FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 5, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-20
Petitioner	:	A. C. No. 44-01696-03501 4FT
v.	:	
	:	Mine No. 2
MINING PROPERTY SPECIALISTS, INC.,	:	
Respondent	:	

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Harry W. Meador, III, President, Mining & Property Specialists, Inc., Big Stone Gap, Virginia, *pro se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Mining Property Specialists, Inc. (MAPS), under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of $500.00. A hearing was held in Big Stone Gap, Virginia.[1] For the reasons set forth below, I modify the citation and assess a penalty of $100.00.

Background

MAPS is an engineering and environmental services firm located in Big Stone Gap, Virginia. Among other things, it provides surveying services for various underground coal mines in the area.

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[1] Subsequent to the hearing, the Respondent requested that the September 7, 2001, deposition of MSHA Inspector John Godsey be admitted into evidence. There being no objection by the Secretary, the deposition is admitted into evidence as Respondent's Exhibit D.

On August 25, 2000, MAPS employees William Johnson, transit man, and Chad Huff, rod man, went to the Fork Ridge No. 2 mine in Wise County, Virginia, to install a survey station indicating the direction of an entry. On arriving at the mine, the surveyors checked in with mine management and then proceeded to the No. 1 entry to install Survey Station 208. At the time they entered the mine, and while they performed their duties, the mine was not producing coal because there was a problem with the belt line. It took the surveyors 15 to 20 minutes to complete their work.

As the surveyors were leaving, sometime between 8:00 a.m. and 8:30 a.m., they encountered MSHA Inspectors Gary Roberts and John Godsey, who were arriving to inspect the mine. The inspectors went into the mine to conduct their inspection accompanied by Hagy "Bear" Barnett, the Mine Superintendent. For most of the time they were underground, the mine was down. Mining was resumed sometime between 10:00 a.m. and 11:00 a.m.

At about 12:00 noon, Inspector Godsey went to inspect the face in the No. 1 entry. He discerned that the last row of roof bolts in the entry did not appear to be within five feet of the face, as required by the mine's roof control plan. He also observed that a warning reflector, or streamer, had been placed on the right hand side of the last row of bolts. He called Roberts and Barnett, who were still in the No. 2 entry, to come and verify what he had seen.

Although it was not as obvious to him, Roberts agreed that the last row of bolts appeared to be farther than five feet from the face. When Godsey measured the distance, he found that the last row was six feet, nine inches, from the face on the left side and six feet, one inch, on the right side. Roberts and Barnett both saw the warning reflector on the right side.

All three observed, after measurement, that Survey Station 208 was 20 inches inby the last row of roof bolts. From this, Godsey and Roberts concluded that the surveyors had gone under unsupported roof. Consequently, they issued Citation No. 7305588 to MAPS, under section

104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),[2] alleging a violation of section 75.202(b) of the Secretary's regulations, 30 C.F.R. § 75.202(b), because:

> Based on evidence present in the face of the number 1 entry 001-0 active section at survey station number 208, survey stations have been installed inby the last row of permanent roof supports. William Johnson, Supervisor [,] and Chad Huff, surveyor [,] were present at the mine site on August 25, 2000. A reflectorized warning device was installed on the last row of permanent roof supports.

(Govt. Ex. 1.) Section 75.202(b) provides that: "No person shall work or travel under unsupported roof unless in accordance with this subpart."

Findings of Fact and Conclusions of Law

MAPS asserts that at the time the surveyors installed the survey station they were not under unsupported roof. The Secretary, of course, argues that they were. Because of the time lapse between the installation of the survey station and the inspection of the area, both sides rely on circumstantial evidence to sustain their positions. The preponderance of the evidence, however, supports the Secretary.

The surveyors testified that when they entered the mine they were not advised of any hazardous conditions in the mine. They maintained that when they arrived at the face of the No. 1 entry, they did not observe any warning reflector or streamer. Not seeing any warning, and not having been informed of any hazardous conditions, and not observing any obviously hazardous conditions, they assumed the area was safe and performed their work. They both admitted to having been inby the last row of roof bolts at some time during the installation of the survey station.

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[2] Section 104(d)1) provides, in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

Based on this testimony, it is the Respondent's position that at the time the surveyors were working, the last row of roof bolts was within five feet of the face and, therefore, the surveyors were not under unsupported roof. This theory is premised on the fact that the roof control plan requires a warning device at the last row of roof bolts if the area inby them is hazardous.[3] Hence, if there was not a warning device the area inby was not hazardous.

