FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

July 28, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-218
Petitioner	:	A.C. No. 15-17651-03597
	:	
v.	:	
	:	
ROCKHOUSE ENERGY MINING CO.,	:	Mine No. 1
Respondent	:	
	:	
ROCKHOUSE ENERGY MINING CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 2001-2-R
	:	Citation No. 7368962; 9/7/00
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2001-7-R
ADMINISTRATION (MSHA),	:	Order No. 7373434; 9/20/00
Respondent	:	
	:	Docket No. KENT 2001-8-R
	:	Order No. 7373435; 9/20/00
	:	
	:	Docket No. KENT 2001-9-R
	:	Order No. 7373436; 9/20/00
	:	
	:	Docket No. KENT 2001-10-R
	:	Order No. 7373437; 9/20/00

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Mark E. Heath, Esq., (Dennise Smith-Kastick, Esq., on brief), Spilman Thomas & Battle, Charleston, West Virginia, for Rockhouse Energy Mining Company.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty brought by Rockhouse Energy Mining Company and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA),

pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of one citation and four orders alleging violations of the Secretary's mandatory health and safety standards. The petition alleges the five violations by the company and seeks a penalty of $230,000.00. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I vacate two orders, dismiss two contest dockets, affirm the citation, modify two orders and assess a penalty of $65,000.00.

Background

Rockhouse Energy Mining Company operates Mine No. 1, an underground coal mine in Pike County, Kentucky. Rockhouse is a subsidiary of A. T. Massey Coal Company in Richmond, Virginia. The mine employs 148 miners on two production shifts and one maintenance shift, six days a week, and produced 3,000 tons of coal a day in 2000.

On September 6, 2000, between 6:30 p.m. and 6:50 p.m., the main, or master, breaker on a continuous mining machine tripped while the machine was approximately 14 feet inby the last row of permanent roof support in the No. 5 entry. Gary Cochran, an electrician, came to the scene to assist in recovering the machine. Cochran, Raymond Fletcher, the section foreman, and another miner began building a crib as temporary roof support to work their way out to the miner. Before the crib was half finished, a rock measuring approximately 132 inches by 84 inches by 9 inches fell from the roof, striking Cochran and killing him.

Rockhouse reported the accident that night and MSHA Inspector Kenneth Murray went to the mine to begin a preliminary investigation. On his arrival, he issued a 103(k) Order, 30 U.S.C. § 813(k), closing the section.

MSHA Inspectors William C. Cole and Robert Newberry arrived at the mine on the morning on September 7. When they learned that a Rockhouse survey crew was in the No. 5 entry, they ordered it out and issued a citation for violating the closure order. At the conclusion of their investigation, they issued four more orders.

Findings of Fact and Conclusions of Law

This case consists of one 104(a) citation, 30 U.S.C. § 814(a), and four 104(d)(1) orders, 30 U.S.C. § 814(d)(1). It is the Secretary's position that the survey crew was in the No. 5 entry in violation of the 103(k) order, that Cochran was impermissibly working under unsupported roof, that the miners failed to follow Rockhouse's roof control plan in attempting to retrieve the mining machine, that the section foreman failed to perform sound and vibrations tests prior to attempting to retrieve the mining machine and that Rockhouse did not have a supply of supplementary roof support materials available at a readily accessible location on the working section. I find that the Secretary has proved the 103(k), the sound and vibrations testing and the supplementary roof support violations, but has not proved the unsupported roof or roof control plan violations.

The violations will be discussed in the order that they were issued.

Citation No. 7368962

This citation alleges a violation of section 103(k) of the Act, because: "The operator was performing work on the 001-0 MMU after a 103(k) order had been issued after a fatal roof fall. A survey crew was mapping the area on the section before an investigation had been conducted by MSHA. The affected area was the 001-0 MMU." (Jt. Ex. 3.) Section 103(k) provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine, and the operator of such mine shall obtain the approval of such representative . . . of any plan to recover any person in such mine or to recover the . . . mine or return affected areas of such mine to normal.

