FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 22, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 93-9
	:	A.C. No. 40-03011-03534
v.	:	
	:	Docket No. SE 93-10
S & H MINING, INC., Respondent	:	A.C. No. 40-03011-03535
	:	
	:	Docket No. SE 93-98
	:	A.C. No. 40-03011-03540
	:	
	:	S & H Mine No. 7

DECISION ON REMAND

Before: Judge Feldman

These civil penalty proceedings initially concerned 11 alleged violations of mandatory safety standards contained in Part 75 of the Secretary's regulations, 30 C.F.R. Part 75. These matters were disposed of in a decision dated October 22, 1993, wherein the parties' settlement terms for seven of the alleged violations were approved and the remaining four violations were adjudicated on the record in a bench decision. 15 FMSHRC 2196.

These cases were remanded by the Commission for further analysis in light of the record evidence with respect to two alleged violations of section 75.220, 30 C.F.R. § 75.220, for failure to comply with the Mine Safety and Health Administration's (MSHA's) approved roof control plan. 17 FMSHRC 1918 (November 1995). The Commission directed that I revisit my conclusions that the first violation was not properly designated as significant and substantial, and that the second violation was not attributable to the respondent's unwarrantable failure.

A. Order No. 3382962

On July 22, 1992, MSHA Inspector Don McDaniel, accompanied by Charles White, S&H's Mine Superintendent, observed a coal pillar that had not been mined in conformity with the provisions of the approved roof control plan that limited initial pillar cuts to 13 feet wide. The initial cut observed by McDaniel was

20 feet wide.[1] Tr. II 67-68.[2] The uncontradicted evidence reflected the initial pillar cut was enlarged, without MSHA's approval, because, given the dimension of the entry, the continuous mining machine was too large to maneuver to cut the pillar according to the plan's sequence. Tr. I 187, 192-93. Following the issuance of Order No. 3382962, S&H's roof control plan was revised to permit it to round off a corner of the pillar and then make an initial pillar cut of 15 feet wide. Tr. II 77-78.

Regardless of the necessity for increasing the size of the initial cut, I concluded that S&H's unilateral decision to disregard its roof control plan was inexcusable conduct justifying the unwarrantable failure charge. However, I also concluded that the violation was not significant and substantial in that S&H's action did not compromise structural support because the roof control plan "was ultimately modified to essentially conform to the respondent's method of initial pillar cut." 15 FMSHRC at 2199.

In its remand decision, the Commission noted that the 20 foot cut cited by McDaniel did not conform with the revised plan permitting 15 foot cuts. Consequently, the Commission concluded the record fails to support my initial decision that the unauthorized 20 foot cut did not compromise roof support.

A violation is properly characterized as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in serious injury. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981); *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984). The likelihood of injury must be evaluated in the context of continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Upon further reflection, it is clear that the respondent's 20 foot initial cut significantly exceeded the 15 foot cut permitted by the revised roof control plan. Although McDaniel testified he did not observe anyone under unsupported roof at the time he issued the order, when viewed in the context of continued operations, McDaniel's testimony that over cutting

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[1] The pillars are approximately 35 feet square. Tr. I 182, 205.

[2] The hearing was conducted on September 28 and 29, 1993. "Tr. I" refers to the September 28 hearing and "Tr. II" refers to the September 29 hearing.

posed a continuing hazard to miners traversing the affected travelway supports the significant and substantial designation in Order No. 3382962.

Accordingly, the significant and substantial designation deleted in my initial decision is hereby reinstated. I initially assessed a civil penalty of $2,100 for Order No. 3382962. Given the civil penalty criteria in section 110(i)of the Mine Act, 30 U.S.C. § 820(i), that contemplates higher penalties for violations involving increased gravity, the assessed civil penalty in this matter shall be increased to $3,000.

