# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 28, 2000

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 99-182 |
| Petitioner | : | A. C. No. 15-13920-03925 |
| v. | : | |
| | : | Docket No. KENT 99-212 |
| LODESTAR ENERGY, INC., | : | A. C. No. 15-13920-03927 |
| Respondent | : | |
| | : | Wheatcroft Mine |

## DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee;
Richard M. Joiner, Esq., Mitchell, Joiner & Hardesty, P.S.C., Madisonville, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lodestar Energy, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege two violations of the Secretary's mandatory health and safety standards and seek penalties of $797.00. A hearing was held in Evansville, Indiana. For the reasons set forth below, I modify the two orders to citations and assess penalties of $205.00.

## Background

The Wheatcroft Mine is an underground coal mine owned by Lodestar Energy, Inc., and located in Webster County, Kentucky. The mine is operated by Green Pond Energy Corporation under contract with Lodestar.

On November 24, 1998, MSHA Inspector Archie Coburn went to the mine to conduct a quarterly inspection, customarily referred to as a "Triple A" inspection. He accompanied Lodestar Fire Boss Dennis Marsili to examine the air courses and seals in the inactive area of the

mine.[1] While they were crawling through the cross-cut going toward the first seal of the No. 6 set of seals, Marsili informed the inspector that the roof in that area was getting heavy, that he had written in the mine book that additional support was needed and that he had orally informed Charlie Dame, the Safety Director for Green Pond, of the situation.

On hearing this, Inspector Coburn examined the area after he got through it. He observed that the roof was sagging six to eight inches in various locations in an area that was approximately 40 feet long and 20 feet wide. When he got back to the surface, the inspector checked the weekly examination book which had the following entry for the previous week:

> Walked ret O/C[2] from #5 seals up to ret O/C 0.1% 20.6%; across and down through #4 seals 0% 20.7% 7:47 am/10:28 am 11-17-98. No hazards observed. DFM
> NOTE: The top in x-cut in front of #1 seals #6 set, to next entry needs extra support — top getting heavy. 11-17-98 DFM

(Govt. Ex. 5 at 4.) The initials DFM are Marsili's.

Inspector Coburn then asked Jess O'Rourke, Green Pond General Superintendent, when they were going to add support to the area. O'Rourke questioned Charlie Dame about the situation and Dame advised him that he had told David Weinbarger, Lodestar Mine Manager, and Kevin Vaughn, Lodestar Safety Director, about the condition, but that Weinbarger was on vacation and nothing had been done.

Based on these facts, Inspector Coburn issued Order No. 4274546 alleging a violation of section 75.364(d) of the Secretary's regulations, 30 C.F.R. § 75.364(d), because:

> The hazardous condition recorded in the mine book provided for weekly examination has not been corrected. The examiner recorded in the mine book on 11/17/98 that additional roof support was needed in the entry outby the No. 1 seal in the No. 6 set of seals, that the top was getting heavy. Several of Lodestar management were informed of the hazardous condition on 11/17/98. As of 11/24/98 no corrective action has been made. Some draw rock has already fallen in the area.

(Govt. Ex. 3.)

---

[1] The responsibility for maintaining the inactive areas was Lodestar's rather than Green Pond's. (Tr. 123.)

[2] O/C stands for "overcast."

On January 19, 1999, MSHA Inspector Robert Simms was conducting a ventilation review at the Wheatcroft Mine. While going through the weekly examination books, he discovered numerous record-keeping errors for which he issued citations not involved in this proceeding. He returned the following day to examine the books more thoroughly. In trying to match the areas shown on the mine map with the notations in the examination books, he discovered that entries were not being made for some areas in the mine and that this had occurred for a period of several weeks.

As a consequence, Inspector Simms issued Order No. 4275621 charging a violation of section 75.364(h), 30 C.F.R. § 75.364(h), in that:

> There is no record showing that the return air course has been traveled from the #2 seals to the #3 seal and from the #6 seal toward the #2 belt entry. There is also no record showing that the Intake and Return of the Main North Parallels have been made. At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly exam . . . shall be made.

(Govt. Ex. 6.) The order was subsequently modified to delete the first sentence concerning the "#2 seals to the #3 seal" and "the #6 seal toward the #2 belt entry." (*Id.* at 2.)

Order No. 4274546 makes up Docket No. KENT 99-182 and Order No. 4275621 is found in Docket No. KENT 99-212. Since the two violations are not related, they will be discussed separately.

## Findings of Fact and Conclusions of Law

Order No. 4274546

Section 75.364(d) provides, in pertinent part, that: "Hazardous conditions shall be corrected immediately." It is the company's position that the sagging roof was not a "hazardous condition." I find that it was and that the company violated the regulation by not adding additional roof support.

At the hearing, everyone agreed that there is no way to know when a sagging roof is going to fall. It could fall sooner or later, with later being months or years later.

Marsili testified that his main concern was that if the roof did fall it would affect ventilation, not that he would be caught in the fall. According to him, he did not consider this to be a hazard, but was notifying management of the condition so they could add the roof support

and the ventilation system would not be affected.[3] Dame testified that based on Marsili's entry in the examination book, and his discussion with Marsili, he was of the same opinion. On the other hand, Inspector Coburn testified that the roof was hazardous because it could fall on a mine examiner traveling through the area.

Section 75.364(d) does not define the term "hazardous condition." Nonetheless, the Commission, in discussing the same term concerning section 75.360(b), 30 C.F.R. § 75.360(b),[4] noted that it had

> recognized in *National Gypsum* [*Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (April 1981)] that, based on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of "hazard" as 'a possible source of peril, danger, duress, or difficulty,' or 'a condition that tends to create or increase the possibility of loss.' *Id.* (citing *Webster's Third New International Dictionary* 1041 (1971).

