FEDERAL M NE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20001

January 28, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-184
Petitioner	:	A. C. No. 15-14492-03877
v.	:	
	:	Docket No. KENT 2002-238
	:	A. C. No. 15-14492-03881
	:	
LODESTAR ENERGY, INC.,	:	
Respondent	:	Baker Mine

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner;
Stanley Dawson, Esq., Fulton & Devlin, Louisville, Kentucky, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994), the "Act," charging Lodestar Energy Inc. (Lodestar) with multiple violations and seeking civil penalties for those violations. The general issue before me is whether Lodestar has violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.[1]

Citation No. 7647114 (Docket No. KENT 2002-238)

Citation No. 7647114 alleges violations of an approved petition for modification and charges as follows:

> The circuit breakers for the P65 and P53 roof bolters were not sealed breakers. This was observed on #3 unit located in the 23rd east gates. P65 bolter was found to have approximately 599 feet of cable and the P53 roof

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[1] Only two citations remained at issue for disposition at hearing. Other citations in these dockets were the subject of a partial settlement decision issued October 22, 2002. Disposition of Citation No. 7646149 has been stayed pending approval of a settlement motion by the Bankruptcy Court.

bolter had approximately 744 feet of cable when measured. The instantaneous settings for the P65 breaker was set at 700 amperes and the P53 breaker was set at 300 amperes. These breakers were not sealed breakers set at 300 amperes as required by page 2 of 101 c petition M-98-028-C. All circuit breakers used to protect the no.6 awg trailing cables that supply power to the Fletcher single boom roof bolters that exceed 550 feet in length shall have instantaneous trip units calibrated to trip at 300 amperes. The unit mechanic was not aware of said petition or of any requirements that the petition contained. The petition became final for this mine on 1/15/1999.

By way of background, Lodestar had petitioned the Secretary of Labor on March 18, 1998, for modification of the application of the standard at 30 C.F.R. § 75.503.[2] The petition was granted on December 16, 1998, with certain conditions. (See Government Exhibit No. 7). In relevant part the order granting the petition provided as follows:

> GRANTED, for the extended length, 480-volt, three-phase alternating current trailing cables, used to develop the three and four entry longwall development panels at the Baker Mine, conditioned upon compliance with the following terms and conditions:
>
> 1. The maximum length of the 480-volt, three phase alternating current trailing cables, supplying power to the Fletcher single boom roof bolters shall not exceed 750 feet in length and the trailing cable shall have a 90 degree centigrade insulation rating.
>
> 2. The trailing cable for the Fletcher single boom roof bolters shall not be smaller than a No. 6 AWG cable.
>
> 3. All circuit breakers used to protect the No. 6 AWG trailing cables that supply power to the Fletcher single boom roof bolters that exceed 550 feet in length shall have instantaneous trip units calibrated to trip at 300 amperes.
>
> 4. The trip settings of these circuit breakers shall be sealed after they are calibrated and these circuit breakers shall have permanent, legible labels.
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> * * * *

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[2] The parties acknowledge that the modified standard more specifically involved 30 C.F.R. Part 18, Table 9, which sets forth specifications for portable cables longer than 500 feet.

13. Within 60 days after this Proposed Decision and Order becomes final, the Petitioner shall submit proposed revisions for its approved 30 C.F.R. Part 48 training plan to the Coal Mine Safety and Health District Manager for the area in which the mine is located. These proposed revisions shall specify task training for miners designated to verify that the short-circuit settings of the circuit interrupting device(s) that protect the affected trailing cables do not exceed the specified setting in Item Nos. 3 and 5. The training shall include the following elements:

    A. The hazards of setting the short-circuit interrupting device(s) too high to adequately protect the trailing cables;
    B. How to verify that the circuit interrupting device(s) protecting the trailing cable(s) are properly maintained;
    C. Mining methods and operating procedures that will protect the trailing cable(s) against damage; and
    D. Proper procedures for examining the affected trailing cable(s) to ensure that the cables are in safe operating condition.

