FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 4, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 91-97
Petitioner	:	A. C. No. 40-02755-03525
v.	:	
	:	Docket No. SE 91-533
FAITH COAL COMPANY,	:	A. C. No. 40-02755-03527
Respondent	:	
	:	Docket No. SE 92-315
	:	A. C. No. 40-02755-03536
	:	
	:	Docket No. SE 92-316
	:	A. C. No. 40-02755-03537
	:	
	:	Docket No. SE 92-343
	:	A. C. No. 40-02755-03538
	:	
	:	Docket No. SE 92-372
	:	A. C. No. 40-02755-03540
	:	
	:	Docket No. SE 92-373
	:	A. C. No. 40-02755-03541
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	:	Docket No. SE 92-375
	:	A. C. No. 40-02755-03542
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	:	Docket No. SE 92-463
	:	A. C. No. 40-02755-03543
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	:	Docket No. SE 92-464
	:	A. C. No. 40-02755-03544
	:	
	:	Docket No. SE 92-488
	:	A. C. No. 40-02755-03545
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	:	Docket No. SE 93-78
	:	A. C. No. 40-02755-03547
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	:	Docket No. SE 93-79
	:	A. C. No. 40-02755-03548

: Docket No. SE-93-194
: A. C. No. 40-02755-03549
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: Docket No. SE-93-195
: A. C. No. 40-02755-03550
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: Docket No. SE 93-257
: A. C. No. 40-02755-03552
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: Docket No. SE 93-300
: A. C. No. 40-02755-03553
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: Docket No. SE 93-348
: A. C. No. 40-02755-03555
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: Docket No. SE 93-365
: A. C. No. 40-02755-03556
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: Docket No. SE 93-366
: A. C. No. 40-02755-03557
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: Docket No. SE 93-411
: A. C. No. 40-02755-03558
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: Docket No. SE 94-42
: A. C. No. 40-02755-03561
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: Docket No. SE 94-75
: A. C. No. 40-02755-03562
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: Docket No. SE 94-96
: A. C. No. 40-02755-03563
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: Docket No. SE 94-256
: A. C. No. 40-02755-03564
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: Docket No. SE 94-257
: A. C. No. 40-02755-03565
:
: No. 15 Mine

DECISION ON REMAND

BEFORE: Judge Barbour

This remand involves one citation (Citation No. 3202337) in one docket (Docket No. SE 94-256). In the citation, the Secretary alleged a violation of 30 C.F.R. ' 75.313 because the methane monitor on a scoop loader was inoperable (Joint Exh. 62). Section 75.313 relates to fan stoppages while miners are underground, not to methane monitors on loading machines. The latter requirements are found in 30 C.F.R. ' 75.342 and its subsections. Therefore, in my original decision, I found the Secretary cited the wrong standard, and I vacated the citation (17 FMSHRC 1146, 1183 (July 1995)).

The Commission reversed. It held I should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and to charge a violation of section 75.342(a)(4). Because the Commission concluded Faith Coal Company understood the nature of the violation charged and was not prejudiced, the Commission reinstated the citation and directed me to find whether Faith violated section 75.342(a)(4) (19 FMSHRC 1357, 1360-62 (August 1997)).

After the case was returned to me, I ordered the parties to determine if they could settle the matter. If they could not, I ordered them to submit briefs or statements regarding whether a violation of section 75.342(a)(4) occurred and, if so, what an appropriate civil penalty should be, taking into account the criteria set forth in section 110(i) of the Mine Act (30 U.S.C. ' 820(i)).

Counsel for the Secretary filed a response advising me the parties were unable to settle their differences. She argued a violation of section 75.342(a)(4) occurred, and she requested Faith be assessed a civil penalty of $4,000 for the violation. Also, she included in her response a statement by Faith=s representative maintaining the company did not violate the standard and requesting he be allowed more time to respond to the Secretary=s response (Response to Order On Remand 2). The request is denied. The representative has had ample opportunity to make known the company=s position regarding the issues on remand, and it is time to end this matter.

THE VIOLATION

Section 75.342(a)(4) requires AMethane monitors . . . [to] be maintained in permissible and proper operating condition.@ I fully set forth the relevant testimony in my pervious decision, and it need not be repeated here (17 FMSHRC at 1182). It is sufficient to note the inspector testified that he saw the scoop operating, he tested the scoop=s methane monitor, and the monitor did not deenergize the scoop (Vol. II Tr. 413-414). He also testified the company=s representa-tive was not present at the time the scoop was operating, but later arrived and told the inspector that he, the representative, had Ajumped out@ the monitor (meaning the monitor mechanism had been bypassed electrically so that the scoop would continue to operate regardless of the presence of methane) (17 FMSHRC at 1182).

The representative acknowledged the monitor had been bypassed. He testified he bypassed it because he was going to use the scoop as a means of transportation rather than as a mechanism to load coal. He maintained the monitor was working when the scoop was loading

coal and it did not need to work when the scoop was used for transportation (Vol. II Tr. 428).

I find the Secretary proved a violation of section 75.342(a)(4). The testimony of the inspector regarding the conditions he observed was entirely credible and not overcome by the representative. Although the representative asserted the scoop was not loading coal with an inoperable monitor, he was not on the section when the inspector saw the scoop. Nor was he there when the inspector tested the monitor and found it did not work (Vol. II Tr. 413-414, 417). In short, the inspector=s testimony conclusively establishes the monitor was not Amaintained in permissible and operating condition,@ as required by the standard (30 C.F.R. ' 75.342(a)(4)).

