FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-90
Petitioner	:	A. C. No. 15-02263-03551
v.	:	
	:	Darby Fork No. 1
LONE MOUNTAIN PROCESSING INC.,	:	
Respondent	:	

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, and Anne Wathen O'Donnell, Esq., Arch Coal, Inc., St. Louis, Missouri, 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 Lone Mountain Processing, Inc., 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 $655.00. A hearing was held in Gate City, Virginia. For the reasons set forth below, I modify the citation and assess a penalty of $1,000.00.

Background

The Darby Fork No. 1 Mine is a large, underground coal mine operated by Lone Mountain, a subsidiary of Arch Coal, Inc., in Harlan County, Kentucky. On October 10, 1998, a fatal roof fall accident occurred at the mine. Among the many inspectors who went to the mine in the late night on October 10 and the early morning of October 11, was MSHA Coal Mine Inspector William R. Johnson. Johnson's assignment was not to investigate the accident, but to conduct a "spot" inspection of the rest of the .002 unit where the accident occurred. Since the accident happened in the No. 4 heading, he inspected the Nos. 1, 2 and 3 headings.

As a result of his inspection, Inspector Johnson issued Citation No. 7456174, alleging a violation of section 75.207(c)(2) of the Secretary's regulations, 30 C.F.R. § 75.207(c)(2), in that:

> The approved pillar plan was not being followed on the .002 unit inby the pillar line because the roadway leading from the solid pillar to the final stump in the No. 2 and No. 3 headings, had not been narrowed down to sixteen feet. The timbers set for the roadway in the No. 2 heading were twenty feet apart. The right side timbers needed to establish the sixteen foot roadway in the No. 3 heading had not been installed.[1]

(Jt. Ex. 2.)

Findings of Fact and Conclusions of Law

Section 75.207(c)(2) provides, in pertinent part, that:

> Pillar recovery shall be conducted in the following manner, unless otherwise specified in the roof control plan:
>
> . . . .
>
> (c) Before mining is started on a final stump--
>
> . . . .
>
> (2) Only one open roadway, which shall not exceed 16 feet wide, shall lead from solid pillars to the final stump of a pillar.

Concerning this citation, the company argues that, with regard to the No. 2 heading, there was no violation at all, and with regard to the No. 3, the violation was neither "significant and substantial" nor an "unwarrantable failure." I find that the Secretary has failed to prove that there was a violation of the regulation in the No. 2 heading and that the violation in the No. 3 was not the result of an "unwarrantable failure" on the part of the operator.

It should be noted at the outset, that there is no dispute that the Respondent was conducting pillar recovery or that the roadways in question led from a solid pillar to the final stump. Likewise, the parties agree that the company's roof control plan did not specify a different method of conducting pillar recovery from the regulation.

No. 2 Heading

Inspector Johnson testified that he determined that the roadway in the No. 2 heading was 20 feet wide by standing against the outby corner of the intersection of the No. 2 heading and the

[1] This is an edited version of the text of the citation. It originally included findings concerning the No. 1 heading which were removed by a subsequent modification. (Jt. Ex. 3.)

crosscut, and running his tape measure along the ground, diagonally across the intersection, until it touched what he believed to be the middle roadway post (the No. 3 timber). He stated that Brad Sears, the mine superintendent, was with him and observed the measurement. He further claimed that "I just told him what I measured and what I found," and that Sears made no response. (Tr. 57.)

On the other hand, Sears maintained that when Johnson took the measurement, "I saw 16 feet and two inches is what I saw." (Tr. 342.) He further declared that: "The only thing that I remember him saying that it looked like it may widen out. No, he didn't say anything about us having a citation or anything of that nature." (Tr. 344.)

Gaither Frazier, the mine manager, testified that when he was informed by the mine's safety manager that the company was receiving a citation for the wide roadways, he went to the No. 2 heading to measure the roadway. He stated that: "I lined myself up best I could outby the corner and measured over to the timbers on the left with a metal tape. And I measured 16 feet two inches . . . ." (Tr. 375.)

After taking this measurement, he went and got some other people and went back to the heading two or three times to have them witness his measurement. Among the people that he had go with him were Sears, Dale Jackson (a fire-boss at the mine), Dennis Cotton (the MSHA inspector conducting the fatality investigation), Gary Harris (another MSHA inspector) and George Johnson (a Kentucky mine inspector). He asserted that every time he measured the roadway, it was sixteen feet, 2 inches. He stated that after showing the measurement to Inspector Cotton, "I came away from the thing feeling that he didn't think there was a violation there." (Tr. 379.)