The company explains the fact that the area inby the last row measured more than five feet at 12:00 by surmising that some time between when the surveyors were present and the inspection, one foot, one inch, to one foot, nine inches, of coal was mined from the face. Unfortunately, there is no evidence to support this argument.

It is undisputed that no mining was performed, after the surveyors finished, until sometime between 10:00 a.m. and 11:00 a.m. There is no evidence that anyone observed mining in the No. 1 entry between that time and the inspection. Barnett testified that to the "best of [his] knowledge" no mining was done in the No. 1 entry before the inspection. (Tr. 73.)

The Respondent hypothesizes that a small amount of coal may have been mined to facilitate the mining of the bleeder to the left of the No. 1 entry. However, even the Respondent admits that such a cut, if it were made, would be nine and one quarter feet deep, not six feet, nine inches. (Resp. Br. at 13-14.) Thus, the depth of the entry does not support this theory. Furthermore, there does not appear to be any reason, from a mining standpoint, to mine such a small amount of coal.

While it would have been nice to have evidence from someone who was actually present in the mine during the time in question, e.g. the section foreman or the continuous miner operator, the preponderance of the evidence in this case supports a finding that there was no change in the No. 1 entry between the installation of the survey station and the inspection.

Since the area inby the last row of roof bolts was unsupported roof both at the time the surveyors were present and the time of the inspection, and the surveyors admit that they were inby the last row of roof bolts, it follows that they worked under unsupported roof. The Act provides that an operator is liable for the violative acts of its employees. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991). Accordingly, I conclude that MAPS violated section 75.202(b) as alleged.

Significant and Substantial

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[3] Barnette testified that although the roof control plan only requires the placement of a warning device at the last row of roof bolts if the area inby is more than five feet from the face, and thus unsupported, or to indicate some other hazardous condition, the company customarily places such a device at the last row whether the condition inby is hazardous or not. (Tr. 85-86.)

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is "significant and substantial" must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

MAPS asserts that the violation was not "significant and substantial" because the area of unsupported roof varied from 13 inches on one side to 21 inches on the other, the mine was noted as having "good top" and the surveyors were only 20 inches inby the last row of roof bolts. (Resp. Br. at 17.) Therefore, the Respondent argues, the violation does not meet the second and third *Mathies* criteria. I find to the contrary.

In *Consolidation Coal Co.*, 6 FMSHRC 34 (January 1984), the Respondent made the same type of argument. In that case, the company contended that spacing roof bolts farther apart than permitted in the roof control plan contributed neither to a hazard nor a reasonable likelihood that such a hazard would result in injury. In rejecting this contention, the Commission held that: "Mine roofs are inherently dangerous and even good roof can fall without warning." *Id.* at 37. It went on to say that "despite the generally good conditions and the absence of reportable injuries in the previous six months, these over-wide bolts created 'a measure of danger to safety or health.'" *Id.* at 38. Similarly, I find that working under unsupported roof created a measure of danger, i.e. being struck by a roof fall, to safety or health.

Turning to the third element, there is little evidence to support the Secretary's position. Inspector Roberts testified on this issue as follows:

> It's dangerous to be under unsupported roof, especially inby the last row of permanent supports, at any time . . . [because] the roof is not supported and there is a good possibility that you could have a roof that's not supported that could fall at any given time.
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> It's highly likely that unsupported roof could fall. Perhaps, I guess, looking at the history of roof falls and being involved with roof – I gave a safety talk the other day of the fatalities that we've had this year.
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> I think almost half of the fatalities of people that have been killed with roof falls or falling pieces of rock have incurred [*sic*] inby the last row of permanent supports, so it's very serious, what we consider no man's land. It's no place to be.

(Tr. 30-31.) No other evidence was offered by the Secretary on the issue.

On the other hand, the company did not offer any evidence to rebut the inspector's assertions. The inspector's judgment is an important element in an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (December 1998). Therefore, considering the inspector's testimony along with the understanding that mine roofs are inherently dangerous, I find that it was reasonably likely that the unsupported roof would fall and result in an injury.

I also find that a disabling injury or death would be the likely result a roof fall. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Secretary's argument that this violation involved an unwarrantable failure is based on the theory that Johnson was "acting in a supervisory role when he went to" the mine. (Sec. Br. at 10.) The evidence, however, does not support this theory.

