

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 20, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-181
Petitioner	:	A.C. No. 36-05018-04053
v.	:	
	:	Cumberland Mine
CYPRUS CUMBERLAND RESOURCES	:	
CORPORATION,	:	
Respondent	:	

## DECISION

Appearances: Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, (the Act). The Secretary seeks to impose a civil penalty of \$3,200 on Cyprus Cumberland Resources Corporation (Cumberland) for 104(d)(2) Order No. 3668716. The Order was issued for an alleged significant and substantial violation, attributable to Cumberland's unwarrantable failure, of the mandatory safety standard in section 75.220(a)(1), 30 C.F.R. ' 75.220(a)(1). This standard requires operators to follow the mine specific roof control plan developed by the operator and approved by the Mine Safety and Health Administration (MSHA).

This case was heard on August 8 and August 9, 1995, in Washington, Pennsylvania.<sup>1</sup> The Secretary relied on the testimony of MSHA Inspectors Robert Santee and William Wilson, as well as George Hazuza, an MSHA supervisory roof control safety and health specialist. Cumberland called its Safety Manager,

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<sup>1</sup> All transcript references in this decision relate to testimony provided on August 8, 1995.

Gary Klinefelter, its General Manager, Charles Zabrosky, and employees Patrick Maher and Michael Konosky. Syd Peng, Ph. D., also testified for the respondent as an expert witness. Dr. Peng is the Chairman of West Virginia University's Mining and Engineering Department. Cumberland stipulated it is a large operator that is affiliated with the Cyprus Amax Coal Company. Cumberland also stipulated that it is subject to the jurisdiction of the Act, and, that the proposed penalty will not adversely affect its ability to continue in business. The parties' post-hearing filings are of record.

### Findings of Fact

This case involves the tailgate entry of the proposed 5A longwall panel at the Cumberland Mine. The 5A panel was to be the thirty-first panel Cumberland had mined since it started longwall mining in 1980. The 5A longwall panel is located adjacent and parallel to the 4A longwall panel, the panel being mined on August 2, 1994, when 104(d)(2) Order No. 3668716 was issued. As illustrated by the mine map, the initial faces of the 4A and 5A panels were slightly offset, with the start of the 5A panel located outby the start of the 4A panel. (Exs. P-2, R-17). This offset was unusual in that the initial face of a subsequent panel is ordinarily even with the start of the previous panel.

Adjacent longwall panels are separated by three development entries. Thus, the 5A and 4A panels were separated by entry Nos. 1, 2 and 3. The No. 1 entry, the entry closest to the 5A panel, was to serve as the 5A tailgate entry once mining began on the 5A longwall. The No. 2 entry was the track entry for the active 4A panel. The No. 3 entry was the 4A headgate that contained the 4A belt conveyor.

Although the Cumberland Mine roof control plan had undergone revisions, the longstanding operative provisions pertinent to this proceeding provide:

#### SAFETY PROCEDURES FOR LONGWALL TAILGATE TRAVELWAYS

A. 1. Typical tailgate roof support will be installed in the longwall tailgate as shown by drawings Nos. 7, 8, or 9. These plans provide a safe travelway out of the longwall section through the tailgate side.

2. Typical tailgate roof support will be installed in the entire length of the tailgate entry of the first longwall panel prior to any mining.

3. *To control frontal abutment stresses, typical tailgate support will be installed a minimum of 50 feet in advance of the longwall face in the proposed tailgate entry of each subsequent panel...*(emphasis added).<sup>2</sup> (Ex. P-4, p. 14).