While conceding that it had successfully petitioned the Secretary, pursuant to Section 101(c) of the Act, for modification of the application of the mandatory standard at 30 C.F.R. § 75.503, Lodestar baldly asserts, without citing any legal authority, that it may, in effect, thereafter choose at any time to accept or ignore the approved modification.[3] Under the

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[3] Section 101(c) of the Act provides as follows:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested p arty, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall

Secretary's standard implementing Section 101(c) however, *i.e.*, 30 C.F.R. § 44.4(c), once a petition for modification is granted, that granted petition is enforceable as a mandatory safety standard.[4] The language of 30 C.F.R. § 44.4(c) is unambiguous and leaves no doubt that compliance with the granted modification is mandatory and not voluntary. Within the framework of the granted petition then, once the trailing cables supplying power to the Fletcher single boom roof bolters exceed 550 feet in length, the procedures set forth in the granted petition must be followed.

The issue then, is whether Lodestar violated the terms of the granted petition. It is undisputed that when Robert Simms, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), was at the mine premises on April 4, 2001, the trailing cables for the P-65 and P53 Fletcher single boom roof bolters were 599 feet and 744 feet in length, respectively. In accordance with the terms of the granted petition for modification, Lodestar must therefore have set the amperage of the corresponding unit circuit breakers at 300 amperes, sealed the trip settings of these circuit breakers after they were calibrated and provided training in accordance with the terms of the granted petition.

It is undisputed that the P-65 circuit breaker was set at 700 amperes and that there were no seals on either of the circuit breakers. It is also clear from the credible record that at least several employees working on the unit were not trained on the terms of the granted petition. Thus, all three of the violations have been proven as charged. In regard to the latter violation, Michael Smith, a Lodestar employee of 23 years and a unit mechanic for 17 years, testified that he was unfamiliar with the petition for modification at issue. Indeed, Smith acknowledged that the breakers had not been sealed in 23 years and that he had periodically adjusted the settings on the circuit breakers without any knowledge as to the appropriate amperage on those settings. I find this testimony credible and certainly sufficient to establish the third violation charged in the citation.

The citation herein was issued by the Secretary, pursuant to Section 104(d)(1) of the

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be subject to section 554 of Title 5.

[4] 30 C.F.R. § 44.4(c), provides as follows:

All petitions for modification granted pursuant to this part shall have only future effect: *Provided*, That the granting of the modification under this part shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard. Orders granting petitions for modification may contain special terms and conditions to assure adequate protection to miners. The modification, together with any conditions, shall have the same effect as a mandatory safety standard.

Act.[5] Accordingly, the Secretary has the burden of proving that the violation was "significant and substantial" and the result of "unwarrantable failure." A violation is properly designated as "significant and substantial" if, based on 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 explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary 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 will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Powder Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*,

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[5] Section 104(d)(1) provides as follows:

"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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

13 FMSHRC 912, 916-17 (June 1991).

In her post-hearing brief the Secretary argues in this regard that the first two violations alleged in the citation constitute a "significant and substantial" violation of the granted petition.[6] The testimony of the issuing inspector in support of such a conclusion is deficient however in that he based his assessment of the event upon a mere "possibility" rather than the requisite "reasonable likelihood" standard. Charles Baird, Lodestar's maintenance foreman, also clearly had the more thorough knowledge of the mine's electrical system and his credible testimony further negates a "significant and substantial" finding. Accordingly, I do not find that the violation was "significant and substantial."