Inspector Murray issued Order No. 7373621 to Ken Deskins, the mine Superintendent, at 9:15 p.m. on September 6. The order stated that:

> The mine has experience[d] a fatal roof fall accident on the MMU 001 Section. This Order is issued to assure the safety of any person in the coal mine until an investigation is made to determine that the MMU 001 Section is safe. Only those persons selected from Company Officials, State Officials, the Miners' Representative, and other persons who are deemed by MSHA to have information relative to the investigation may enter or remain in the affected area.

(Jt. Ex. 2.)

According to his notes, when Inspector Murray gave the order to Deskins, he told Deskins that the MMU 001 section was "closed." (Govt. Ex. 1 at 5.) The notes reflect that Deskins then asked if supplies could be delivered to the section to recover the continuous miner and that Murray told him "that they could be delivered to the end of the MMU 001 section's tail track," but "no persons or no work could be done in affected area (MMU 001)." (*Id.*) The notes go on to state that "Mr. Deskins repeated these instructions (restricted areas) and fully understood" and that "Mr. Deskins stated he had no problems with the 103(k) order or instructions." (*Id.*)

The company argues that it did not violate the order because it had a duty to conduct its own investigation of the accident and that "Rockhouse was not put on notice that MSHA was construing its order is such restrictive fashion." (Resp. Br. at 20.) These arguments are without merit.

Section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation. While the Secretary's regulations require that the operator conduct its own investigation of the accident, it does not give the operator authority to do so in violation of a 103(k) order. The Respondent does not dispute that Murray's notes accurately reflect what Superintendent Deskins was told when the order was given to him. Thus, it is clear that Rockhouse was put on notice through Deskins what the order prohibited. Deskins apparently failed to disseminate the information to the appropriate Rockhouse employees. However, it was the company's duty to insure that this was done, not MSHA's.

Rockhouse goes on to argue that: "If Inspector Murray found it necessary that no one, including Rockhouse's investigative team, be in the area for any reason, he should have stated so in his Order." (Resp. Br. at 20.) In hindsight, this would have been a good idea. Nevertheless, if the order was ambiguous, Murray clarified it with his instructions to Deskins. Accordingly, I conclude that the survey crew violated the order as alleged.

Negligence

Inspector Cole testified that he alleged "high" negligence on the part of the operator in connection with this violation because there were no mitigating circumstances. (Tr. 55.) I find, however, that there are mitigating circumstances. The company did have a duty to investigate the accident, and the evidence indicates that they had not been charged with violating 103(k) orders when they had done so in the past. Further, the company did not attempt to hide the survey team from the inspectors; the inspectors learned that it was in the mine from the Mine Manager. (Tr. 46.) Finally, there is no evidence that they were using the survey as a pretext for altering the accident scene. Taking these factors into consideration, I find that the company was "moderately" negligent with regard to this violation.

Order No. 7373434

This order alleges a violation of section 75.202(a) of the Secretary's regulations, 30 C.F.R. § 75.202(a) in that:

> A fatal roof fall accident occurred on September 6, 2000, when the electrician, Gary Cochran, travelled [*sic*] inby permanent roof support. The victim was building a crib to access the continuous miner which was immobilized by an electrical problem. The accident occurred near the face of the No. 5 entry on the 001-0 MMU. The victim had gone inby the last row of permanent roof support approximately 3 feet when a rock measuring approximately 132" X 84" X 9" fell because of a lack of temporary roof support causing fatal injuries. Evidence obtained during the accident investigation indicated that cribs were routinely installed while accessing immobilized equipment inby permanent roof

> support without installing temporary support such as posts or jacks. Support materials such as jacks, posts, cap boards, or wedges were not available on or near the working section. Other miners were also endangered as a result of this practice. The supervisor, Raymond Fletcher, was in the working place supervising this unsafe work practice.

(Jt. Ex. 4.) Section 75.202(a) requires that: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of roof, face or ribs and coal or rock bursts."

It is not clear why the inspector alleged a violation of section 75.202(a). The crux of the charge is that Cochran traveled inby permanent roof support. It would appear that this would be more properly charged under section 75.202(b), 30 C.F.R. § 75.202(b), which states that: "No person shall work or travel under unsupported roof unless in accordance with this subpart." However, "this subpart," Subpart C–Roof Support, permits persons installing temporary roof supports to proceed beyond permanent support. 30 C.F.R. § 75.210(a). And installing temporary roof support is a means of supporting or otherwise controlling the roof.