Sears corroborated Frazier's testimony. He said that when the company learned that the Nos. 1 and 2 headings were included in the violation, he went back to the headings with Frazier, Cotton and, possibly, Jackson because "we couldn't really see how there was anything wrong with it, you know, that it should be included." (Tr. 347.) He related that when they measured the roadway in the No. 2 heading, it measured "16 feet or close to 16 feet." (Tr. 348.)

Inspector Cotton, who apparently could have resolved the issue one way or another, gave testimony that can only be described as evasive. He admitted accompanying the others to witness the measurement of the roadway in the No. 2 heading and he admitted that he observed a measurement of 16 feet, but claimed that he did not know what the measurement represented because:

> I wasn't sure what they wanted me to observe, but I had my mind on the accident scene. As to the lead investigator, I have a lot of responsibility on me, and I wanted to do that job to the best of my ability. I had a lot of people that --- my primary concern was this accident scene, the area over there.

(Tr. 252.) He even admitted that in observing the 16 feet measurement he actually observed the numbers on the tape measure, but he never was specific as to exactly what he observed being measured.[2]

I find Inspector Cotton's testimony distressing. While his reluctance to contradict his colleague is understandable, such reluctance should not, and cannot, override his obligation to provide the hearing with the facts, as he observed them, in a clear and concise manner.

Operators are frequently reproached in decisions for not having brought a fact or disagreement to the attention of the inspector at the time of the inspection, and then bringing it up for the first time at the hearing. Here the company questioned the citation, made its own measurements and then attempted to bring the discrepancy to MSHA's attention as soon as possible. While the best course would have been to bring it to Inspector Johnson's attention, contacting Inspector Cotton was not unreasonable. Now the Respondent, instead of having taken care of the matter appropriately, finds that its inspector witness' testimony has become more imprecise the nearer the hearing gets.[3]

If Inspector Cotton really was so involved in the accident investigation that he could not pay attention to anything else, he should have informed the company's representatives that he could not go with them. Once he agreed to accompany them, it was his duty as an inspector to give the matter his complete and undivided attention, to ascertain exactly what he was being asked to do, and to report the facts as he observed them, "letting the chips fall where they may."

I find that the Secretary has failed to prove that the roadway in the No. 2 heading was more than 16 feet wide. In making this finding, I accept the testimony of the company over that of Inspector Johnson. I can think of no explanation for the inspector's mistaken measurement, nor do I believe that he has been deliberately misleading. However, the weight of the evidence supports the testimony of Frazier and Sears. In this regard, I note that Sears, although when he testified about the width of the roadway was testifying on cross examination, was the Secretary's witness. Further, while Frazier was the company's witness, he ceased working for Lone Mountain or any of its related companies on June 7, 1999, and, thus, would not have been under any apparent pressure to testify in the company's favor. Finally, vague as Inspector Cotton's testimony was, it tends to corroborate the testimony of Frazier and Sears, more than refute it, and certainly adds nothing to Inspector Johnson's testimony.

Consequently, I conclude that the company did not violate its approved pillar plan, or section 75.207(c)(2), when it set its roadway posts in the No. 2 heading. The citation will be modified accordingly.

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[2] Cotton's colloquy with the judge, set out in the Appendix, demonstrates the elusive nature of his testimony on this issue.

[3] He evidently was more specific when he gave his deposition. (Tr. 304-05.)

No. 3 Heading

As noted above, the Respondent agrees that none of the required roadway posts had been installed on the right side of the roadway leading to the final stump in the No. 3 heading. The company argues, however, that this violation was neither "significant and substantial" nor an "unwarrantable failure." I find that the violation was S&S, but not an "unwarrantable failure."

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 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 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 (December 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 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 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.

Everyone agrees that the hazard created by failing to narrow the roadway to 16 feet with timbers is an increased danger of roof falls. Nevertheless, the Respondent argues that in this case there was no hazard created in the No. 3 heading because the company was not going to mine the final stump. If the final stump had not, in fact, been mined, this might be a valid argument. The evidence indicates, however, that not only was this a dangerous area even if no mining were performed, but also that the company did mine at least part of the final stump.

Ricky Clark, the continuous miner operator, testified that he unilaterally decided not to set the roadway timbers on the right side of the No. 26 pillar (final stump) because he was not going to mine the pillar. He said that the bottom was bad and he was afraid he would get the miner stuck. He admitted, however, that he did mine two cars worth of coal, which he estimated to be about two feet of the pillar, in the hopes that it would cause the roof to fall.

Frazier testified that when he observed the No. 26 cut, after the citation was issued, that: "It looked short. It looked like maybe from the corner that probably ten feet may have been taken out of it." (Tr. 383.) Conversely, Inspector Johnson testified that in his opinion the entire cut had been taken. He based this on the fact that when he looked into the cut he could not see the back of it with his cap light and the fact that if all, or almost all, of the cut had not been taken, he would not have been able to see into the No. 24 cut. I credit his testimony for the following reasons.