While the Secretary also alleges that the violation was the result of Lodestar's "unwarrantable failure" to comply with the modified standard, that issue is now moot in the absence of a "significant and substantial" violation. See fn. 5. Nevertheless I find that the violation was the result of significant negligence. In this regard I find that Lodestar should have been on heightened awareness of the requirements of the granted petition having made significant efforts in filing the petition. It is noted, moreover, that the petition was granted more than two years before the citation at bar was issued. The undisputed testimony of Michael Smith, the unit mechanic, also clearly establishes operator negligence. Smith admitted that he had no knowledge of the requirements of the granted petition, that the breakers had not been sealed in 23 years and that he had periodically adjusted the settings on the circuit breakers without any knowledge as to the proper amperage. Lodestar's training of Smith was therefore clearly deficient and the result of its own negligence. The negligence of Smith, a rank-and-file miner, may therefore also be imputed to Lodestar for purposes of assessing a civil penalty, *A. H. Smith Stone Co.,* 5 FMSHRC 13, 15 (January 1983); *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (August 1982).

Under all the circumstances, Citation No. 7647114 must be modified to delete the "significant and substantial" findings and modified to a citation under Section 104(a) of the Act.

Order No. 7647121 (Docket No. KENT 2002-184)

Order No. 7647121, issued April 17, 2001, alleges a violation of the standard at 30 C.F.R. § 75.342(a)(4) charges as follows:

> The methane monitor for the M21 miner located on #3 unit in the 23rd East gates was not being maintained in a proper operating condition. When 2.5

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[6] In her post-hearing brief the Secretary does not argue or claim that the third violation charged in the citation - - *i.e.*, failure to train the unit mechanic in the requirements of the granted petition - - constituted a "significant and substantial" violation. Accordingly any such allegation is deemed to have been waived.

> percent of methane was applied, the digital read out for the monitor showed 0.1 percent methane. The continuous miner had only cut approximately 10 feet from the 2 left face before the methane monitor was tested. It was determined by a maintenance foreman that the dust cap was stopped up. The methane monitor had been calibrated the shift before on 4/17/2001 during an examination.

The cited standard, 30 C.F.R. § 75.342(a)(4), provides in relevant part that "methane monitors shall be maintained in permissible and proper operating condition . . ." MSHA Inspector Robert Simms testified that on April 17, 2001, while conducting an inspection at the subject mine, he observed that, as the continuous miner cut into the face on the No. 3 unit, its methane monitor was registering zero methane. Simms found this to be suspicious because he had previously detected methane at a nearby location. He requested that the suspicious monitor be checked. A known 2.5% methane sample was presented to the sensing head of the monitor and the monitor registered .1% methane. In Simms' presence, mechanic Barry Utley then cleared the dust cap covering the sensing head. This procedure did not correct the problem so Charlie Willett, the third shift maintenance boss, then helped change the sensing head. A known sample of methane gas was again presented and again the sensor failed to register correctly. According to Simms, Willett then cleaned the screen in the dust cap and washed it out with a spray. The sensor then worked properly upon testing. Since there is no dispute that the cited methane monitor for the M21 continuous miner was in fact not properly functioning, the violation is proven as charged.

The Secretary also alleges that the violation was "significant & substantial" and the result of "unwarrantable failure." The analysis to establish a "significant and substantial" violation has previously been discussed. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" (neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

According to Inspector Simms, after the monitor was properly functioning, he returned to the surface and checked the operator's examination books. It is undisputed that it was reported in the books that the monitor had been calibrated the night before. It is undisputed that only 10 feet to 15 feet of coal had been cut since the purported calibration. Simms concluded however

that the amount of dust in the dust cap was in excess of the amount that should have been there based on the amount of mining that had occurred. Simms opined that this amount of mining could not have caused the monitor's dust cap to have become so clogged.

Charlie Willett was the maintenance foreman on the subject shift. According to Willett they replaced the sensing head (sniffer) and blew out the dust cap. He could not recall whether he sprayed any water onto it. Willett claimed at hearing that the dust cap was not in fact clogged and that he only blew through it. He denied that he told Simms that the dust cap was clogged and maintained that he only said that it was "possible" that it was stopped up. Willett noted that sensors break down all the time.