The Secretary's problem is that she does not think that cribs, which are built by stacking six inch square by 30 inch long pieces of wood, two by two on top of each other, until they reach the roof, should be used as temporary support. It appears from the evidence at the hearing that she is probably right. Cribs take longer to install than either jacks or posts and, therefore, increase a miner's exposure to unsupported roof. (Tr. 122.) Nor does it appear that the greater support provided by cribs over jacks or posts offsets the increased exposure while they are being constructed. This is particularly true in a situation such as this one where the temporary support is to be used only to allow someone to access the miner to reset the breaker and the support will be knocked down by the miner as it is backed out of the entry. However, as the Secretary admits in her brief, "[i]t is not illegal to use cribs as temporary support . . . ." (Sec. Br. at 12.)

Since the Secretary has not prohibited the use of cribs as temporary support, she cannot sustain this violation. Furthermore, the fact that the company did not have a complete supply of supplementary supports, which is the subject of Order No. 7373437, does not change matters. The roof fall occurred when the first crib had barely been started. Thus, a complete supply of supplementary supports would not have prevented the accident.

I conclude that the Secretary has failed to prove that Rockhouse violated section 75.202(a). Accordingly, I will vacate the order.

Order No. 7373435

This order charges a violation of Section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), because:

> The roof control plan, approved August 25, 1999, was not followed on the 001-0 MMU. The plan states on page 11, item 5, that, in the event of a breakdown of face equipment inby permanent roof support, permanent roof support shall be installed as close to the work area as practical. Item 5, further states that temporary roof support, if necessary, will then be installed for a minimum of 2 rows inby the work area.
>
> A fatal roof fall accident occurred when the electrician, Gary Cochran, travelled [*sic*] inby permanent roof support to construct a crib in the No. 5 entry of the 001 MMU. Permanent supports had not been installed as close as practical to the work area. The supervisor, Raymond Fletcher, was in the working place supervising this unsafe work practice.

(Jt. Ex. 5.) Section 75.220(a)(1) requires that: "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."

As stated in the order, item five on page 11 of the Respondent's roof control plan says that: "In the event of a breakdown of face equipment inby permanent roof support, permanent roof support shall be installed as close to the work area as practical." (Jt. Ex. 8 at 11.) The parties are in agreement that the continuous miner was face equipment which had broken down and that this provision applied. They do not agree, however, on what the "work area" was and whether installing additional roof bolts was "practical."

The company asserts that the "work area" was the area on the right side of the mining machine, because that was the side on which the breaker was. The company further asserts that roof bolts had already been installed as close to the work area as practical and no further roof bolts were needed. The Secretary does not address "work area" or "practical," instead making the conclusory statement that: "Additional roof bolts *could* have been installed inby the roof bolts on the left side of the [continuous miner's] boom and in the area where the crib was being constructed." (Sec. Br. at 15, emphasis added.)

While the term "work area" is not defined in the roof control plan, Inspector Newberry agreed with the Respondent, that the work area was on the right side of the mining machine. (Tr. 174.) The term "practical" is also not defined in the plan. Indeed, in looking the word up in the dictionary, it appears that the word is used in place of the word "practicable" which means:

> 1 : possible to practice or perform : FEASIBLE 2 : capable of being used : USABLE
>
> **syn** PRACTICABLE, PRACTICAL means capable of being put in use or put into practice. PRACTICABLE applies to what has been proposed and seems feasible but has not actually been tested in use; PRACTICAL applies to things and to persons and implies proven success in meeting the demand made by actual living or use.

Webster's Ninth New Collegiate Dictionary 923 (1986). Thus, it appears that the plan calls for permanent support to be installed as close as seems feasible. This clearly is a judgment call.

Inasmuch as Fletcher did not testify, it can only be assumed that he did not think that installing additional roof bolts was feasible. James Pinson, who was the Mine Foreman at the time of the accident and is now the Mine Superintendent, and Johnny Robertson, who was the Safety Coordinator for Massey Coal Services at the time of the accident and is now the Mine Manager at the Justice Mine, both testified that they had observed the accident scene on the night of September 6 and that they would not have installed any additional roof bolts prior to trying to retrieve the miner. (Tr. 298, 349, 377.) Not surprisingly, Inspector Newberry testified that additional roof bolts could have been installed, particularly on the left side of the miner. (Tr. 156.)