Considering the roof control plan in its entirety, it is clear the term *Atypical tailgate support* referenced in Paragraph A3 means the installation of a single row of cribs in addition to routine roof bolting. (Tr. 60-61, 96; Ex. P-4 at 38A-41A). Consistent with the plan's provisions, Cumberland Mine entries were routinely supported with cribs. (Tr. 56, 87-88, 199, Ex. R-13). With respect to the cited area, Safety Manager Klinefelter admitted he was aware the roof control plan required the installation of cribs in the proposed tailgate entry 50 feet in advance of the active face. (Tr. 238). Although this area was not supported by cribs, extra supplemental support in the form of 20 super roof bolts and T2 channels were installed at the intersection of the proposed 5A longwall and the proposed longwall tailgate. (Tr. 91, 214; Exs. P-4, R-13).

On August 2, 1994, Inspector Santee traveled the track haulage to the 5A section. Santee was accompanied by Mike Konosky, Cumberland's safety escort, and Jerry McCombs, a union local president. At that time, the face of the proposed 5A panel was approximately 4,000 feet in by the actively retreating 4A longwall face. (Tr. 37, 67-68, 130; Exs. P-1, 2, 3). The face of the 4A panel had been adjacent to the initial proposed 5A face on or about May 6, 1994. (Tr. 37, 67; Ex. P-1, 2, 3).

Upon arriving at the 5A section, Santee took ventilation readings prior to proceeding towards the proposed 5A tailgate section. As Santee approached this entry near the 5A face, he noticed that cribs had not been installed in accordance with the approved roof control plan. Consequently, Santee issued 104(d)(2) Order No. 3668716 for an alleged violation of section 75.220(a)(1). The following condition was noted in the Order:

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<sup>2</sup> There are two exceptions to the provisions of Paragraph A3 of the roof control plan. These exceptions are not applicable in this proceeding. (Tr. 61).

The operator failed to install the required typical tailgate support, in the proposed tailgate of the future 5A longwall section, for a distance of 59 feet outby the face. The present 4A(012) longwall face, according to the mine map as well as information obtained from Company officials, was mined on or about May 6, 1994. The operator's roof control plan (Page 14), A Safety procedures for longwall tailgate travelways, @ Item A3 requires, A to control frontal abutment stresses, typical tailgate support will be installed a minimum of 50 feet in advance of the longwall face in the proposed tailgate entry of each subsequent panel. @ This area is required to be pre-shifted as well as traveled weekly by certified persons who are acting as agents of the operator. There were 5 violations issued during the last inspection period from April 1, 1994, to June 30, 1994, of 30 C.F.R. ' 75.220(a)(1). (Tr. 40; Ex. P-1)

Santee modified Order No. 3668716 on August 4, 1994, to reflect cribbing was not installed 49 feet rather than 59 feet outby the 5A face. Santee testified he recalculated this distance by measuring outby the 5A face rather than using a crosscut intersection inby that existed as a result of the offset configuration of the 4A and 5A panels. (Tr. 38-39). Santee also terminated the Order on August 4, 1994, after a single row of cribs was installed in the 5A tailgate outby the 5A panel. (Tr. 38-39, 94-95). Santee did not require the installation of cribs in the No. 1 entry inby the proposed face to abate the Order. (Tr. 201-02; Ex. R-13).

On balance, the testimony reflects the uncribbed roof cited by Santee was not significantly compromised by the abutment pressures from the 4A panel. Cumberland witnesses Klinefelter, Zabrosky, Konosky and Peng testified they did not observe any signs of roof stress or deterioration upon inspection of the area in the days and months following Santee's Order. Even Santee conceded he did not consider the roof condition to be bad in that it did not pose any danger. (Tr. 78-79).

Despite roof control provisions to the contrary, Klinefelter testified Cumberland unilaterally decided to stop cribbing the first 50 feet of the tailgate entry outby the proposed face for more than half of its developed longwall panels. (Tr. 203-04, 223; Ex. R-17). This practice began in 1988 to improve ventilation to the active longwall faces by preventing loss of air to those faces. (Tr. 203, 223, 238).