The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator, in this case the contractor, for penalty assessment purposes. *Fort Scot Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah,Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). To determine whether such a miner was an agent of the operator, whose negligence can be imputed to the operator, "the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995)." *Whayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997).

It is the Secretary's position that the following factors made Johnson a supervisor: (1) He was the transit man; (2) The inspectors and, perhaps, the mine superintendent thought he was a supervisor;[4] (3) He testified that he was responsible for a project while at the mine site: (3) When the mine superintendent had a problem he went to the transit man; (4) He told the mine superintendent who needed hazard training; (5) He marked the mine maps, although the maps had to be certified by the company president; and (6) He directed the activities of the rod man.

In *Whayne Supply*, the Commission rejected a similar argument by the Secretary as "lacking legal and evidentiary support" because "[a]lthough the record evidence indicates that [the miner] was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager." *Id.* The Commission further found that there was no evidence that he "exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there any evidence that [the miner] 'controlled' the mine or a portion thereof; rather he merely carried out routine duties involving the repair of Caterpillar machinery." *Id.*

Likewise, in this case there is no evidence that Johnson exercised any of the traditional indicia of supervisory responsibility. Indeed, the evidence is that he did not have such authority, did not think he had such authority and did not exercise such authority. The two man crew performed routine surveying work which was "pretty much the same every time when you go in." (Tr. 96.) Directing the activities of the rod man, i.e. telling him where to stand with the rod, and marking the mine map are part of the normal, routine surveying duties. Such actions do not make him a supervisor anymore than do the actions of the continuous miner operator directing the activities of the miner helper make him a supervisor.

Further, Johnson did not determine who needed hazard training, direct him to get it or tell the mine superintendent who needed hazard training; rather if a new employee was with him he "would take them to get their hazard training *if they didn't know to get it*." (Tr. 97, emphasis added.) In addition, Barnett stated: "I know when it's a touchy situation you've got to know for

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[4] Barnett said: "As far as just ever thinking about it, I'd really never give it a thought." (Tr. 78.)

sure, you know, Bill [Huff] is usually the one that comes to the problem." (Tr. 79.) Bill Huff was the person in MAPS office who sent the surveyors on their missions. Thus, mine personnel did not go to the transit man for consequential problems.

Consequently, I conclude that Johnson was not a supervisor whose conduct, if it was aggravated, can be imputed to MAPS. However, that does not end the inquiry because the Commission has further held that: "[W]here a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464. While this standard is normally applied in determining the operator's negligence for penalty purposes, the Commission has also confirmed that it applies in determining whether an operator can be held responsible for an "unwarrantable failure." *Whayne Supply* at 452-453.

Nonetheless, the Secretary did not present any evidence concerning MAPS supervision, training and disciplining of its employees. Nor is there sufficient evidence in the record to make such a determination. Since the Secretary has failed to show that the Respondent's supervision, training and discipline of its employees was deficient, it must be concluded that the company had taken reasonable steps to prevent the violative conduct.

Finally, it is uncontroverted that no MAPS supervisor was present when the violation was committed. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997). Accordingly, inasmuch as neither Johnson's nor Chad Huff's negligence can be imputed to MAPS and there is no evidence that the company engaged in aggravated conduct, I conclude that the violation was not the result of an "unwarrantable failure." The citation will be modified appropriately.

Civil Penalty Assessment

The Secretary has proposed a penalty of $500.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With regard to the penalty criteria, the parties have stipulated, and I so find, that the penalty will not adversely affect MAPS' ability to continue in business. (Tr. 9.) I also find that MAPS is a very small company and that, since its Assessed Violation History Report shows that it had no previous violations within the two years preceding this violation, it has an excellent history of previous violations. (Govt. Exs. 5 and 6.) I further find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Turning to the question of gravity, I find this to be a serious violation. Working or traveling under unsupported roof is one of the more dangerous activities that can occur in a coal mine. On the other hand, as discussed in the section on "unwarrantable failure" there is no negligence that can be imputed to the Respondent.

Therefore, taking all of these criteria into consideration, I assess a penalty of $100.00.

Order

Citation No. 7305588 is **MODIFIED** by reducing the level of negligence from "high" to "none," by deleting the "unwarrantable failure" designation and by making it a 104(a) citation, 30 U.S.C. § 814(a), instead of a 104(d)(1) citation. The citation is **AFFIRMED** as modified. Mining Property Specialists, Inc., is **ORDERED TO PAY** a civil penalty of **$100.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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