FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 94-639
	:	A.C. No. 40-02934-03549
v.	:	
	:	Mine No. 78
KELLYS CREEK RESOURCES INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Hollis Rogers, President, Kellys Creek Resources, Inc., Whitwell, Tennessee, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty, filed by the Secretary (Petitioner) alleging a violation by Kellys Creek Resources (Respondent) of 30 C.F.R. ' 75.388(a)(2). Subsequent to notice, the case was scheduled and heard in Chattanooga, Tennessee, on April 6, 1995. Tommy Frizzell testified for the Petitioner, and Hollis Rogers testified for the Respondent. At the conclusion of the hearing, Petitioner indicated he intended to file a brief. Respondent was accorded the same privilege. Briefs were ordered to be filed three weeks after receipt of the transcript. The transcript was received by the Commission on May 8, 1995. After requesting extentions, Petitioner filed his brief on July 26, 1995. No brief was filed by Respondent.

Findings of Fact and Discussion

Tommy Frizzell, an MSHA Inspector, was notified by the Respondent on January 27, 1994, that a cut had been made into a sealed area, and that the operator had withdrawn miners from the

area. Frizzell went to the mine and was informed by Jerry McGowan, the section foreman, that low oxygen was detected at the cut-through.

According to Frizzell, the cut-through measured 3 feet wide, and 6 to 8 inches high. Frizzell indicated that the crosscuts were 40 feet apart. He examined the ribs for test holes, five crosscuts out by the cut-through, and did not see any evidence of any test holes. Frizzell issued a citation alleging a violation of 30 C.F.R. ' 75.388(a)(2) which, in essence, provides that boreholes shall be drilled when the working place approaches within 200 feet of an area of the mine not shown by surveys that are certified. Respondent stipulated to the fact of the violation. Based on this stipulation and the testimony of Frizzell, I find that the Respondent did violate Section 75.388(a)(2), supra.

Unwarrantable Failure

In order for a violation to be found to be the result of an operator's unwarrantable failure, the Secretary must establish that its actions constituted more than ordinary negligence and reached the level of aggravated conduct (See Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987)). According to Frizzell, on June 11, 1990, Hollis Rogers, who was the Respondent's president on January 27, 1994, was cited for mining within 200 feet of an adjacent sealed mine, and not having any boreholes in violation of 30 C.F.R. ' 75.1701, the predecessor of Section 75.388(a)(2), supra. Frizzell alleges that Hollis has had considerable mining experience, including training of miners and rescue teams, and therefore he should have known that in the time period at issue, he was mining near an abandoned mine. Frizzell explained that the dotted lines encircled in green on Government Exhibit 5-A depict a sealed area that abutted the area being mined on January 27, 1994, that was not surveyed and was not certified. In this connection, he noted that broken lines on mine maps are universal symbols used by engineers to indicate areas that are not certified to be accurate. Frizzell's testimony does not provide any specific factual foundation to support his conclusion that broken lines on a mine map indicate areas not surveyed. The legend on the mine map in issue does not indicate that the broken lines symbol stands for unsurveyed areas. To the contrary, a handwritten notation on the bottom of the printed legend indicates that a broken line is the symbol for "line curtain."

Rogers testified that the broken lines on a mine map do not necessarily indicate areas not certified. He testified, in essence, that broken lines are used to indicate the point where

surveyors cannot enter any further. According to Rogers, the broken lines depicted in the map at issue represent a gob area or loose rock within the gob area.

Rogers testified that when the cut-through was made, he thought he "was 90 feet away" (Tr. 124).

Frizzell testified that he had asked McGowan, the section foreman, why boreholes were not drilled in advance of the work. According to Frizzell, McGowan told him that he was told by Rogers that "he didn't have to drill those test holes until he got within 50 feet of that area" (Tr. 39).

Based on the above facts, I conclude that Petitioner has not established that the level of Respondent's negligence rose to the level of aggravated conduct. I thus find that the violation was not a result of Respondent's unwarrantable failure.

Significant and Substantial

In essence, according to Frizzell, boreholes are to be drilled in order to detect the presence of low oxygen in the sealed area, which, if it were to escape in an unplanned cut-through, could cause the death of miners. Also, boreholes are to be used to detect methane in the atmosphere of the sealed area which, if in an exposure range, could cause an explosion resulting in fatalities. Frizzell explained that at a point 6 inches outby the cut-through, the amount of oxygen detected was 15 1/2 percent. He explained that a person exposed to an oxygen level of 10 percent would become unconscious.

I find that accordingly, the violation here contributed to a measure of danger to safety. However, in order for the violation to be considered significant and substantial it must be established that there was a "reasonable likelihood" that the hazard contributed to will result in an injury." (Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984)).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated as follows:

> We have explained further that 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., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and

effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Hence, it must be established by the Secretary that there was a reasonable likelihood of an injury producing event, i.e., a fire, explosion, or exposure to low oxygen contributed to by the lack of boreholes. An injury producing event can occur attendent upon a cut-through into an area containing low oxygen or methane in an explosive range. This event in turn depends upon the manner to which the continous miner is being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. These factors all operate independently of the failure to drill boreholes, the violative acts herein. I thus find that it has not been established that an injury producing event was likely to have occurred as a result of the violation herein. I find that it has not been established that the violation was significant and substantial.

Penalty

I find that the level of Respondent's negligence herein was only moderate. However, since the violative actions could have led to unexpected exposure of miners to hazardous amounts of methane and low amounts of oxygen, both of which could be fatal, I find that the violation was of a very high level of gravity. On the other hand, the level of the penalty to be assessed should be reduced taking into account its effect on the Respondent's ability to continue in business for the reasons set forth in Kellys Creek Resources, 17 FMSHRC 1085, 1092, (June 29, 1995). [1] Taking all the above into account, I find that a penalty of $500 is appropriate.

ORDER

It is ORDERED that the order at issue be amended to a section 104 (a) citation that is not significant and substantial. It is further ORDERED that respondent shall, within 30 days of this decision, pay a civil penalty of $500.

[1]At the hearing of the case at bar, the parties stipulated to the proof adduced in the earlier hearing between these parties, Kellys Creek Resources, Inc., 17 FMSHRC, supra, as it relates to the appropriateness of the penalty to the size of Kellys Creek's ability to continue in business.

Avram Weisberger
Administrative Law Judge

Distribution:
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Hollis Rogers, President, Kellys Creek Resources, Inc., Route 4, Box 662, Whitwell, TN 37397 (Certified Mail)

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