Cumberland explained why it decided not to crib the subject tailgate areas during the last seven years. At the beginning of each longwall panel air is directed to the face by stoppings in entries behind the face. (Tr. 203-04, Exs. R-14, R-15). In the initial stages of longwall mining, it becomes difficult to maintain proper airflow to the face because of the void left by removal of the coal. (Tr. 86-87, 203, 208, 212). The stoppings behind the longwall may also become compromised by roof falls as the longwall retreats. (Tr.213). Prior to the initial fall in the longwall gob, air can flow to the bleeder entries through the stopping location behind the gob rather than flowing across the face into the tailgate. (Tr. 86-87, 227-28). This can cause high methane concentration in the tailgate or at the face, or, make it difficult to control respirable dust on the face. (Tr. 87, 208, 227).

Cumberland concluded its ventilation problems could be remedied if the area consisting of the first 50 feet of the proposed tailgate entry was not cribbed. (Tr. 213-14, 227). A lack of cribs would cause the area to fall at an earlier time after mining of the proposed panel began. This would enable Cumberland to maintain ventilation on the face by adding resistance and restricting airflow through the gob. (Tr. 212-14, 229). Klinefelter testified Cumberland's approved ventilation plan recognizes the problems associated with longwall start up and permits Cumberland to mine 100 feet before it must satisfy the full ventilation requirements for the face. (Tr. 208-09).

### **Further Findings and Conclusions**

#### **A. Fact of Occurrence**

Evidence is immaterial if it is relevant to establish or disprove a proposition that is neither in issue or probative of a fact in issue. Jerome Prince, *Richardson On Evidence*, ' 4 (10th ed. 1973). The propriety, as a ventilation measure, of Cumberland's lack of cribbing of the first 50 feet of each of its proposed tailgate entries is not in issue. Nor is it probative of the issue of whether Cumberland's failure to crib constitutes a failure to follow its approved roof control plan in violation of section 75.220(a)(1). Thus, Cumberland's reasons for not cribbing are not material with respect to the issue of the fact of occurrence of the cited violation. Similarly, as discussed below, having elected not to inform MSHA of its decision to modify its tailgate cribbing procedures, the rationale for its

unilateral modification is not a material mitigating factor with respect to the issue of unwarrantable failure.

Generally, the Secretary's interpretation of a mandatory safety requirement is afforded weight when it is reasonable and consistent with statutory intent. *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 284 (March 1989). Here, the Secretary contends Paragraph A3 of Cumberland's roof control plan requires tailgate cribbing in the proposed tailgate 50 feet in advance of the adjacent active longwall face. In response, Cumberland argues the roof control language in Paragraphs A2 and A3 is ambiguous.

Cumberland points to Paragraph A2 which requires the "entire length" of the tailgate entry of the "first longwall panel" to be cribbed prior to the initiation of mining in 1980. By comparison, Paragraph A3, which applies to all subsequent longwall panels, does specify the "entire length" of each proposed tailgate. Rather, Paragraph A3 states:

To control frontal abutment stresses, typical tailgate support will be installed a *minimum of 50 feet in advance of the longwall face in the proposed tailgate* of each subsequent panel... (emphasis added)

Cumberland argues the phrase "a minimum of 50 feet in advance" is ambiguous because it is unclear whether it requires typical tailgate support 50 feet inby or outby the proposed panel or 50 feet ahead of the advancing face.

As a threshold matter, it is significant that Cumberland did not view these roof control provisions as ambiguous from 1980 through 1988 when it adhered to proposed tailgate cribbing 50 feet in advance of the active face. Moreover, taking Cumberland at its word, the departure from this procedure in 1988 was motivated by Cumberland's ventilation concerns, rather than its realization of the purported ambiguity in the roof control provisions. Finally, although resolution of ambiguity requires clarification, Cumberland never sought guidance from MSHA.