Obviously, reasonable persons can differ on the feasibility of installing additional bolts in this case. However, when it came to exactly how the bolts would be installed, the inspector was less positive as to whether they could actually be installed. (Tr. 171-73.) Furthermore, I find it significant that when the miner was recovered the next day, the recovery plan approved by MSHA did not call for additional roof bolts, Inspector Newberry did not suggest to Pinson, who did the work, that additional roof bolts should be installed, and, in fact, no additional bolts were installed. (Tr. 170, 300.) Consequently, I conclude that the Secretary has not shown that Fletcher's judgment in not installing additional roof bolts was patently incorrect and will vacate the order.

Order No. 7373436

This order alleges a violation of section 75.211(b)(2), 30 C.F.R. § 75.211(b)(2), because:

> Sound and vibration roof tests, or other equivalent tests, were not made prior to installation of roof supports on the 001-0 MMU. Evidence obtained during an accident investigation indicates that no such tests were made prior to installing a crib to access equipment immobilized inby permanent roof supports. An electrician was fatally injured while constructing a crib. The

> supervisor, Raymond Fletcher, was in the working place supervising this unsafe work practice.

(Jt. Ex. 6.) Section 75.211(b)(2) provides that:

> (b) Where the mining height permits and the visual examination does not disclose a hazardous condition, sound and vibration roof tests, or other equivalent tests, shall be made where supports are to be installed. When sound and vibration tests are made, they shall be conducted–
>
> . . . .
>
> (2) Prior to manually installing a roof support. This test shall begin under supported roof and progress no further than the location where the next support is to be installed.

Rockhouse does not dispute that Fletcher failed to perform sound and vibration testing prior to beginning to install temporary roof support. Inspector Newberry testified that Fletcher told him that "he didn't do one." (Tr. 212.) Consequently, I conclude that the Respondent violated the regulation as alleged.

Significant and Substantial

The Inspector found this violation to be "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." 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 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying

violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Considering the *Mathies* criteria, I have already found the underlying violation of section 75.211(b)(2). The company argues that there was no measure of danger to safety contributed to by the violation because sound and vibration testing "[is] not useful for indicating problems where the mine has a drummy roof." (Resp. Br. at 31.) While all parties agreed that the roof in Mine No. 1 generally had a "drummy" sound, none of the witnesses agreed that because of that sound and vibration tests were not useful in determining the status of the roof.

Inspector Cole testified that even in mines with drummy roofs, the miners "at a particular mine of these conditions, would become accustomed to telling the degree of – [t]he thickness of the rock. They can get pretty close to what they've got by the sound and vibration measuring." (Tr. 81-82.) Inspector Newberry testified that sound and vibration testing was useful in a mine with a drummy roof because, "[w]hen you sound the roof in different areas and you can tell the change in roof conditions." (Tr. 198.) Pinson agreed that in a drummy mine "there would be different sounds" when a fall is imminent as opposed to more stable places. (Tr. 317.) Finally, Robertson, when asked if he were aware that in a mine with a drummy roof one could listen for differences in the drummy nature of the roof, that there are degrees of drumminess, responded: "Absolutely." (Tr. 386.)

Therefore, I find that performing a sound and vibration test could have indicated a possible roof fall and that failure to perform it created a distinct safety hazard of a roof fall.[1] I further find that the third and fourth criteria are met because it is reasonably likely that a roof fall will result in a reasonably serious injury. As the Commission stated 20 years ago, "[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining" and "remain the leading cause of death in underground mines." *Consolidation Coal Co.*, 6 FMSHRC 34, 37-38 n.4 (Jan. 1984).

