

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-134
Petitioner	:	A. C. No. 15-17979-03510
v.	:	
	:	No. 6 Mine
DAGS BRANCH COAL CO., INC.	:	
Respondent	:	

## DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Dags Branch Coal Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$6,173.00. A hearing was held in Pikesville, Kentucky. For the reasons set forth below, I affirm the citations and order and assess a penalty of \$6,173.00.

During the trial, counsel for the Respondent announced that the company was withdrawing its contest of Citation No. 9982163, involving respirable dust samples, and would pay the civil penalty sought by MSHA. (Tr. 129.) As the Secretary had no objection to that disposition, it was accepted. (*Id.*) The penalty will be assessed at the end of this decision.

## Background

The No. 6 mine is an underground coal mine, owned and operated by Dags Branch Coal Co. in Pike County, Kentucky. On September 23, 1998, MSHA Ventilation Specialist and Coal

Mine Inspector Thomas M. Charles was sent to the mine to conduct a health and safety inspection, including reviewing the mine's bleeder system.<sup>1</sup>

Inspection of the bleeder system was included because "second mining" or "pillaring" was being performed in the mine. "Second mining" or "pillaring" occurs when miners retreat out of a section of the mine in which advanced mining has ceased, removing the remaining pillars as they go. As a result, the roof of the mine collapses as the pillars are removed and the area becomes known as "gob" area. The bleeder system is designed to sweep the gob area with air and prevent accumulations of methane or other noxious gases.

On arriving at the mine, Charles was informed by James Miller, the section foreman, that the bleeder system was blocked with water. Charles and Miller then went underground to the working section where the section crew was removing its equipment from the pillar line after having finished mining a pillar. At this time, Charles checked the seven entries on the section for airflow. He concluded that air was flowing from the gob onto the active section from entries one, two and three.

As a consequence of this test, Charles issued Citation No. 4515035, alleging a violation of section 75.334 of the Secretary's health and safety standards, 30 C.F.R. § 75.334,<sup>2</sup> because:

Air from pillared works is passing onto the active 001-0 MMU.<sup>3</sup> Pillar recovery work is being conducted on the 001-0 MMU without an operative bleeder system. This allows air which has passed through the gob area to travel back onto the active working section. The top end of the gob area of the 001-0 MMU is cut-through into an adjacent panel to provide ventilation of the gob area, and to allow air to flow away from the active workings. There is an E.P.<sup>4</sup> at that location. According to statements made by the foreman and crew, this E.P. and top end of the adjacent panel were found to be blocked by water last night on the 2<sup>nd</sup> shift. Mining operations were performed today. Air was found passing

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<sup>1</sup> "A bleeder system is an airway that's provided to be maintained open so that you can have airflow within it to sweep the area to keep it free from accumulations of methane and blackdamp, anything that could accumulate in it." (Tr. 21.)

<sup>2</sup> Inspector Charles testified that the specific part of section 75.334 that he found Dags Branch to have violated was section 75.334(b)(1), 30 C.F.R. § 75.334(b)(1). (Tr. 20.) That section requires that: "During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine."

<sup>3</sup> *Mechanized Mining Unit.*

<sup>4</sup> *Evaluation Point.*

from the gob back onto the section via entries number one, two and three.

(Govt. Ex. 2.)

Inspector Charles traveled up the adjacent panel to the area of the evaluation point, where he encountered water. Based on his inspection in this area, he issued Order No. 4515036, for a violation of section 75.370(a)(1), 30 C.F.R. § 75.270(a)(1).<sup>5</sup> The order states:

The approved ventilation plan which shows a description of the bleeder system to be used at this mine and requires that bleeder entries be maintained free from obstructions such as roof falls or water [] is not being complied with in the 001-0 active bleeder panel. Water accumulation, roofed, has blocked air flow from the top end of the panel. Travel to the evaluation point is blocked by water in the number one mains at survey station #146. According to statements made by James Miller [,] Foreman. [*Sic.*] This was found by the 2<sup>nd</sup> shift foreman last night. Coal was produced on the 001-0 pillaring section today.

(Govt. Ex. 4.)

### **Findings of Fact and Conclusions of Law**

In its brief, the company concedes that both of these violations occurred and that they were "significant and substantial."<sup>6</sup> The Respondent argues, however, that neither of the violations was "unwarrantable." Based on the operator's concession, and the evidence presented at the hearing, I conclude that Dags Branch violated sections 75.334(b)(1) and 75.370(a)(1), as alleged, and that the violations were "significant and substantial." Contrary to the company's position, I also conclude that the violations were the result of its unwarrantable failure to comply with the regulations.

#### **Unwarrantable Failure**

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<sup>5</sup> Section 75.370(a)(1) requires, in pertinent part, that: "The operator shall develop and follow a ventilation plan approved by the district manager. The Plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

<sup>6</sup> 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 (April 1981).

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

[T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g.*, *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

*Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (August 1998). In this case, the operator knew of the violations and deliberately chose to mine coal rather than attend to the violations.

The inspector testified that he found these violations to be unwarrantable because the mine's management was aware of the conditions and elected to mine coal before correcting them. He related that the foreman, Miller, "indicated to me that he was aware that the gob air had been passing back onto the section due to the bleeder system being blocked and that they had been instructed to go ahead and mine the blocks." (Tr. 32.) Inspector Charles further described a conversation that he had with Linton Griffith, a fifty percent owner of the mine, about the conditions in the mine; i.e. the water in the gob and his knowledge of that water in the section that was mining coal. He said that Griffith "told me that the mine had been down for two or three shifts on a stacker belt thrower, that they had to mine coal and that they needed to get those blocks mined so that they could move the section." (Tr. 33.)

