

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

July 26, 1996

LION MINING COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. PENN 94-71-R  
: Citation No. 3711869;11/17/93  
:  
SECRETARY OF LABOR, : Grove No. 1 Mine  
SAFETY AND HEALTH : Mine ID 36-02398  
ADMINISTRATION (MSHA), :  
Respondent :

**DECISION ON REMAND**

Before: Judge Hodgdon

On May 23, 1996, the Commission vacated my determinations<sup>1</sup> that the violation in this case was not ~~A~~significant and substantial~~@~~ and did not result from the operators~~s~~ ~~A~~unwarrantable failure~~@~~ to comply with the Regulations, and remanded the case for further analysis consistent with its decision. *Lion Mining Company*, 18 FMSHRC 695 (May 1996). The parties have filed briefs concerning the remand. For the reasons set forth below, I conclude that the violation was S&S and the result of Lion Minings~~s~~ unwarrantable failure.

The facts, which are set out more fully in the previous decisions in this matter, can be briefly summarized. Lion Mining was cited for violating its roof control plan by failing to install roadway posts prior to mining a notch out of pillar block 37. Note 7 to Drawing A of the plan provided that: ~~A~~Roadway posts shall be installed on either side to limit roadway to 16' in pillar splits. Roadway posts installed in roof bolted entries, rooms, and crosscuts shall be installed to limit roadway width to 18 feet.~~@~~

**Significant and Substantial**

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<sup>1</sup> *Lion Mining Company*, 16 FMSHRC 641 (March 1994).

In this case, it is undisputed that the first two *Mathies S&S* criteria<sup>2</sup> are present, i.e. that there was an underlying violation of a mandatory safety standard and that the violation contributed to a discrete safety hazard - a possible roof fall. In connection with the third criterion, a reasonable likelihood that the hazard contributed to would result in an injury, the Commission stated that ~~A~~the judge erred in placing undue weight on the operators's compliance with applicable roof bolting, breaker, and radius post requirements~~@~~ and ~~A~~in failing to consider the history of roof falls in the section~~@~~ *Id.* at 698-99.

The inspector testified as follows concerning his basis for concluding that this third criterion was met:

Q. Okay. Now, in your opinion, did the company's failure to erect posts, roadway posts at the crosscut, significantly or [*sic*] substantially contribute to the hazard of a roof fall?

A. Yes, it would.

Q. Did you observe any particular conditions in this area on November 17th that would lead you to the conclusion that the company's failure to erect posts would significantly contribute to the danger of a roof fall?

A. Yes, it would.

Q. What particular conditions did you observe?

A. The rib was rolling off on number 38 and 39, which indicates there's pressure above the strata coming off the pillar line.

Q. Okay. Now, was this in the same area where Mr. Jones and Mr. Marines were standing?

A. Yes, it is.

Q. And is this the same area where the roadway posts were to be erected?

A. Yes, it is.

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<sup>2</sup> *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).

. . . .

Q. Did it indicate to you anything -- does the history of roof falls that you've read into the record and the roof fall that you observed on the day before, did that indicate to you anything about the likelihood of a roof fall on November 17th?

A. Yes, it did.

Q. What is that?

A. Well, with these conditions it's reasonably likely that a roof fall would occur and which could be a serious injury to someone.

(Tr. 38-39, 51-52.)

The Respondent argues in its brief that ~~A~~given the roof support measures in place, the short period of time the condition existed and the roof support provided by the remainder of the pillar block, the absence of the roadway posts, even though they are a roof support device, did not create a hazard that was reasonably likely to result in a serious injury<sup>@</sup> (Resp. Br. at 6-7.) This is essentially the same argument that the Commission has already rejected. *Id.*

Additionally, the Respondent argues that the mine's history of roof falls should be accorded little weight because in the particular area where the notch was made the roof appeared to be good. The company further argues that the inspector based part of his finding that the violation was S&S on his belief that half of block 37 had already been extracted, when in fact it had not.

In another mine, the Respondent's arguments might be persuasive. However, this particular mine had had five roof falls in the previous two years, one of which had occurred the day before in an area two pillar blocks away from block 37. In addition, the rib was already rolling between pillar blocks 38 and 39, the precise area where the roadway posts should have been installed, prior to the notch being cut. Finally, it has long been recognized that mine roofs ~~are~~ are inherently dangerous and even good roof can fall without warning<sup>@</sup> *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (January 1984).

Taking all of this into consideration, I conclude that the failure to install roadway posts prior to cutting the notch made

a roof fall which would result in an injury reasonably likely to happen.<sup>3</sup> It follows that such an injury would be reasonably serious, thus meeting the fourth *Mathies* criterion.