B. Order No. 3382964

On the second day of the inspection, on July 23, 1992, McDaniel, again accompanied by White, was standing two crosscuts from section foreman Steve Phillips who was operating a continuous miner to clean up loose waste material (gob) in an entry. Tr. I 199. McDaniel conceded that S&H's continuous miner was too big to maneuver and operate in compliance with its roof control plan given the configuration of the crosscuts, the location of the pillars and the size of the entries. Tr. II 11-13. McDaniel observed Phillips load a shuttle car with gob and, as another shuttle car arrived, positioned the miner against the side of the pillar, penetrating the pillar,[3] without having first installed roof support timbers as required by the roof control plan. Tr I 199-200. McDaniel, with White, approached Phillips after he had made a 12-foot-wide, 38-inch-deep wedged shaped cut in the pillar.[4] Tr. I 200. Phillips told McDaniel that he was still cleaning up gob and had cut the pillar unintentionally. Tr. I 205-06.

Although I concluded this violation was significant and substantial, I declined to credit the Secretary's unwarrantable failure assertion because the evidence did not establish that Phillips' alleged mining was intentional given the angle of the

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[3] As discussed *infra*, McDaniel repeatedly referred to Phillip's penetration of the pillar as "mining." Counsel for the Secretary correctly acknowledged that "cutting" into the pillar was the appropriate term as the question of "mining" is the dispositive issue to be resolved. Tr. I 200.

[4] As discussed *infra*, the dimensions of this wedged shape cut are crucial. McDaniel repeatedly gave the impression that the cut was essentially 12 feet wide by 38 inches deep, when in fact, it was a wedge shaped cut penetrating the pillar at approximately 15 degrees. Tr. I 200, 204, 205, 207.

cut and the other evidence of record. 15 FMSHRC at 2198. The Commission's remand noted that I did not adequately indicate why I rejected McDaniel's conclusion that Phillip's action could not have been accidental given the 12 foot distance cut into the pillar. 17 FMSHRC at 1923.

McDaniel issued the subject Order No. 3382964 for an alleged roof control plan violation of section 75.220 for S&H's failure to set timbers before mining a pillar. Order No. 3382964 stated:

> The approved roof control plan was not being complied with on the working section where pillars was (sic) being mined. The first cut out of the pillar was started and the A Timbers in the outby crosscut had not been installed. The miner cut started on a angle for 12 feet and penetrated the coal bed 38" inches deep (emphasis added).

In my initial decision I rejected the unwarrantable failure charge because the Secretary had failed to establish that this violation was "a willful rather than a negligent act." 17 FMSHRC at 1922. The Secretary argues that I erred when I concluded that this violation can be found to be unwarrantable only if it is "intentional." The corollary is that the Secretary can prevail even if Phillips' act was unintentional. However, here S&H has been charged for its failure to set timbers before mining a pillar. Try as I might, I do not understand the Secretary's assertion that Phillips' actions constituted mining even if his contact with the pillar was inadvertent.

Of course, a willful act is not ordinarily a prerequisite to an unwarrantable failure. Significantly, S&H was not charged with aggravated carelessness, reckless disregard or other unintentional unjustifiable conduct. On the contrary, Phillips' maneuvering of a large continuous miner, in entries too small to permit compliance with its roof control plan, mitigates negligence if the pillar was penetrated accidentally. Thus, the negligence associated with an accidental penetration is inadequate to support an unwarrantable failure in this case. Moreover, it would require extremely aggravated, unintentional conduct under these circumstances to warrant unwarrantable failure as an operator is under no obligation to set timbers prior to an unanticipated encounter with a pillar.

Rather, the Secretary's unwarrantable failure case is only sustainable if Phillips was (intentionally) mining. There are several reasons why the Secretary has not met his burden of proving Phillips was mining. As noted in my initial decision, the shape of the wedge fails to convince me that Phillips' act

was intentional. McDaniel's testimony and the exhibits reflect Phillips cut into the pillar at a 15 degree angle removing a wedge in the shape of a right triangle. *See* Gov. Ex. 12-C, Resp. Ex. 17; Tr. I 208-10, Tr. II 49, 53-54. One side of the wedge (triangle) is 144 inches (12 feet) long. At the end of this side is a side 38 inches deep. These two sides constitute the right angle. The remaining side (the hypotenuse) is approximately 149 inches long. The remaining angles of the removed wedge, depicted in Gov. Ex. 12-C and Resp. Ex. 17, are 15 degrees and 75 degrees.[5]