The Respondent argues that the violations were not unwarrantable because, with respect to Citation No. 4515035, the inspector was not present in the mine while mining was actually being performed. The operator maintains that air was moving through the gob area to the return air course at that time. Concerning Citation No. 4515036, it is the company's position that because there is no evidence that the water in the mine actually reached the roof, a finding of unwarrantable failure is not appropriate. Neither contention is persuasive.

Inspector Charles testified that there was a large stream of coal coming off of the belt when he arrived at the mine and that coal was being mined as he was going to the working section, but that mining had ceased by the time he arrived at the section. Thus, mining had only been stopped for a short time when he found air coming out of the gob onto the area where work had recently been ongoing. It was his opinion that the air would have had to have been flowing the same way while coal was being mined "[b]ecause of the way the ventilation controls were installed and in order for them to maintain airflow for the mine, period." (Tr. 121.)

To counter this evidence, the Respondent relies on the equivocal assertion of Miller that he was taking continuous air readings "in the area" while the pillars were being mined and no return air was coming out of the gob onto the section. (Tr. 140.) To explain the inspector's findings, which neither he nor anyone else disputes, Miller speculated that damage to a ventilation curtain could have occurred when the equipment was being moved out of the section.

There is less to these professions than meets the eye. Miller did not testify that he took readings in the three entries where the air was flowing from the gob to the section. No one testified that moving the equipment did, in fact, damage any ventilation controls. Furthermore, since the equipment was being pulled out of the section, no one explained how it could have damaged a curtain located in the opposite direction from which the equipment was being moved; how curtains in three entries could have been damaged at the same time, all in the time between the cessation of mining and Charles' arrival; or, if the curtains were not damaged at the same time, how no mining occurred while any one of them was damaged.

Turning to the order, there is no direct evidence as to whether the water in the mine reached the roof or not. Neither the inspector nor Miller traveled through the water to observe its level. Inspector Charles testified that the water must have reached the roof because he could not detect any movement of air in any of the seven entries of No. 1 mains where the toe of the water was encountered. Miller agreed that Charles did not detect any air movement in most of the entries, but stated that Charles did detect movement in the No. 1 entry.

The inspector also testified that the company had removed parts of stoppings in two areas of the No. 1 mains which changed the air flow in the mine in violation of the mine's ventilation control plan. Miller did not dispute this but claimed that he thought the removal of the stoppings was permitted.

I find the inspector's testimony to be credible on these issues. While I find that circumstantial evidence supports a finding that the water was in contact with the roof someplace in the mine, such a finding is not necessary in view of the uncontroverted evidence that the bleeder entries had not been maintained free of water for at least 24 hours after it was discovered,

that travel to the evaluation point was blocked by water, and that the stoppings had been partially removed, all of which violated the ventilation plan.

In accepting the testimony of Inspector Charles over that of Miller and Griffith, I find it very significant that neither Miller, on whom both the order and citation were served, nor Griffith protested to the inspector, or apparently to anyone from MSHA, that air was not flowing from the gob onto the working section while coal was being mined, that moving the equipment must have damaged the ventilation curtains or that the water did not block any air flow. Miller said he did not say anything because he lets the owners take care of violations. Griffith testified that he was concerned about the characterization of the violations as unwarrantable, but did not explain why he did not present any factual defense.

Furthermore, I find it determinative that neither Miller, nor Griffith, nor the company in its brief, denied that they had decided to finish mining the pillars before taking care of the problems caused by the water. Griffith, when specifically asked whether he had ordered the completion of mining before taking care of the water, stated: "I'm saying I have never told in my lifetime a mine foreman to do something that would endanger men." (Tr. 192.) When read carefully, it is apparent that this is not a denial that he ordered the mining to be completed.

I find that the operator intentionally chose to finish the pillaring of the section before taking care of the water problem, which it had been aware of since the second shift the night before. Accordingly, I conclude that both of these violations were the result of the company's unwarrantable failure to comply with the regulations. *See, e.g., Lion Mining Co.*, 19 FMSHRC 1774, 1778 (November 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1770 (November 1997); *Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997).

### **Civil Penalty Assessment**

The Secretary has proposed penalties of \$3,000.00 each for Order No. 4515036 and Citation No. 4515035 and \$173.00 for Citation No. 9982163. 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 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that Dags Branch is a small-to-medium-size operator and that the civil penalties in this proceeding will not affect the operator's ability to continue in business. (Govt. Ex. 1.) The evidence also indicates that for the two years prior to these violations, the company had received 180 citations. (Govt. Ex. 10.) From this I conclude that the operator's violation history is average. I further conclude that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. Finally, I conclude that the gravity of these violations was fairly serious and that the company's negligence with respect to Order No. 4515036 and Citation No. 4515035 was high and with respect to Citation No. 9982163 it was moderate.

Taking all of this into consideration, I conclude that the penalties proposed by the Secretary are appropriate. Accordingly, I will assess penalties of \$3,000.00 for Order No. 4515036, \$3,000.00 for Citation No. 4515035, and \$173.00 for Citation No. 9982163.

**Order**

Order No. 4515036 and Citation Nos. 4515035 and 9982163 are **AFFIRMED**. Dags Branch Coal Company, Inc., is **ORDERED TO PAY** a civil penalty of **\$6,173.00** within 30 days of the date of this decision.

T. Todd Hodgdon  
Administrative Law Judge

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