(i) spot inspection because of its inactive status.

Left Fork employs two individuals to maintain the mine in the event it becomes economically feasible to restart active mining operations. These individuals are mine foreman Russell Kelly and assistant mine foreman Tim Daniels. Their duties consist of maintenance and rehabilitation to ensure that the mine is kept in safe operating condition. For example, they install roof support in areas of roof sloughage, they repair torn cables, and they pump water to maintain safe passage.

In addition to Kelly and Daniels, Left Fork uses the services of Martin's Fork Security, a contractor that provides a security guard on a 24-hour-a-day basis that remains in a guard shack on the mine's surface. The security guard is responsible for communicating with Kelly and Daniels on an as needed basis by means of a voice activated walkie-talkie type telephone system that has been approved by MSHA. Although MSHA generally approves the communications system, MSHA's approval does not require that telephones must be

located at specific locations. There are several telephones on the surface in the guard shack as well as in the hoist house and main fan house. Telephones are located underground at various locations at approximately 500 feet intervals. There are approximately seven phones located underground in the working section in the vicinity of the intake slope area and at the elevator. (Tr. 83). As noted below, the location of the underground phones satisfied the Secretary's regulations governing two-way communications systems.

As discussed below, ventilation through the main mine shaft is accomplished through two discrete slopes to the surface - - an intake slope and a return slope. There are two means to exit the Straight Creek Mine. The route designated as the primary escapeway relies on an elevator shaft located approximately 1,500 feet from the bottom of the intake slope. (Gov. Ex. 1; Tr. 203). As an alternative to using the elevator to exit the mine, the intake slope serves as a secondary escapeway to the surface. (Tr. 127).

At the time immediately preceding Goins' October 18, 2000, inspection, Kelly and Daniels were in the return slope of the fan shaft installing additional roof support to abate a citation that had been previously issued and that is not in issue in this proceeding. They were several hundred feet from the nearest telephone. To install the roof support, Kelly and Daniels were using steel auger drills that were connected to, and powered by, a compressor located on the surface in the hoist house. A steel auger drill has a spiral drill bit that, in the absence of any ventilation controls, causes the drill-dust roof material to fall directly from the roof to the floor below.

A. The Inspector's Perspective from the Surface

Alexis Goins has nine years experience as a coal mine inspector and she is currently assigned to MSHA's Barbourville Field Office. Goins arrived at the Straight Creek No. 1 Mine on October 18, 2000, at approximately 11:45 a.m. Upon arriving at the mine, Goins stopped at the guard shack and requested the security guard to call underground to inform Kelly to meet her on the surface at the elevator.

Goins traveled to the elevator and waited there until approximately noon, however, Kelly never arrived at the surface. Consequently, Goins left the elevator area and traveled to the mine office where she examined the pre-shift and onshift examination book. After realizing that Kelly was not going to meet her in the mine office, at approximately 12:30 p.m., Goins traveled back to the guard shack to determine if Kelly had been contacted underground. The guard informed Goins that he could not contact Kelly underground. Goins estimated the closest phone underground was located at the base of the return and intake slopes approximately 200 feet from where Kelly and Daniels were roof-bolting in the return slope. (Tr. 132-35). Goins conceded the locations of the phones underground satisfied the requirements of sections 75.1600 and 75.1600-2, 30 C.F.R. §§ 75.1600 and 75.1600-2, that require telephones or equivalent two-way communications systems at the base of slopes and within 500 feet outby the last open crosscut. (Tr. 139-41).

Goins returned to the elevator to see if Kelly had arrived at the surface. She waited at the elevator approximately 10 minutes before going to the hoist house. The hoist house contains hoisting equipment and it also serves as the employee locker room. The hoist house is also where the secondary escapeway intake track slope meets the surface. The intake slope is approximately 200 yards long and Goins estimated that it takes approximately 20 to 25 minutes to travel the intake slope. (Tr. 125).

The hoist house also contains the fan house where the main mine exhaust fan is located at the top of the return mine shaft slope. The main mine fan is approximately five feet in diameter and it draws approximately 123,000 CFM (cubic feet per minute) of air through the exhaust slope. The fan shaft is a travelable return slope that runs parallel to the secondary escapeway intake slope. Although the fan shaft return slope is travelable, unlike the intake slope, it is not used to access and exit the mine because it has a sharp incline. (Tr. 126).