The Commission has emphasized that in determining whether a violation is S&S the particular facts surrounding the violation and continued normal mining operations must be taken into consideration. 18 FMSHRC at 699; *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988). Accordingly, taking into consideration the particular facts in this case and continued normal mining operations, I conclude that the violation in this case was significant and substantial.

### Unwarrantable Failure

With respect to whether the violation resulted from Lion Minings' Unwarrantable failure, the Commission found that Lion's history of roof violations and roof falls should have placed [it] on notice that greater efforts were necessary for compliance. 18 FMSHRC at 700 (citations omitted). In addition, it directed the judge to reconsider the testimony of Superintendent Jones and Foreman Marines and to consider what effect the inspectors' presence may have had on the installation of roadway posts. *Id.* at 701.

The inspector testified that he found this violation to result from an unwarrantable failure because of the previous citations and orders that were issued on this four and a half section for pillaring on the roof control plan and the number of roof falls that have occurred. (Tr. 57.) He testified as follows concerning his presence while the violation was being committed:

Q. And after you spoke with Mr. Bittner can you describe what happened?

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<sup>3</sup> In reaching this conclusion, I have considered the Respondent's argument that the inspector testified that he thought that one half of block 37 had already been removed. However, he also testified that even if the block were whole he still would have found the violation to be S&S. (Tr. 101.)

A. As I talked to him I looked over there and I seen the two management people [Jones and Marines] standing there looking towards the miner watching it load the shuttle car. And at that time Russ Lambert, the mine foreman, came up along number 44 block to where Mike and I were standing and Mike went to the side of Russ Lambert and whispered in his ear. And Russ --

Q. Did you hear anything?

A. I couldn't hear what he was saying. And Russ Lambert looked up towards this area in the crosscut, between 38 and 39, and he started to come towards me. And I asked him, I said, isn't it about time you get your roadway posts set? And by that time he kept on going, walking. And then he went up there and started measuring the height from the roof to the floor.

. . . .

Q. Okay. What happened after that?

A. After that then Mike Bittner and I walked over to this crosscut between 38 and 39. And as I observed, the shuttle car got loaded and Art Jones there and Ted Marines, and I was talking to Mike Bittner, the safety director, and I said, this isn't going to look too good on the violation Mike. I said, Art Jones, the superintendent and Ted Marines names on these violations -- the violation. And Mike just laughed and he, you know, gave a smile, you know, and he didn't make no comment.

(Tr. 35-36.)

Mr. Jones testified that he had 21 years experience in the mining industry and had been superintendent at the Grove Mine for eight months. He stated that while he was generally familiar with the roof control plan, he was not aware of all of its specifics and he was not aware of the requirements of Note 7. With regard to the mining of the notch, Mr. Jones testified as follows:

Q. Okay. Now, neither you nor Mr. Marines at anytime instructed the operator of the continuous miner to cease extracting coal from pillar 37 during the time in question, is that correct?

A. I did not. I didn't know that there was anything wrong.

Q. Mr. Marines did not either, did he?

A. Mr. Marines ordered posts and I told him to bring back posts.

Q. My question is, did he ever instruct a miner to stop extracting coal from the 37 pillar before the posts were erected?

A. No.

(Tr. 128.) Finally, he testified that usually it would make sense to erect roadway posts before the extraction of coal begins.

Mr. Marines testified that he was at the face while the miner operator was cleaning up Agob, that he left the area for about fifteen minutes to take care of another matter and then he returned to the face. He described his return as follows:

Q. And what were they doing when you got to the face?

A. He was finishing up a buggy and I told the shuttle car operator to bring timber up.

Q. Why did you tell the shuttle car operator to bring timber up?

A. Because he had just started to notch out the 37 stump.

Q. Had any time elapsed between the time you became aware he was mining the stump and the time you ordered the timber?

A. No.

Q. Who did you tell or who did you ask to bring the timber into the area?

A. Tim Lambert.

Q. And what is his particular position?

A. Shuttle car operator.

Q. Did anyone indicate to you that you needed timber in the area?

A. No.

Q. Did Mr. Lambert or Mr. Bittner tell you that you needed timber in the area?

A. No.

Q. Did the inspector tell you that you needed timber in the area?

A. No.

. . . .

Q. Now, he was taking coal from the pillar when you arrived in this area?

A. Uh-uh (yes).

Q. He was extracting coal from the pillar; was he not?

A. Right.

Q. Did you tell him to cease extracting coal from the pillar at that time?

A. Not till he finished that shuttle car.

(Tr. 133-34, 137.)