Notwithstanding the fact that Cumberland's claimed confusion is belied by its own past conduct and testimony, the plain language of Paragraph A3 concerns the "control of frontal abutment stresses." Dr. Peng testified that abutment pressure is caused by the removal of coal from the retreating longwall when the overhanging unsupported gob transfers pressure to the edges of the gob, both in front of the advancing face and to the sides. (Tr. 278). Although Peng opined that abutment pressures are

minor at the beginning of the longwall panel and increase as the panel is mined, it is evident that "control of abutment stresses" referenced in Paragraph A3 can only be accomplished with roof support in advance of the active longwall. (Tr. 286).

It is also apparent the operative language in Paragraph A3 requiring cribbing in the Proposed tailgate entry contemplates roof support installation as the adjacent panel advances. For the tailgate entry ceases to be a Proposed entry once mining of the proposed panel begins. Thus, when Cumberland advanced the 4A panel when it was adjacent to the 5A face on or about May 6, 1994, without supporting the proposed 5A tailgate 50 feet in advance of the active 4A panel, it did so in contravention of the approved roof control provisions. Consequently, the Secretary has established the fact of occurrence of the cited mandatory safety standard in section 75.220(a)(1).

#### B. Significant and Substantial Issue

A violation is properly designated as being significant and substantial (S&S) in nature "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature." *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984) the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). The question of whether any *particular violation* is significant and substantial must be viewed in the context of the continued existence of the cited violation during the course of continued normal mining operations. *Halfway Incorporated*, 4 FMSHRC 8, 12-13 (January 1986).

In applying the *Mathies* and *Halfway* criteria in this case, identification of *the particular violation* that contributes to the discrete safety hazard, i.e. roof fall, is essential. Significantly, Santee testified Cumberland was *not cited* for a violation of section 75.202(a), 30 C.F.R. ' 75.202(a), which prohibits persons from working or traveling under unsupported roof, because Santee did not consider the roof condition to be bad.<sup>3</sup> (See Tr. 79). Therefore, Cumberland's extensive testimony by Dr. Peng and its other witnesses that the roof area cited by Santee was in good condition, while credited, is not dispositive and does not preclude a significant and substantial finding in this matter.

Rather, the subject mandatory standard in this proceeding is section 75.220(a)(1). This mandatory standard provides:

*Each mine operator shall develop and follow a roof control plan, approved by the [MSHA] District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered. (Emphasis added).*

Therefore, an evaluation of the likelihood of serious injury must be accomplished by analyzing the degree of hazard contributed to by Cumberland's longstanding failure to "follow its roof control plan." With respect to the first element in *Mathies*, as noted above, Cumberland violated section 75.220(a)(1). With respect to the second element, the failure to follow an approved roof control plan that is suitable to the specific conditions at the Cumberland Mine contributes to the danger of a roof fall. See, e.g., *Jim Walter Resources, and*

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<sup>3</sup> Section 75.202(a) provides:  
The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the rock, face or ribs and coal or rock bursts.

case cited therein, 9 FMSHRC 903, 907 (May 1987). The fourth element is also satisfied in that mine roofs are inherently dangerous and roof falls are a leading cause of death in underground mines. *Consolidation Coal Company*, 6 FMSHRC 34, 37 (January 1984).

Turning to the remaining question, the Commission has held the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). This third element must be viewed in the context of *Halfway* to determine if there is a reasonable likelihood that Cumberland's continued failure to crib in accordance with the requirements of its roof control plan will result in an event, *i.e.*, a roof fall, that will cause serious injury.

This is not a matter in which Cumberland, on one occasion, inadvertently failed to crib a proposed tailgate in violation of its roof control plan. On the contrary, Cumberland admittedly stopped cribbing the first 50 feet outby the initial face of each proposed tailgate since 1988 (approximately 15 tailgates). Moreover, but for Santee's Order, Cumberland undoubtedly would have continued not to crib future proposed tailgates within 50 feet of their proposed longwall faces. With the exception of the 5A tailgate, all previous uncribbed tailgate areas at the initial faces have fallen into the gob. Therefore, it is impossible to determine the condition of these areas after they were exposed to abutment pressures from the active adjacent longwall panels.<sup>4</sup>

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<sup>4</sup> Cumberland argues the Secretary is estopped from citing this practice because MSHA inspectors have failed to cite this condition since 1988. Whether inspectors previously observed this condition is unclear. However, the lack of previous enforcement of a mandatory safety requirement does not constitute a defense to a violation. See *U.S. Steel Mining Company, Inc.*, 15 FMSHRC 1541, 1546-47 (August 1993).