Goins testified she arrived at the hoist house at approximately 12:35 p.m.. At that time, she noticed that the main mine fan was not operating. Goins also noted an absence of a warning signal to alert personnel underground that the mine fan had stopped working. Goins opened the door to the fan house where a fan chart was located. The fan chart graphs the operation of the fan similar to the operational design of a seismograph. (Resp. Ex. 1). The fan chart documents the time of the fan's shut down when the red ink of the graph touches the innermost black concentric circle of the graph.

Goins examined the fan chart and testified it indicated the fan recently had stopped at 12 noon on that day. (Tr. 37). Despite Goins' testimony that the fan chart reflected the fan had stopped at 12:00 noon, the fan chart, proffered by Left Fork, clearly reflects the fan actually stopped considerably later than noon. Significantly, the fan chart reflects the fan stopped between 12:30 p.m. and 1:00 p.m. on Wednesday, October 18, 2000.¹ (See Resp. Ex. 1).

After examining the fan chart, at approximately 12:40 p.m., Goins heard muffled voices coming from the return slope to the surface. Although she heard the voices through the return shaft she "couldn't actually tell where they were coming from." (Tr. 39). Goins went to an area in the vicinity of the fan house where she observed a telephone with disconnected wires hanging from it. Although the phone at the fan house was disconnected, Goins testified there were several other phones in the hoist house which were located nearby the fan house. (Tr. 91). The closest surface telephone to the fan house was located approximately 50 feet away in the hoist house. (Tr. 209).

¹ The fan chart was admitted in evidence over the objection of the Secretary. The Secretary objected to its admissibility because she was not informed prior to trial that it would be offered as an exhibit. Goins had no reason to question the fan chart's authenticity. The record was left open for the Secretary to file an affidavit by a person qualified to interpret the fan chart. (Tr. 150-67). The Secretary declined to do so.

Goins returned to the guard shack to inquire if the guard had communicated with the miners underground because the miners had to be withdrawn because of a lack of exhaust ventilation. The guard informed Goins he was unable to contact the men underground. However, the guard did not distinguish whether Kelly and Daniels had not answered the phone, or, whether the phone was not working. (Tr. 81). Significantly, Goins conceded that surface to underground communication may have been unsuccessful because no one was located close enough to the receiving phone to hear the incoming message. (Tr. 142-46).

Goins and the guard returned to the hoist house to see if the men had arrived at the surface through the intake slope. Kelly testified that he had instructed the guard to turn off the compressor if Kelly was ever needed on the surface and he could not be reached by telephone. (Tr. 198). When it became clear that the men were still underground, the guard told Goins he would get their attention by shutting off the compressor that was used to power the steel auger drills used for roof bolting. The compressor was turned off at approximately 1:00 p.m. (Tr. 49-50).

Goins waited in the hoist house for Kelly and Daniels to arrive at the surface. Goins observed Kelly and Daniels arrive at the surface by exiting the intake slope at approximately 1:30 p.m. (Tr. 55-56, 124). Goins approached Kelly to determine what Kelly and Daniels had been doing underground. Goins testified:

. . . [Kelly] said to me that he noticed that there was no air moving at about 12:15 and they traveled from the return slope to the elevator. He said it took about ten minutes. And then they got on the elevator and it didn't function properly. They then traveled back from the return, crossed over to the intake slope, and it took them about 20 minutes to walk up the slope.

(Tr. 108).

Kelly's statement to Goins that he knew the fan had stopped is consistent with Goins' testimony. In this regard, Goins explained:

They should have known the mine fan was off because they were in the return entry working. Once that fan goes down, if you're coursing 123,000 CFM air down that . . . coming through that return, and they wasn't (sic) far from the top of the return shaft there, I mean, you can feel when the air stops.

(Tr. 111).