Negligence

The inspector found the level of negligence in connection with this violation to involve a "reckless disregard" on the part of the operator. The Secretary's regulations define "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). While I find that Fletcher was highly negligent in not knowing about section 75.211(b)(2) and in not performing the tests, I cannot agree that he exhibited an absence of the slightest degree of care. He did, in fact, perform a visual examination of the area. And since he did not know of the regulation, it cannot be said that he deliberately ignored it. Accordingly, the

[1] The Respondent's additional assertion that because of his height, Fletcher would not have been able to reach out far enough to perform the test does not merit comment.

level of negligence for this violation will be reduced from "reckless disregard" to "high."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation.[2] 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 (Dec. 1987); *Youghiogheny,* 9 FMSHRC at 2010. "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 Co.,* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

In this case, Fletcher told Inspector Newberry that he did not perform a sound and vibration test because he thought he only needed to do a visual exam. (Tr. 211.) Contrary to Rockhouse's assertion that since Fletcher was unaware of the regulation the severity of the violation is not aggravated, I agree with Inspector Newberry that as a certified foreman Fletcher should have known to perform sound and vibration tests.

In *Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1130 (July 1992), the Commission held: "Although the operator knew of the dangers involved in operating large metal machinery near energized power lines, it directly exposed its miners to such hazards without regard for their safety and without taking precautions. Such conduct is aggravated, and constitutes more than ordinary negligence." In this case, Fletcher knew, or should have known, that the mine had an unstable, shale roof, and knew, or should have known, that that made the danger of going under unsupported roof even greater than normal, yet he exposed his miners to such a hazard without taking the precaution of performing sound and vibration tests. Such conduct is aggravated and constitutes more than ordinary negligence.

In *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 194, the Commission held that "an agent's conduct may be imputed to the operator for unwarrantable failure purposes." As foreman, Fletcher was clearly an agent of Rockhouse. Accordingly, I conclude that the company's violation of section 75.211(b)(2) was an unwarrantable failure to comply with the regulation.

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[2] The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

Order No. 7373437

This order charges a violation of section 75.214(a), 30 C.F.R. § 75.214(a), because:

> A supply of supplementary roof support materials such as posts or jacks, cap boards and wedges, and the tools and equipment necessary to install the materials were not available at a readily accessible location on the 001-MMU [*sic*] working section or within four crosscuts of the working section. An electrician was fatally injured while installing a crib to provide access to equipment immobilized inby permanent supports. The supervisor, Raymond Fletcher, was in the working place supervising this unsafe work practice.

(Jt. Ex. 7.) Section 75.214(a) requires that: "A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section."

Inspector Newberry testified that he found 21 crib blocks at the site of the accident and another 70 blocks more than four crosscuts outby the working section. (Tr. 108, 137, 218, 228.) He further testified that nowhere did he find any wedges or caps, which are necessary to complete installation of a crib. (Tr. 108, 110.) Finally, the inspector stated that the 21 crib blocks found at the scene were not enough to complete one crib. (Tr. 240.) The company does not dispute this evidence.

Rockhouse argues that: "The regulation does not require that [an] operator have enough material to build one crib, six cribs or any other number of cribs – only that a supply be maintained." (Resp. Br. at 33.) This argument disregards section 75.214(b), 30 C.F.R. § 75.214(b), which states that: "The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall." Having only 21 crib blocks on site, not enough to build even one crib, and having no wedges or caps anywhere, plainly does not meet the requirements of section 75.214(a). Therefore, I conclude that Rockhouse violated the regulation.

Significant and Substantial

The inspector found this violation to be significant and substantial. He said that because of the bad roof on the section, Fletcher should have had a heightened awareness of the possibility of unsafe conditions and better monitored his roof support materials. (Tr. 222.)

Applying the *Mathies* criteria, I find: (1) A violation of a safety standard, section 75.214(a); (2) A distinct safety hazard, a measure of danger to safety, contributed to by the

violation, namely the roof going unsupported longer than necessary because the materials were not available, thereby increasing the danger of a roof fall; (3) A reasonable likelihood that a roof fall would result in an injury; and (4) A reasonable likelihood that the injury would be of a reasonably serious nature, most likely fatal, but at a minimum broken bones. Consequently, I conclude that the violation was "significant and substantial."

Negligence

The inspector found that the negligence attributable to this violation was "high" because Fletcher was supervising the recovery and should have had a heightened awareness of the need to have supplementary roof support on hand. On the other hand, there has been no showing that it was Fletcher's responsibility to stock the supplementary roof support materials or that he was aware, when he began the recovery process, that no such materials were within four crosscuts of the section. Further, even if a full supply of supplementary roof support materials had been easily accessible it would not have prevented this accident, since the roof fall occurred when the miners had barely begun building the first crib, before they had used up the materials on the site.