Thus, it is inappropriate to consider the maximum penetration of 38 inches to have occurred along the entire 12 foot length of the cut. Rather, the first few feet of the cut constituted a 15 degree glancing blow only inches in depth. Moreover, the Secretary failed to present any evidence concerning how long it took to make this cut or whether the continuous miner was clearly positioned by Phillips to cut into the coal seam[6]. Therefore, on balance, the weight of the evidence concerning the dimensions and circumstances of the cut does not support the Secretary's position that Phillips was mining.

There are additional facts that do not support the Secretary's assertion that Phillips' act was intentional. McDaniel has admitted that the entry was narrow, and, the continuous miner was comparatively large which made maneuvering difficult. Moreover, Phillips' asserted operation of the continuous miner for non-mining purposes is supported by McDaniel's observations of Phillips loading gob in shuttle cars.

While exculpatory statements must be viewed cautiously, such statements are entitled to greater weight when they are made spontaneously. For example, Phillips' assertion to McDaniel at the time of the inspection, during a period when he had been cleaning gob, that his contact with the pillar was inadvertent is

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[5] I take judicial notice of the Pythagorean Theorem and trigonometric functions that calculate the length of the remaining side of the wedge and the remaining two angles of the right triangle formed by the wedge.

[6] McDaniel's testimony that the miner head could cut into the pillar a few feet, "but you couldn't travel 12 feet and say it was an accident," reflects the position of the continuous miner could have been accidental. Tr. I 207. As noted, it is misleading to say the miner head traveled 12 feet given the angle of entry into the pillar.

of more evidentiary value than if such a position was initially taken at trial.

Additionally, it is uncontroverted that Phillips knew McDaniel, who was accompanied by superintendent White for a second day, was in the vicinity inspecting the mine. Such knowledge, while not alone dispositive, supports Phillips' spontaneous, albeit exculpatory, statement to McDaniel that his penetration into the crib was accidental. I place no evidentiary value on the fact that there is no evidence that Phillips knew McDaniel was watching him at the time he committed the violation. As one who travels to work on streets where a 30 mile per hour speed limit is frequently enforced by radar "speed traps," my conduct is not dictated by whether I am certain the police are actually watching me as I crawl along the street on my way to the office. On the contrary, the mere possibility that a radar unit may be in the area is an extremely effective deterrent that governs my behavior. Similarly, Phillips' assertion that his act was unintentional is consistent with his knowledge of McDaniels' presence in the mine.

Finally, the Commission, citing *Youghiogheny & Ohio*, 9 FMSHRC at 2011 (in overseeing compliance with the roof control plan, the section foreman is held to a demanding standard of care) notes that a higher standard of care is required of mine management such as superintendent White and foreman Phillips. 17 FMSHRC at 1923. However, surely *Youghiogheny* does not support the proposition that accidents (as distinguished from cases involving supervisory responsibility) by mine management through ordinary negligence are attributable to an unwarrantable failure.

The Secretary has the burden of proving every element of a citation. While Phillips' conduct may have evidenced mining if he had not been quickly interrupted by McDaniel, based on the record before me, the Secretary has failed to rebut S&H's affirmative defense that Phillips' action was inadvertent rather than intentional. Having concluded that Phillips' action was accidental, there is insufficient evidence to attribute Phillips' actions to more than moderate negligence given the narrow entries and large mining machine. Consequently, I adhere to my initial decision that modified Order No. 3382964 to a 104(a) citation and assessed a civil penalty of $400.

ORDER

In view of the above, **IT IS ORDERED** that the significant and substantial designation for Order No. 3382962 **IS REINSTATED**. The civil penalty for Order No. 3382962 is increased from $2,100 to

$3,000. Payment of this additional $900 penalty is to be made within 30 days of the date of this decision.

Jerold Feldman
Administrative Law Judge

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