At approximately 1:00 p.m. Terry Nelson, Left Fork's Safety Director, arrived at the guard shack. The guard informed Nelson that Goins was in the hoist house waiting for Kelly and Daniels to exit the mine. Nelson went to the hoist house where he observed that Kelly and Daniels had already exited the mine. Nelson turned the mine fan on by routinely using the power switch. Nelson speculated the fan had stopped due to a power failure experienced by Kentucky Power because the fan restarted after he turned on the fan's power switch. Goins took two air bottle samples. The first was obtained at 1:35 p.m. before the fan was turned on. The second was taken at 1:42 p.m. after the fan became operational. (Tr. 168). Both air bottle samples were negative for any traces of methane. (Tr. 171-72). Goins' notes

reflect Kelly and Daniels arrived at the surface at 1:30 p.m. shortly before the first air bottle sample was taken. (Tr. 168-69).

B. The Miners' Perspective from Underground

Mine Foreman Russell Kelly has 16 years mining experience. Assistant Mine Foreman Timothy Daniels has 13 years mining experience. On October 18, 2000, Kelly and Daniels were installing roof bolts in the return fan shaft slope with an auger drill. An auger drill is an air-powered drill with augured steel bits that suction and remove roof material so that bolts can be driven into the roof. Kelly and Daniels explained that, in the fan shaft, roof dust falls from the auger directly into the face of the drill operator if the mine fan is not operating. (Tr. 195-96, 238-39). When the fan is running, it draws dust away from the face of the drill operator who is positioned under the hole being drilled. On October 18, 2000, Kelly carried a methane spotter that sounds a beeper alarm in the presence of hazardous methane concentrations. Kelly's methane monitor did not detect any significant levels of methane on that day. (Tr. 194-96).

Although Kelly does not remember the exact time, Kelly testified that the fan went off "somewhere around 12:00." (Tr. 195). At that time, Kelly and Daniels immediately discontinued drilling. (Tr. 225, 238-39). Although section 75.313(c)(1) of the Secretary's regulations permits personnel to remain underground for 15 minutes after the mine fan ceases to operate before withdrawing, Kelly and Daniels testified there was no point in waiting since the only way the fan could be turned on was by them returning to the surface. (Tr. 205, 242-43). Consequently, Kelly and Daniels disengaged their drills from the roof, removed the steel bolts from the hole being drilled, and placed the steel at the side of the slope. They then proceeded to the telephone at the bottom of the slope that was located 2½ breaks away, approximately 160 feet from where they had been working. They attempted to contact the guard by holding down the speaker button and talking into the telephone's headset, but they were unsuccessful. Kelly explained that it was not important to communicate with the guard since only Kelly and Daniels were authorized to turn the fan back on. (Tr. 196-97).

After unsuccessfully attempting to communicate with the surface, Kelly and Daniels used the three-wheel mantrip to travel to the elevator that is designated as the primary escapeway. (Tr. 199, 240). They entered the elevator and used the automatic buttons inside. The elevator malfunctioned and stopped after it rose approximately 25 feet. Kelly climbed to the top of the elevator and managed to use manual controls to get the elevator to return to the surface. Kelly and Daniels estimated that they were delayed approximately 15 to 20 minutes at the elevator. (Tr. 202, 240). They next walked from the elevator to the bottom of the intake secondary escapeway slope, a distance of approximately 1,500 feet. Upon arriving at the bottom of the intake slope, they walked approximately 900 feet up its 18 percent grade. (Tr. 203). Kelly and Daniels estimated it took them approximately 15 minutes to walk up the slope. (Tr. 203, 241). In total, Kelly estimated it took approximately one hour to exit the mine. (Tr. 224-25).

Although Kelly's recollection was that he and Daniels exited the mine at approximately 1:05 p.m., significantly, Goins testified her notes reflect the miners exited the mine at approximately 1:30 p.m. (Tr. 168-69, 203). Given the approximate one hour it took to exit the mine, a 1:30 p.m. arrival at the surface is consistent with the fan map that reflects the fan stopped operating on Wednesday, October 18, 2000, shortly after 12:30 p.m. (Resp. Ex. 1).

IV. Further Findings of Fact and Conclusions of Law

A. Citation No. 7508622 - Fan Warning Signal

Based on Goins' observations that a warning signal was not sounded when the mine fan stopped, she issued Citation No. 7508622 citing a violation of the mandatory safety standard in section 75.310(a)(3), 30 U.S.C. § 75.310(a)(3), that requires mine fans to be equipped with an automatic warning device to signal when the fan ceases to operate. (Gov. Ex. 2). Although Citation No. 7508622 initially alleged the cited violation was unwarrantable, the citation was subsequently modified to reduce Left Fork's degree of negligence from high to moderate, thus deleting the unwarrantable failure charge.