Lodestar argues that it was the sensor that was defective and that since sensors break down all the time Lodestar suggests that the defect had occurred only shortly before it was discovered by the inspector. I do not find this scenario credible, however, in light of the undisputed sequence of events cited by Inspector Simms. According to that sequence, after the defect was discovered, the sensor was replaced and the monitor still did not function. It was only after the dust cap was then cleaned that the monitor began properly registering methane. Thus, whether or not the sensor was defective, the dust cap was in fact so clogged that it prevented any methane from reaching the sensor. Considering that only one cut of coal of about 10 to 15 feet had been taken since the monitor had been calibrated and reported in the corresponding examination book and considering Simms' unchallenged testimony that the dust generated by this limited cut would not be sufficient to clog the sensor to the extent found, it may reasonably be inferred that the defect in the monitor had existed prior to the time it was reported as calibrated in the examination book. This is evidence of gross negligence and "unwarrantable failure."

As noted, the Secretary also alleges that the violation was "significant and substantial." In this regard the following colloquy occurred at hearings:

> Q. Mr. Simms, you marked this 104(d)(1) order as being characterized - - the gravity being characterized as significant and substantial. Why did you do that, sir?
>
> A. Because the methane monitor - - 2 ½ percent methane was applied and would not read but .1.
>
> Q. Are you saying 1/10?
>
> A. One tenth of one percent, .1. The No. 1 and the No. 2 units had been liberating methane earlier between the 4th and the 17th when I had visited those other two units. There's an increased likelihood that with the methane monitor not working and them up in the face cutting coal, it would be possible to cause an ignition.

Q. How would that happen?

A. The churning of the bits against the mine roof and the face. The methane accumulation not being detected by a bad sensor and the sparking of the bits could possibly cause an ignition.

Q. Now, I think it's probably known by the Judge as many cases as he's heard, but what's the methane monitor supposed to do?

A. The methane monitor is supposed to give a warning of 1 percent and knock the power at 2 percent.

Q. An explosive range is 5 percent to 15 percent?

A. Yes.

(Tr. 219-220).

To find a violation "significant and substantial" there must be a finding of a "reasonable likelihood" of injury. The inspector's testimony that an ignition was "possible" is therefore not sufficient. In addition, Lodestar section foreman Varney Coleman opined that the likelihood of a methane ignition here was "very very slim." Lodestar compliance coordinator Kevin Vaughn testified that, of the 13 prior violations of this standard cited by MSHA, the only one found to be "significant and substantial" was the one at issue herein. Vaughn opined that injuries were not likely to occur on the facts herein. He observed that many circumstances must come together to result in an explosion. In this regard he noted that a place is only cut for 15 minutes and then the continuous miner is moved. He further noted that methane was unlikely because of water sprays, adequate ventilation, the scrubber and the fact that the area is checked for methane before mining.

Under all the circumstances I am not satisfied that the Secretary has sustained her burden of proving the violation herein to be "significant and substantial."

Civil Penalties

Citation No. 7647114 - considering the high negligence and moderate gravity of the violation, the fact that the violation was abated in good faith, that the operator is large in size, that it has a significant history of prior violations, and that it has been stipulated that the penalty would not effect the ability of the operator to remain in business, I consider a civil penalty of $1,000.00, appropriate.

Order No. 7647121 - considering the high negligence, moderate gravity, good faith abatement of the violation, the large size operator, the significant history of violations and the fact that it has been stipulated that the penalty would not effect its ability to remain in business, I

find a civil penalty of $1,000.00, appropriate.

ORDER

Citation No. 7647114 is hereby modified to delete its "significant and substantial" findings and modified to a citation under Section 104(a) of the Act. Lodestar Energy Inc., is directed to pay a civil penalty of 1,000.00, within 40 days of the date of this decision for the violation charged therein. Order No. 7647121 is hereby modified to delete the "significant and substantial" findings. Lodestar Energy Inc., is directed to pay a civil penalty of $1,000.00, within 40 days of the date of this decision for the violation charged therein.

Gary Melick
Administrative Law Judge

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