Since the company's defense is that the violation was not S&S because the cut was not mined, its witnesses would not want to admit that it had been. However, both Clark and Frazier acknowledged some of it had been mined. Therefore, the next best defense is to minimize the extent of the cut. Since Clark decided not to place the roadway posts on his own, without consulting or informing the foreman, it was clearly in his interest to claim that only a few feet were mined. But his testimony is contradicted by Frazier, who admitted that at least ten feet had been cut. Thus, the Respondent's own evidence supports a finding that a minimum of ten feet of the No. 26 pillar had been mined.

Inspector Johnson's reasons for concluding that the No. 26 cut had been entirely made were logical. Obviously, no one could go in and accurately determine the exact depth of the cut. When comparing the inspector's testimony with the company's obvious interest in minimizing the amount of coal taken, I find the Inspector's testimony to be more credible.

Turning to whether there was a reasonable likelihood of injury, I note that pillar recovery is inherently dangerous under the best of circumstances. When the final pillar is removed, the roof is supposed to fall. Thus, mining the final stump is one of the more dangerous, if not the most dangerous, activities performed in underground coal mining.[4] Moreover, in this case, the best of circumstances did not exist. The floor was "heaving" so badly that Clark wanted to get his continuous miner out of there.[5] Yet, instead of installing the roadway posts, he attempted to mine coal from the No. 26 stump, which, without the roadway posts, made an unstable situation even worse.[6]

I have little difficulty in concluding that a serious, probably fatal, injury was reasonably likely to occur in these circumstances. The company was fortunate that it did not. But the fact that it did not, does not mean that a serious injury was not reasonably likely. As the Commission

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[4] The Secretary offered into evidence accident reports involving two fatal roof falls at mines that occurred during mining of the final stump. Both reports concluded that failure to install the required roadway posts contributed to the accident. (Govt. Ex. 2 & 3.)

[5] Inspector Johnson testified that pressure from the roof comes down through the pillars and causes the bottom to "heave up." (Tr. 79.)

[6] In fact, Clark testified that the reason he mined in the No. 26 pillar was to try "to get that intersection to fall where it wouldn't hurt us later on." (Tr. 196.)

has long held: "The question of whether a violation is S&S must be resolved on the basis of conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations. *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985)." *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1382 (August 1996). Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

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 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Secretary's argument that this violation involved an unwarrantable failure is based on the theory that Ricky Clark, the continuous miner operator, was a *de facto* supervisor. If Clark were a supervisor, the violation would clearly be an unwarrantable failure, since he intentionally decided not to install the roadway posts and then went ahead and mined coal anyway. However, he was not a supervisor, *de facto* or otherwise.

The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for penalty assessment purposes. *Fort Scot Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). To determine whether such a miner was an agent of the operator, whose negligence can be imputed to the operator, "the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995)." *Whayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997).

It is the Secretary's position that the following factors made Clark a supervisor: (1) He was certified as a foreman in the state of Kentucky; (2) In his prior employment he had worked as a foreman for six years; (3) On occasion he had filled in as a foreman for the Respondent; (4) He had authority to shut down the mine if methane was encountered; (5) He had the authority to make decisions that affected the safety of miners; (6) He could determine how much of a cut should be made when operating his continuous miner; and (7) The foreman and he worked together and the foreman relied on him to make safety tests.

In *Whayne Supply* the Commission rejected a similar argument by the Secretary as "lacking legal and evidentiary support" because "[a]lthough the record evidence indicates that . . . was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager." *Id.* The Commission further found that there was no evidence that he "exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there any evidence that . . . 'controlled' the mine or a portion thereof; rather he merely carried out routine duties involving the repair of Caterpillar machinery." *Id.*

Likewise, in this case there is no evidence that Clark exercised any of the traditional indicia of supervisory responsibility. While the record demonstrates that he was an experienced continuous miner operator who needed little supervision, he did not "control" the mine or any part of it, but merely carried out routine duties involving the operation of a continuous mining machine. Among those routine duties were being alert for methane and shutting down the miner when it was encountered and determining how much of a cut to make, or not make, based on the conditions encountered. There is no evidence to support the Secretary's claim that he had the authority to make decisions affecting the safety of other miners, or that he had any more authority than any miner has when encountering hazardous conditions.[7]

Consequently, I conclude that Clark was not a supervisor whose aggravated conduct can be imputed to the operator. However, that does not end the inquiry because the Commission has further held that: "[W]here a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464. While this standard is normally applied in determining the operator's negligence for penalty purposes, the Commission has also confirmed that it applies in determining whether an operator can be held responsible for an unwarrantable failure. *Whayne Supply* at 452-53.