Although no one travels the uncribbed tailgate area outby the proposed face once mining on this face begins, Santee testified that, during the mining of the adjacent longwall panel, the weekly mine examiner is required to travel the uncribbed proposed tailgate area once every seven days and pre-shift examiners must examine this area three times each day. (Tr. 64-65, 210-11, 248). If this area is not pre-shifted, then the on-shift examiner would be exposed. (Tr. 64-65).

Under these circumstances, for several years, mine examiner personnel were exposed to areas of roof that were intended to rapidly collapse into the gob once mining at each proposed panel began because these areas lacked supplemental roof support. These facts demonstrate there was a reasonable likelihood of a roof fall that would result in serious or fatal injuries to mine personnel traversing the uncribbed areas in issue. Accordingly, the third *Mathies* element has been satisfied. Thus, Cumberland's failure to crib the tailgate areas immediately outby the proposed longwall faces was properly characterized as significant and substantial.

### C. Unwarrantable Failure

Finally, we arrive at the question of unwarrantable failure. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected, or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use...characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'). *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

Resolution of whether Cumberland's unilateral disregard of the provisions of its roof control plan manifests an unwarrantable failure requires a review of the plan approval process. Pursuant to section 101 of the Act, 30 U.S.C. ' 811, mandatory safety standards are promulgated through the rulemaking process and apply to all similarly situated mines. However, such general industry standards are frequently ineffective when applied to mining practices or conditions unique to a particular mine.

Consequently, Congress, in section 302 of the Act, 30 U.S.C. ' 862, provided for MSHA to require mine operators to adopt comprehensive plans tailored to each mine to ensure the most effective measures of roof control. The roof control plan must be submitted by the operator for the MSHA District Manager's approval. The plan approval process contemplates negotiations in good faith between operators and MSHA over the plan's provisions. *Jim Walter Resources, Inc.*, 9 FMSHRC at 907. If an agreement cannot be reached, the parties may seek resolution of their disputes in enforcement proceedings before this Commission. *Id.*

The plan approval system would frustrate Congressional intent if operators could selectively follow only those provisions they like while ignoring other provisions. Such conduct eviscerates the plan approval process, compromises safety, and, must not be condoned. See *S & H Mining, Inc.*, 15 FMSHRC 2196, 2199 (October 1993). If Cumberland had an alternative method of roof control without any diminution in safety, it should have sought MSHA's approval. Having failed to do so, Cumberland's unabashed failure to follow its roof control plan since 1988 constitutes intentional and inexcusable misconduct. Such aggravated conduct supports the Secretary's unwarrantable failure charge.

Accordingly, 104(d)(2) Order No. 3668716 is affirmed. Given Cumberland's large operator status, its longstanding failure to follow its roof control plan, the degree of negligence manifest by its intentional misconduct, and, the gravity associated with a potential roof fall, the \$3,200 civil penalty proposed by the Secretary is likewise affirmed.

#### ORDER

As noted above, 104(d)(2) Order No. 3668716 **IS AFFIRMED**. Consequently, **IT IS ORDERED** that the respondent pay a total civil penalty of \$3,200 in satisfaction of the cited violation in this matter. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of the \$3,200 payment, Docket No. PENN 95-181 **IS DISMISSED**.

Jerold Feldman  
Administrative Law Judge

Distribution:

Maureen A. Russo, Esq., Office of the Solicitor, U. S. Department  
of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104  
(Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre,  
301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410

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