While Fletcher, and through him the operator, were clearly negligent with respect to the supply of supplementary roof support, there are mitigating circumstances. Accordingly, I conclude that the Respondent was "moderately" negligent with regard to this violation and will modify the citation accordingly.

Unwarrantable Failure

For the same reasons that he found "high" negligence, the inspector charged this violation as involving an "unwarrantable failure." For the same reasons that I find the violation to involve "moderate" negligence, I find that it did not involve an unwarrantable failure. The conduct in connection with this violation was clearly not "intentional," nor does it evidence "reckless disregard," "indifference" or a "serious lack of reasonable care." In short, it was not aggravated conduct constituting more than ordinary negligence. Therefore, I will modify this order to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation.

Civil Penalty Assessment

The Secretary has proposed penalties of $20,000.00 for Citation No. 7368962 and $55,000.00, each, for Order No. 7373436 and Citation No. 7373437, the three violations that are being affirmed. 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 F.2d 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 at the time of the accident Mine No. 1 produced 3,000 tons of coal a day and that payment of the proposed penalties will not

adversely affect Rockhouse's ability to remain in business. (Tr. 7-9.) From this I find that Rockhouse is a large company and that payment of the penalty I assess will not affect its ability to remain in business. Based on the Assessed Violation History Report [3], (Jt. Ex. 9), and the Proposed Assessment Data Sheet in the file, I find that Rockhouse has an average history of previous violations.

Based on the citation forms and evidence Rockhouse presented at the hearing that it is taking significant steps in attempting to prevent the reoccurrence of this type of accident, I find that the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Jt. Exs. 3-7.) In direct response to this accident, Rockhouse has expended a considerable sum of money in developing an isolator switch to reset the main power breaker, a traction breaker reset system, an emergency stop override system and a methane monitor malfunction override system which will give miner operators the ability to restore power to a continuous miner and move it to a safe area for servicing without having to build temporary supports to go under unsupported roof. (Tr. 270, 274, 276, 280; Resp. Exs. E, F and G.) Additionally, the company has conducted presentations and seminars on these systems to share this technology with others in the industry. (Tr. 281-82.)

With regard to Citation No. 7368962, I find the gravity of the violation to be only moderately serious. While violations of inspectors orders are serious and not to be condoned, this does not appear to have been an intentional violation and resulted in no harm to the investigation. As previously discussed, I find the Rockhouse was moderately negligent in committing this violation.

The gravity of the violation in Order No. 7373436 is very serious. A death occurred and it is possible that it would not have occurred if all required precautions were taken prior to commencing the recovery of the continuous miner. The company exhibited a high degree of negligence in connection with this violation.

Finally, the gravity of the violation in Citation No. 7373437 is serious. While the violation did not cause the fatality, it shows a lack of preparedness on the part of the company in being able to immediately deal with poor roof conditions. The company was moderately negligent in committing this violation.

Taking all of these factors into consideration, I assess a penalty of $5,000.00 for Citation No. 7368962, a penalty of $40,000.00 for Order No. 7373436 and a penalty of $20,000.00 for Citation No. 7373437.

[3] The Assessed Violation History Report was submitted post-hearing. (Tr. 7.)

Order

In view of the above, Citation No. 7368962 and Docket No. KENT 2001-2-R are **AFFIRMED**; Order No. 7373434 is **VACATED** and Docket No. KENT 2001-7-R is **DISMISSED**; Order No. 7373435 is **VACATED** and Docket No. KENT 2001-8-R is **DISMISSED**; Order No. 7373436 is **MODIFIED** by reducing the level of negligence from "reckless disregard" to "high" and it and Docket No. KENT 2001-9-R are **AFFIRMED** as modified; and Order No. 7373437 is **MODIFIED** from a 104(d)(1) order to a 104(a) citation by deleting the "unwarrantable failure" designation, and is further **MODIFIED** by reducing the level of negligence from "high" to "moderate" and it and Docket No. KENT 2001-10-R are **AFFIRMED** as modified.

Rockhouse Energy Mining Company is **ORDERED TO PAY** a civil penalty of **$65,000.00** within 30 days of the date of this order.

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T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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