FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
October 22, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2003-107 A.C. No. 15-17651-03619
v.	:	
ROCKHOUSE ENERGY MINING COMPANY, Respondent	:	Mine No. 1

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, for Petitioner;
M. Shane Harvey, Esq., Massey Coal Services, Inc., Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Rockhouse Energy Mining Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of $30,000.00. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of $7,000.00.

Background

Rockhouse Energy operates Mine No. 1, an underground coal mine, in Pike County, Kentucky. Rockhouse is a wholly owned subsidiary of A. T. Massey Coal Company.

On March 22, 2002, foreman Keith L. Casey was fatally injured when his head was struck by the boom of a continuous mining machine that he was tramming through a cross-cut. After investigating the accident, MSHA Investigator Robert Bates issued Citation No. 7389525, alleging a violation of section 75.220(a)(1) of the Secretary's regulations, 30 C.F.R. § 75.220(a)(1), because:

> The safety precautions specified on pages six and fifteen of the approved roof control plan were not being followed while the remotely controlled continuous mining machine was being trammed in the last open crosscut of the 001 section. Page six of

> the plan requires that while the miner is being trammed from place to place, all persons will remain outby the boom of the machine. Page fifteen specifies that while the miner is in motion, no person will be positioned between the machine and the coal rib.
>
> On March 22, 2002, Keith L. Casey was fatally injured when he was caught between the tip end of the conveyor boom and the coal rib while he was tramming the miner in the last open crosscut of the 001 section. The position of the victim at the time of the accident indicates that he was located between the machine and the coal rib, which is a violation of the approved roof control plan.

(Govt. Ex. 4.) Section 220(a)(1) provides that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to prevailing geological conditions, and the mining system to be used in the mine."

Findings of Fact and Conclusions of Law

MSHA's Report of Investigation found that the accident occurred as follows:

> On March 22, 2002, a 33 year old section foreman was fatally injured when he was caught between the conveyor or boom of a continuous mining machine and the coal rib. Keith L. Casey (victim) was using a remote control unit to back the machine across the last open crosscut of the 001 section when the accident occurred. According to the only eyewitness, the victim was kneeling behind the machine, on the right side, while backing it through the crosscut. As the machine came through the intersection of the No. 2 entry and the last open crosscut, it suddenly moved to the right and pinned him against the rib. The accident occurred primarily because the victim was located too close to the pinch point created by the boom of the machine and the coal rib.

(Govt. Ex. 3 at 2.)

The parties stipulated that "there were no operational or physical defects of the continuous miner that contributed to the accident." (Tr. 24.) Further the company did not contest at the hearing either the fact of violation or that the violation was "significant and substantial." (Tr. 29, 32-35, 122.) Accordingly, I conclude that the Respondent violated section 75.220(a)(1) as alleged and that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed a penalty of $30,000.00 for this violation. 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). Section 110(i) provides that:

> In assessing civil monetary penalties, 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 the violation.

With regard to the penalty criteria, the parties have stipulated that the proposed penalty will not affect the company's ability to remain in business. (Tr. 24.) Therefore, I so find.

I find, as shown on the Proposed Data Assessment Sheet, that Mine No. 1 is a fairly large mine and that Massey is an extremely large coal company. (Govt. Ex. 1 at 1.) I further find, based on the Company's Assessed Violation History Report, the Proposed Data Assessment Sheet and the parties' stipulation, that Rockhouse has an average history of previous violations. (Tr. 26, Govt. Ex. 1 at 2, Govt. Ex. 3.) I also find that the gravity of the violation was very severe in that it resulted in the death of a miner.

Although the parties have stipulated that the Respondent demonstrated good faith in abating the violation, (Tr. 27), they do not agree whether Massey's development of a proximity device designed to prevent similar accidents is entitled to any credit under this criterion. The Secretary's position is that, while the development of such a device is commendable, it "should not be considered as [a] factor[] that can serve to reduce the amount of the assessed penalty by way of the "good faith" criterion." (Sec. Br. at 7.) On the other hand, the company argues that "[b]ecause of the very high levels of good faith exercised by Respondent . . . the penalty should be small." (Resp. Br. at 6.) I find that the Respondent has the better argument in this instance.

The Secretary argues that "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of the violation" means "taking certain steps to correct a particular violation within a relatively short time period immediately following notification of a particular violation's existence." (Sec. Br. at 5.) Thus, if the steps to correct the violation are not taken "within a relatively short time period immediately following notification" of the violation, there can be no good faith credit. In part, the Secretary bases this interpretation on section 100.3(f) of the regulations, 30 C.F.R. § 100.3(f), which provides that an operator will receive "a 30%

reduction in penalty amount of a regular assessment where the operator abates the violation in the time set by the inspector."

While there do not appear to be any cases interpreting this specific criterion, I find the Secretary's argument to be too restrictive. In the first place, the penalty point formula in 30 C.F.R. § 100.3 is not binding on the Commission or its judges. *Sellersburg*, 736 F.2d at 1152. In the second place, the Act says nothing about abating the violation "in the time set by the inspector." In the third place, there are cases, such as this one, where there is nothing to correct. There were no defects in the continuous miner. Unlike a guarding violation, where a missing guard can be installed to abate the violation, or an accumulations violation, where the accumulations can be removed to abate the violation, there was no action of a similar nature for the operator to take to achieve rapid compliance.