Goins designated the violation as significant and substantial (S&S) opining that it was reasonably likely that a methane explosion and resultant serious injury will occur if normal mining operations continued. Although the mine was inactive, Goins was concerned that burn-related injuries could occur if methane leaked and migrated to pockets in the roof from seals from worked-out areas of the mine. In such an event, methane could be ignited by sparks generated from roof-bolting the shale and sandstone material in the roof.

With respect to the fact of occurrence of the cited section 75.310(a)(3) violation, Left Fork admits the fan signal device was not operational at the time of Goins' inspection. Thus, the Secretary has demonstrated the fact of the violation. Turning to the S&S issue, ordinarily, the absence of an operational warning signal to alert miners underground that mine fan ventilation had been interrupted *in an active mine* undoubtedly would constitute an S&S condition that was reasonably likely to contribute to serious injury.

As related by Goins, the discrete safety hazard contributed to by this violation was the inability to recognize that, as a consequence of an interruption in ventilation, methane could have escaped from seals and migrated to roof pockets in proximity to roof-bolting operations. Resolution of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Company*, 9 FMSHRC 2007 (December 1987). In the present case, *the mine is inactive* and it will remain so for the foreseeable future. Thus, there is no ongoing liberation of methane as a result of mining operations. As the Commission noted in *Texasgulf*, "the key question here is whether there was a reasonable likelihood that this hazard would result in an ignition or an explosion." 10 FMSHRC at 501.

In other words, the question is whether it was likely that the absence of a ventilation warning device would result in an ignition or explosion. The degree of likelihood of an explosion is dependant on the likelihood of methane as a fuel source. Although almost anything is possible, to prevail on the S&S issue, the Secretary must bear the burden of demonstrating a likelihood of a methane explosion. Given the apparent history of no recent methane liberation as a consequence of the mine's inactivity, as well as a reasonable expectation of no methane liberation in the foreseeable future, it cannot be said that it is reasonably likely that the hazard contributed to by the cited violation of section 75.310(a)(3) will result in a mine ignition or explosion. *Id.* at 503. In this regard, while not dispositive, it is noteworthy that Goins' air bottle samples, collected both before and after the fan had been turned on, disclosed no traces of methane. Consequently, **the significant and substantial designation in Citation No. 7508622 shall be deleted.** Although the violation is attributable to a moderate degree of negligence, given the low gravity of this non-S&S condition, **a civil penalty of \$55.00 shall be assessed.**

B. Citation No. 7508623 - Two-Way Communications System

Based on her observations on the surface that the phone at the fan house had been disconnected and that the security guard had told her that he unsuccessfully tried to telephone underground "several times," Goins also issued Citation No. 7508623 citing an alleged S&S violation of the provisions of section 75.1600, 30 C.F.R. § 75.1600. (Tr. 77-78, 81; Gov. Ex. 3). This mandatory standard requires, in pertinent part, that telephone service approved by the Secretary shall be provided between the surface and each landing of main shafts and slopes. Although Citation No. 7508623 also initially reflected the cited violation was unwarrantable, the citation later was modified to remove the unwarrantable allegation.

The issue is whether the two-way telecommunications system was operational on October 18, 2000. Left Fork does not have to prove that the telephone system was working. Rather, the Secretary, as the proponent, must demonstrate that the telephone system was not working. It is undisputed that the telephone located at the fan house was disconnected and that the closest surface telephone was in the hoist house approximately 50 feet away. However, the Secretary does not contend that Left Fork's approved communications system required a telephone at the fan house, or, that the surface and underground phone locations were otherwise inadequate or in violation of the Secretary's regulations. (Tr. 227-29). The fact that the fan house phone was disconnected is not material to whether the phone system was operational. Although the fan house phone was reconnected to abate Citation No. 7508623, there is no evidence that any other telephone system repairs had been performed before the citation was terminated by Goins the following morning on October 19, 2000. (Tr. 89-92; Gov. Ex. 3, p.2).