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (January 1997).

While it may not have been likely that the roof would fall on the examiner since he was only in the area once a week, it was certainly a possibility. Thus, it was a possible source of peril, danger, duress or difficulty as well as a condition that tended to create or increase the possibility of loss and, therefore, involved a measure of danger to safety. Consequently, I conclude that the roof was a hazardous condition.

The regulation requires that hazardous conditions be corrected "immediately." In this case, no one would be traveling the area until the next week. Accordingly, I find that for this violation, "immediately" means before anyone is in the area again. Since no roof support had been added before Marsili and the inspector went into the cross-cut, I conclude that the company violated section 75.364(d).

*Unwarrantable Failure*

This order was issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). That section provides that:

---

[3] I find it curious that Marsili made it a point of informing the inspector of the situation, if this was his only concern.

[4] 75.360(b) states: "The person conducting the preshift examination shall examine for hazardous conditions . . . ."

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.[5]

To establish that a violation comes within section 104(d)(2), the Secretary must prove three things: "(1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard caused by unwarrantable failure; and (3) the absence of an intervening clean inspection." *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 725 (July 1999) (citation omitted); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984). In this case, the Secretary did not present any evidence concerning the absence of an intervening clean inspection. Nor is there any evidence in the record from which such a finding can be inferred.

---

[5] Section 104(d)(1), 30 U.S.C. § 814(d)(1), states:

> 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.

Consequently, I conclude that this violation does not come within the purview of section 104(d)(2).

The order will be modified accordingly. In this regard, it cannot be modified to a section 104(d)(1) order because there is no evidence that this order was issued within 90 days of a 104(d)(1) citation. Indeed, the assumption is that it was not since in that case it should have originally been issued as a 104(d)(1) order rather than a 104(d)(2) order. Nor can it be modified to a 104(d)(1) citation inasmuch as the parties stipulated that the violation was not "significant and substantial." (Tr. 14-15.) Hence, it will be modified to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 4275621

Section 75.364(h) requires, in pertinent part, that: "At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made." The Respondent argues that the regulation was not violated. I find that it was.

After the order was modified, the only violation alleged is that there was "no record showing that the Intake and Return of the Main North Parallels have been made." The parties agree that the air courses had, in fact, been made. Thus, this violation is, as depicted by Inspector Simms, a "bookkeeping" violation.

The company argues that because no hazardous conditions were observed and no measurements of air and methane were required in these areas, the examiner had not failed to follow the regulation when he did not make any entry for the intake and return air courses in the Main North Parallel. However, the regulation requires that the "results" of the examination be recorded. The fact that no hazardous conditions were observed is a result of the examination. Therefore, it should have been recorded. Additionally, as Inspector Simms testified, making such an entry allows someone reading the examination book to verify that the required examinations were being performed.

For these reasons, I conclude that the Respondent violated section 75.364(h) when the examiner did not record the results of his examination of the intake and return air ways in the Main North Parallel.

*Unwarrantable Failure*

Like the previous order, this one was lodged under section 104(d)(2). For the same reason that I found that the Secretary did not demonstrate that the other order was properly issued under that section, that there is no evidence of the absence of an intervening clean inspection, I conclude that this order was not properly issued under section 104(d)(2). Accordingly, as with the previous order, this violation will be modified to a 104(a) citation.

## Civil Penalty Assessment

The Secretary has proposed penalties of $797.00 for these two violations. 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 the penalty criteria, the parties have stipulated that a reasonable penalty will not affect the ability of Lodestar to remain in business, that the Wheatcroft mine produces 342,117 tons of coal per year and that Lodestar produces 9,387,053 tons of coal per year. (Tr. 14.) From this I conclude that Lodestar's ability to remain in business will not be adversely affected by the penalties in these cases and that the mine is a medium size mine, while Lodestar is a large operator.

Based on the company's Assessed Violation History Report and the Proposed Assessment documents in this case, I find that Lodestar has an average history of prior violations. (Govt. Exs. 1 & 2.) I further find from the evidence of record that the company demonstrated good faith in attempting to achieve rapid compliance after being notified of the violations.

As previously noted, the parties stipulated that neither of these violations were "significant and substantial." (Tr. 14-15.) Therefore, I find that the gravity of these violations is not very high.

Finally, with regard to the negligence involved in these violations, I find that the company was moderately negligent in not adding roof support in the cross-cut before the No. 1 seal in the No. 6 set of seals. I make this finding based on the fact that the violation was not S&S, that the area was only traveled once a week, and that Marsili apparently indicated to the company that the matter was not urgent. I find that the negligence involved in the bookkeeping violation was low in view of the facts that the decision not to enter negative findings was not an unreasonable interpretation of the regulation and that several other inspectors had reviewed the examination books and had not alerted the company to the deficiency.

Taking all of these factors into consideration, I conclude that a penalty of $150.00 is appropriate for Citation No. 4274546. I find a penalty of $55.00 to be appropriate for Citation No. 4275621.

## Order

Order No. 4274546 in Docket No. KENT 99-182 is **MODIFIED** to a 104(a) citation by deleting the "unwarrantable failure" designation and by reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order No. 4275621 in Docket No. KENT 99-212 is **MODIFIED** by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "low," and is **AFFIRMED** as modified.

Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of **$205.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Richard M. Joiner, Esq., Mitchell, Joiner & Hardesty, P.S.C., 113 East Center Street, P.O. Box 659, Madisonville, KY 42431 (Certified Mail)

/nj