Instead, the inspector required Rockhouse to give training sessions to all personnel who worked on sections using continuous mining machines "to raise awareness of the hazards that can exist when walking or working around continuous mining machines." (Tr. 57.) While the training sessions could not correct the particular violation, they would probably make it less likely that the same thing would happen again. Nonetheless, because these training sessions were all completed the same day as the violation, the Secretary asserts that this is the type of rapid compliance required under the Act.

In essence, the Secretary seems to be arguing that if you take an action to prevent a violation from reoccurring you are entitled to credit for good faith abatement if the action is taken within "a relatively short time period," but you are not entitled to credit if the action takes longer than a relatively short time period. Yet it appears that the Respondent's development of a proximity device is very likely to really prevent reoccurrences of the accident.

In an MSHA paper entitled "Remote Control Fatal Accident Analysis Report of Victim's Physical Location with Respect to the Mining Machine," April 26, 2002, an analysis of 18 remote control-related fatal accidents including the one in this case, the authors stated that:

> The high incidence of poor work practices in the fatal accidents also highlights the dangers associated with the psychological detachment from the machine and complacency that develops in the minds of the operators with the use of remote control technology. Because of these factors, *established work practices and training alone are not sufficient to prevent the type of accidents that have occurred.*

(Resp. Ex. C at 6.) (Emphasis added.) The paper concluded by stating that: "It is estimated that the use of proximity protection with machine shutdown could have been a preventative factor in 15 of the 18 fatal accidents . . . . The technology for personnel proximity protection currently exists and its development and use on remote controlled mining machinery needs to be pursued." (Resp. Ex. C at 6.)

The company began trying to design such a device as a result of this accident. According to Inspector Bates, testing of the device has gone well. (Tr. 89.) Although development of the device had not been completed at the time of the hearing, I conclude that the Respondent's undertaking of this task, specifically in response to this violation, is entitled to consideration under the "good faith" element of the penalty criteria.

The final factor to be considered is negligence. The inspector determined that Casey was "moderately" negligent because "he simply misjudged his location with respect to the moving machine. He simply made a mistake in judgment . . . ." (Tr. 55.) Normally, the negligence of a foreman is imputable to the operator in determining the amount of penalty. Here, the company argues that Casey's negligence should not be imputed to it based on the so-called *Nacco* defense. The Commission has summarized the imputation of negligence and the *Nacco* defense as follows:

> It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982). In *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851.

Wilmot Mining Co., 9 FMSHRC 684, 687 (April 1987).

The Secretary asserts that the defense is not available in this proceeding because when Inspector Bates required additional "awareness" training to abate the violation, he "implicitly" found a deficiency in the operator's training plan which indicates that the training plan was inadequate. (Sec. Br. at 4-5.) This assertion is contrary to the evidence.

Inspector Bates testified that he required the training, not because he believed the miners needed additional training, but because it "is a standard course of action in cases of accidents and fatalities where issues of awareness and other human factors are involved." (Tr. 92.) He further stated that "[t]he company's training plans were in compliance to the best of my knowledge" and that all of the witnesses who were interviewed "indicated that they had received training

concerning what Massey calls the red zone, which is the area not to stand while the mining machine is in motion." (Tr. 92-3.)

In addition, the investigation report states that: "A review of the company's training records indicated that the victim had received task training on the operation of the remote control continuous mining machine. The victim had also received training regarding the approved roof control plan." (Govt. Ex. 3 at 8.) Finally, Frank Foster, Safety Coordinator for all of Massey Energy, testified extensively concerning Massey's safety training program, known as the "S-1 Safety Program," as well as the MSHA training received by Casey and other supervisors, Rockhouse's weekly safety meetings and the types of discipline administered for safety violations. (Tr. 107-10.)

No other evidence concerning the Respondent's training and general safety procedures was presented at the hearing. Consequently, I find that the company's training and general safety procedures were sufficient.

None of the other *Nacco* requirements were addressed in the Secretary's brief. Nevertheless, I find that the operator had taken reasonable steps to preclude the particular class of accident involved by having a specific prohibition against such conduct in its roof control plan and providing the training already discussed. I further find that Casey's conduct was not foreseeable. He was "well respected" as a foreman, (Tr. 110), and, as addressed above, he was properly trained. There is no evidence that he had performed in an unsafe manner in the past, took short cuts or otherwise did not perform properly. Furthermore, he exposed only himself to risk. Inspector Bates testified that the investigation indicated that no one else was in danger at the time of the accident and that there was no danger of the mining machine running by itself and putting miners in danger after Casey was struck and dropped the remote control box. (Tr. 61, 94-5.) Finally, I find that the company was not otherwise blameworthy in this accident.

In *Nacco*, a "section foreman, while supervising two miners cutting a roof belt trench, proceeded alone past the last row of permanent supports under loose, unsupported roof, where a large rock fell on him" causing injuries from which he subsequently died. 3 FMSHRC at 848. The Commission held that: "Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for 'negligence.' 3 FMSHRC at 850.

I can find no difference between the facts in this case and *Nacco*. Accordingly, I find that the Respondent was not negligent.

Taking all of these factors into consideration, I conclude that a penalty of $7,000.00 is appropriate.

Order

In view of the above, Citation No. 7389525 is **MODIFIED** by reducing the level of negligence from "moderate" to "none" and is **AFFIRMED** as modified. Rockhouse Energy Mining Company is **ORDERED TO PAY** a civil penalty of **$7,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: Certified Mail

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

M. Shane Harvey, Esq., Massey Coal Services, 315 70th Street, Charleston, WV 25304

/hs