Even if the scoop was not loading coal but was used or was going to be used for transportation purposes, I would still conclude its lack of a functioning methane monitor violated section 75.342(a)(4). The standard is directed at detecting methane in working places, that is at detecting methane inby the last open crosscut (30 C.F.R. ' 75.2). The standard=s goal is to prevent potentially disastrous explosions and fires by warning of the presence of gas before it reaches dangerous concentrations. Interpreting the standard to allow removal of this protection when use of the equipment is altered temporarily but its functional capabilities remain the same, would not promote the protective purpose of the Act or the standard. I suspect this is why the standard does not, as it might, require a monitor to be present and functioning only when the equipment is in use within a working place.

GRAVITY

The inspector determined the violation was not a significant and substantial contribution to a mine safety hazard (S&S violation) because the mine normally does not liberate methane and no methane was detected at the time the violation was cited (Vol. II Tr. 419). The inspector testified that if methane was detected at the mine it was in Avery small quantities@ (Vol. II Tr. 419). These factors properly influenced the inspector=s assessment of the S&S nature of the violation -- that is, whether the hazard created by the violation was reasonably likely to result in a reasonably serious injury.

However, the same factors do not compel a conclusion the violation was none serious. The violation consisted of the company=s deliberate failure to maintain the methane monitor in proper operating condition. Because methane=s past is not always its prologue, proper maintenance of a methane monitor is one of the Act=s most important protections. An operator cannot unilaterally remove the protection. While I recognize the gravity of the violation was mitigated by the lack of past and present methane, nevertheless, it was a serious violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In her initial brief the Secretary=s counsel argued the representative=s testimony he intentionally bypassed the monitor should result in a finding of unwarrantable failure (Sec. Br. 150). I did not reach the issue, because I did not find a violation. However, in dicta, I stated if I had found a violation, I would not have found it the result of unwarrantable failure. (AThe original citation did not charge unwarrantable failure and Faith was not given notice such . . . an allegation was at issue@ (17 FMSHRC at 1183)).

On remand, counsel renews her argument. She asks the citation Abe modified to conform to the proof; i.e., that it be modified to a [s]ection 104(d) citation to reflect [the representative=s] unwarrantable failure to comply with the regulation@ (Response to Order on Remand 5). Again, she cites the representative=s testimony he intentionally bypassed the monitor (Id. 5-6).

Counsel=s request comes much too late. While it is true the representative testified he intentionally bypassed the monitor, he did so without knowing unwarrantable failure was at issue. As the Commission noted in reversing in part my original decision, the Federal Rules of Civil Procedure are applied so far as practicable on procedural questions not governed by the Commission=s rules or the Act (19 FMSHRC at 1352 n.10). Rule 15(b) of the Federal Rules provides for conformance of the pleadings to the evidence adduced at trial, but the Commission has stated that when determining whether a Rule 15(b) amendment is to be allowed, Aemphasis [is] upon the parties understanding that the unpleaded claim is, in fact, being litigated@ (19 FMSHRC at 1362 n.10 (citing to *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986)).

Here, the representative did not know, nor should he have know, the government would charge the company with unwarrantable failure. No such charge was on the citation, in the pleadings, or mentioned during the hearing. The only issue regarding culpability of which the representative had notice was that of the company=s negligence. Under the Mine Act the concepts of negligence and unwarrantable failure are not identical. To allow modification of the citation at this point would be to eliminate the distinction between them and to prejudice the representative, who, had he known unwarrantable failure was an issue, might well have presented the company=s case and his testimony differently.

Finally, there is a fundamental statutory problem with counsel=s request. To issue a citation under section 104(d)(1), the inspector must make an S&S as well as an unwarrantable finding (30 U.S.C. ' 814(d)(1)). In issuing Citation No. 3202337, the inspector did not find the violation was S&S, nor did the Secretary allege such was its nature (Vol. II Tr. 419; Response to Order on Remand 3).

Turning to the criteria of negligence, the inspector=s and representative=s testimony establishes that the representative intentionally bypassed the monitor (Vol. II Tr. 417, 425). Therefore, I find the representative, and through him the company, exhibited high negligence in allowing the violation to exist.

GOOD FAITH ABATEMENT

The violation was abated when the scoop was removed from service and not returned to the mine (Vol. II Tr. 420). This constituted good faith abatement.

OTHER CIVIL PENALTY CRITERIA

My findings regarding the civil penalty criteria of ability to continue in business, size, and history of previous violations were not disturbed on review and are applicable here (17 FMSHRC at 1208-10).

PENALTY ASSESSMENT

Counsel requested a civil penalty of $4,000 (Response to Order on Remand 7). The request is highly excessive, especially in view of my previous findings regarding the adverse consequences of the Secretary=s proposed penalties on the company=s ability to continue in business (17 FMSRHC at 1208-10), and in view of the mitigated gravity of the violation. A civil penalty of $150 is consistent with penalties previously assessed and settlements previously approved, and is in accord with criteria particularly applicable to the violation. Accordingly, Faith is **ORDERED** to pay such a penalty, along with all other penalties assessed in these proceedings, within 30 days. Upon payment of the penalties, these proceedings are **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution:

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

Mr. Lonnie Stockwell, Faith Coal Company, Route 1, Box 196, Palmer, TN 37365 (Certified Mail)

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