I find Mr. Jones' testimony irrelevant to the issue of unwarrantable failure. At the time that the violation was being committed, he did not know what the roof control plan required. Consequently, whether or not the plan explicitly required the installation of roadway posts prior to extracting any coal had no bearing on his actions. Whether his failure to know what the plan required, in view of his position at the mine, amounted to negligence sufficient to support an unwarrantable failure finding is a question that need not be answered in this case because there were two other management officials present who did know the requirements of the roof control plan.

Clearly, Mr. Russ Lambert, mine foreman, and Mr. Marines, section foreman, were the management officials making decisions on the scene. Nowhere in his testimony did Mr. Marines claim that the roof control plan did not require installation of roadway posts prior to the mining of the notch. Nor, apparently, did Mr. Lambert, who did not testify, raise such an objection when confronted by Inspector Fetsko.

The logical conclusion to be drawn from this, is that they

understood the plan to require that the posts be erected before any mining was performed. This is consistent with the admission of the violation by the Respondent throughout these proceedings<sup>4</sup>. Therefore, I conclude that the roof control plan, as understood by company management officials, required the installation of roadway posts before the notch was mined.

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<sup>4</sup> In view of the Respondent's interpretation of its own requirement, the Secretary's concession in its brief before the Commission that the plan did not explicitly require the installation of posts before commencement of pillar extraction, while correct, is not relevant.



With regard to whether the inspector's presence served as an impetus for ordering the posts, the entire testimony concerning the inspector's presence is set out above. Neither Mr. Lambert nor Mr. Bittner testified. Jones and Marines were not asked on direct or cross whether they knew that the inspector was present and, if so, whether it had any effect on their actions. Only the inspector testified concerning the actions of Lambert. The only mention made of Lambert by any of the Respondents' witnesses was Marines' denial that Lambert told him to get the posts.<sup>5</sup> Marines also denied that the inspector told him to get the posts.

On the other hand, it is hard to imagine that the presence of the inspector would not have had an effect. One would hope that the normal reaction of someone when in the presence of an enforcement official would be to insure that the rules are being followed. Consequently, based on the testimony of the inspector concerning his presence during the violation, the presence of both Jones and Marines, and the actions of Lambert in taking measurements after the inspector spoke to him, I infer that Marines' decision to install the posts was at least partially triggered by the inspector's presence.

I also find the following testimony of the miner operator significant on the unwarrantable failure issue:

Q. Were you, in fact, beginning to mine the pillar block when that notch was taken out?

A. I was finishing loading the gob and was loading the buggy, yes. I loaded some out of that block.

. . . .

Q. Now, you intended to continue extracting coal from the pillar 37 at the time in question, is that correct?

Aside from the notch that was actually indicated here on Joint Exhibit One you intended to continue extracting coal --

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<sup>5</sup> Two Lamberts worked for the company, the question to Marines did not specify which Lambert was being referred to. However, due to the nature of the question and the inspector's testimony, I am assuming it referred to Russ Lambert.

A. Yes.

Q. -- from pillar 37?

A. Uh-huh (yes).

(Tr. 106, 112.)

In sum, then, the miner operator mined a notch out of block 37 with no apparent intent of stopping after the notch was removed; no one told him to stop mining;<sup>6</sup> Jones, Marines and Lambert were all present while this occurred; at a minimum both Marines and Lambert knew what the roof control plan required, yet no action was taken to install the roadway posts until after the notch was mined, and the reason for installing them then was at least partially the result of the inspector being present. Further, as the Commission has already held, the company's previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.

Taking all of this into consideration, I find that the failure to install the roadway posts prior to mining the notch resulted from **A**indifference<sup>@</sup> or a **A**serious lack of reasonable care<sup>@</sup> and, thus amounted to aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (December 1987). Accordingly, I conclude that Lion Mining's commission of this violation resulted from an unwarrantable failure to comply with the Regulations.

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<sup>6</sup> According to his testimony, he only stopped because he always stopped between shuttle cars, he did not testify that anyone told him to stop, and Jones testified that neither he nor Marines told him to stop. Therefore, I conclude that he was not told to stop.

ORDER

Citation No. 3711869 is **AFFIRMED** as written.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Joseph A. Yuhas, Esq., P.O. Box 25, Barnesboro, PA 15704 (Certified Mail)

Richard T. Buchanan, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St.,  
Room 14480, Philadelphia, PA 19104 (Certified Mail)

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