In the final analysis, the evidence presented by the Secretary establishes that the security guard was unable to contact the miners underground by telephone, not that the phone was not working. In essence, the Secretary has shown that neither Kelly nor Daniels answered the phone. Such an event permits two divergent inferences - - that, for whatever reason,

Kelly and Daniels “were not home” in that they did not answer the phone, or, that the phone was not working. Who knows? Based on this evidentiary record, surely not the Secretary. **Accordingly, Citation No. 7508623 shall be vacated.**

C. Citation No. 7508624 - Withdrawal from the Mine Within 15 Minutes

Section 75.313(c)(1), 30 C.F.R., 30 C.F.R. § 75.313(c)(1), provides that “if ventilation is not restored within 15 minutes after a main mine fan stops . . . everyone shall be withdrawn from the mine.” Based on her observations on the surface Goins concluded Kelly and Daniels had not ceased roof-bolting and had not begun their withdrawal from the mine within 15 minutes after the mine fan had stopped. Goins’ conclusion was inferred from facts known to her on the surface. Namely, Goins knew there was no mine fan warning signal to alert the miners that the fan had stopped. In addition, the compressor on the surface enabled the miners to continue roof-bolting despite the operational interruption of the fan. Finally, Goins believed the fan had shut down at 12:00 noon and the miners had not reached the surface until 1:30 p.m.

Consequently, Goins issued 104(d)(1) Citation No. 7508624 citing an alleged violation of section 75.313(c)(1). The violation was attributed to Left Fork’s unwarrantable failure. Citation No. 7508624 states:

The main mine fan system was not operating while two employee’s (sic) were underground working in the Return Slope performing roof bolt operations. According to the Main Fan Chart the system went down at 12:00 noon. This inspector observed the fan not operating at approximately 13:00 hours.

Goins has no direct knowledge of the underground activities of Kelly and Daniels. Contrary to their testimony, Goins concluded Kelly and Daniels continued to roof-bolt long after the fan ceased operating. However, Goins’ conclusion is inferred from contradictory and erroneous facts, and, as such, it is not inherently reasonable. As a threshold matter, Goins conceded that Kelly and Daniels immediately became aware of the fan’s shutdown when the roof dust generated by the drills was no longer being ventilated away from them. Thus, the absence of a fan warning signal, the guard’s failure to communicate from the surface underground, and the energized compressor on the surface, do not provide a basis for concluding that the men were unaware, or otherwise unconcerned, that the fan had stopped.

Moreover, Goins’ conclusion that the men’s arrival on the surface at 1:30 p.m. was evidence that they did not timely begin their withdrawal from the mine is based on Goins’ belief that the fan map reflected the fan had stopped at 12:00 noon. However, in fact, the fan map reflects the fan stopped after 12:30 p.m. Thus, the miners’ arrival on the surface at 1:30 p.m., less than 60 minutes after the fan stopped, rather than more than 90 minutes after the fan stopped as Goins had assumed, is not evidence that supports the conclusion that their withdrawal was

untimely.² Accordingly, the Secretary has failed to carry her burden of establishing that it was more likely than not that Kelly and Daniels delayed their withdrawal in violation of the provisions of section 75.313(c)(1). **Thus, Citation No. 7508624 shall also be vacated.**

ORDER

In view of the above, **IT IS ORDERED THAT** Citation Nos. 7508623 and 7508624 **ARE VACATED.**

IT IS FURTHER ORDERED THAT Citation No. 7508622 **IS MODIFIED** to delete the significant and substantial designation, and, as modified, Citation No. 7508622 **IS AFFIRMED.**

IT IS FURTHER ORDERED THAT, Left Fork Mining, Inc., **SHALL PAY** a \$55.00 civil penalty in satisfaction of Citation No. 7508622 within 45 days of the date of this decision. Upon timely receipt of payment, Docket No. KENT 2001-129 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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² The provisions of section 75.313(c)(1) do not require miners to withdraw until 15 minutes after the fan has stopped. Thus, the 1:30 p.m. arrival of Kelly and Daniels on the surface occurred less than 45 minutes from the time they were required to start their departure from the mine.