Nonetheless, the Secretary did not present any evidence concerning Lone Mountain's supervision, training and disciplining of its employees. Nor is there sufficient evidence in the record to make such a determination. Since the Secretary has failed to show that the Respondent's supervision, training and discipline of its employees was deficient, it must be concluded that the company had taken reasonable steps to prevent the violative conduct.

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[7] This claim is apparently based on the following question and answer:

> Q. Does the company intrust you with the authority to make decisions which effect [*sic*] the safety of miners?
>
> A. I would think so.

(Tr. 194.)

Finally, it is uncontroverted that no supervisor was present when the violation was committed. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997). Accordingly, inasmuch as Clark's negligence cannot be imputed to Lone Mountain and there is no evidence that the company engaged in aggravated conduct, I conclude that the violation was not the result of an "unwarrantable failure." I will modify the citation appropriately.

Civil Penalty Assessment

The Secretary has proposed a penalty of $655.00 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).

With regard to the penalty criteria, the parties have stipulated, and I so find, that the penalty will not adversely affect the company's ability to continue in business and that the Darby Fork No. 1 Mine is a large-sized coal mine. (Tr. 20-21.) I also find that Lone Mountain is a large company. (Jt. Ex. 6.) Based on the company's Assessed Violation History Report, I find that the company has a relatively good history of previous violations. (Jt. Exs. 1 and 6.) I further find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Turning to the question of gravity, I find this to be a serious violation. As previously noted, pillaring is dangerous under the best of circumstances and mining the final stump is the most dangerous aspect of pillaring. Mining the final stump without putting in the required roadway posts is a situation fraught with the gravest consequences.

Notwithstanding the fact that the miner operator's negligence cannot be imputed to the Respondent and that there is no evidence that the operator engaged in aggravated conduct, I find that the operator was moderately negligent. The inspectors testified that while there is no requirement in the regulations that the foreman be present when the final stump is being mined, it is good mining practice for him to be present to monitor the mining and the roof conditions. Indeed, they maintained that in their experience the foreman had always been present in such a situation. In this case, the foreman was not present, but was off on another matter. It may be that the miner operator got to the final stump sooner than anticipated, but I find that the company was not blameless in not having someone in authority present.

Taking all of the penalty criteria into consideration, I conclude that a penalty of $1,000.00 is appropriate for this violation.

Order

Citation No. 7456174 is **MODIFIED** by deleting the words "No. 2" and the words "the timbers set for the roadway in the No. 2 heading were also twenty feet apart" from section 8, by reducing the level of negligence from "high" to "moderate," by deleting the "unwarrantable

failure" designation and by making it a 104(a) citation, 30 U.S.C. § 814(a), instead of a 104(d)(1) citation, 30 U.S.C. § 814(d)(1). The citation is **AFFIRMED** as modified.

Lone Mountain Processing, Inc., is **ORDERED TO PAY** a civil penalty of **$1,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Appendix

Q. Mr. Cotton, when you went up to review this measurement, did they tell you what they were measuring?

. . . .

A. They said they were lined up with the timbers.

Q. Okay.

A. That's what I --- .

Q. And then what were they measuring?

A. They said they were going to measure over to the next row of timbers over here, sir.

Q. And did they measure over to the next row of timbers?

A. I don't know for --- I mean, I didn't do it, I was just standing there.

Q. You watched them do it?

A. As far as I know that's what --- they said they did that.

Q. Could you tell whether they were or not?

A. I didn't --- I didn't check it myself[.] I just watched them do it.

Q. Yes. But when I see somebody measuring something I could see where the end of the tape measure is and where it's going to?

A. Well, like I said if it gets into this, to me, since I didn't evaluate this area, this plan calls for timbers up in here.

Q. I want to know what they were measuring.

A. From what I understood that's what they said they were measuring and I believe I even told them which I didn't get to say on the record that was according to Mr. Johnson and the company because I was very concerned about coming back here.

Q. You did see the tape measure that said 16 feet; right?

A. It was some point down --- back in --- .

Q. Wherever it was down there --- was it 16 feet from the timbers across the intersection to that?

A. To these over here?

Q. Yes. Was it the red one?

A. Their 16 foot was in this area right here.

Q. But it wasn't to the timbers?

A. Like I said I didn't come over here and make sure that it was those timbers. I just assume they did what they were saying they were doing. And like I said I didn't know, I just --- .

(Tr. 318-22.)

Distribution:

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

Anne Walthen O'Donnell, Esq., Arch Coal, Inc., City Place One, Suite 300, St, Louis, MO 63141 (Certified Mail)

Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, 250 West Main Street, Suite 1700, Lexington, KY 40507 (Certified Mail)

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