FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 11, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2001-37 A.C. No. 44-06889-03501 TQI
v.	:	
MINE MANAGEMENT CONSULTANTS, INC., Respondent	:	Four O No. 8 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2001-42 A.C. No. 44-06889-03502 ATQI
v.	:	
TONY M. STANLEY, Employed by MINE MANAGEMENT CONSULTANTS, INC., Respondent	:	Four O No. 8 Mine

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Dr. Nick E. Brewer, Appalachia, Virginia, (at hearing), and L. W. Pennell, Special Engineer, Mine Management Consultants, Inc., Jenkins, Kentucky, (on brief), for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Mine Management Consultants, Inc. (MMC), and Tony M. Stanley, respectively, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege a violation of the Secretary's mandatory health and safety standards and seek penalties of $1,800.00 against the company and $600.00

against Stanley. A hearing was held in Abingdon, Virginia. For the reasons set forth below, I dismiss the case against Stanley, and modify the citation and assess a penalty of $300.00 against MMC.[1]

Background

Mine Management Consultants, Inc., is an engineering firm in Jenkins, Kentucky.[2] It is licensed to do business in Kentucky and Virginia. MMC provides engineering services including surveying, mapping, layout and design, construction, and obtaining permits for the development of underground and surface mining for the mining industry. It also provides civil engineering services in the design of sanitary sewers, water distribution systems, waste water treatment plants, bridges and roads. MMC has 22 employees, ten of whom work underground.

MMC began providing surveying and engineering services to Four O Mining Co., Inc., and its predecessors, in the latter part of 1997. On June 29, 2000, an MMC survey crew consisting of Tony Stanley, Benjamin Adams and Larry Mullins arrived at the Four O No. 8 Mine,[3] located in Wise County, Virginia, to set spads in the No. 2 Right Crosscut to indicate the direction of mining for meeting the No. 3 Entry. Stanley was the crew's supervisor.

After meeting with Mine Foreman Paul Mullins, the crew entered the mine to perform their work. At that time, the mine was not producing coal and no Four O employees accompanied the surveyors. The crew installed the survey points as requested in about 45 minutes and then left the mine and returned to their office.

On July 7, 2000, MSHA Inspector Gary W. Jessee went to the mine to conduct a six month review of the roof control plan. While conducting this inspection, he observed that survey spads had been installed inby the last row of roof bolts in the No. 2 crosscut. On measuring the distance from the face to the last row of roof bolts, he determined that the roof bolts ranged from five feet, two inches, to six feet from the face. He also observed that a reflectorized warning device had been installed on the last row of roof bolts and that loose, wet gob material had been pushed into the face. The gob material was within four inches of the roof,

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[1] The Secretary's brief was filed three days late. The Motion to Accept Brief Filed Out of Time, which accompanied the brief, indicates that the brief was prepared on time, but was not filed through clerical error. The Respondents have not objected to the late filing. Therefore, I grant the motion and accept the brief.

[2] At the hearing it was determined that the company's name is listed incorrectly with MSHA as Mine Management Consultant, instead of Consultant*s*. (Tr. 37-38.) The caption has been amended to indicate the correct name.

[3] At the hearing, the Secretary moved to amend the caption to show that the mine was the Four O No. 8 Mine, instead of the Grace No. 2 Mine. (Tr.14.) The caption has been amended to accomplish this.

at the face, and sloped out from the face toward the last row of roof bolts.[4] Finally, the inspector observed indentations in the gob where the survey stations had been installed.

As a result of these observations, and after interviewing Paul Mullins and some other miners, Inspector Jessee issued Citation No. 7305787 to MMC, alleging a violation of section 75.202(b) of the Secretary's rules, 30 C.F.R. § 75.202(b), because the survey crew under the direction of Tony Stanley had worked or traveled inby the last row of permanent roof supports on June 29. A subsequent investigation determined that Tony Stanley should be personally assessed a civil penalty for the violation under section 110(c) of the Act, 30 U.S.C. § 820(c).[5]

Reopening Docket No. VA 2001-42

On December 12, 2001, the Secretary, moved to dismiss the case against Stanley, Docket No. VA 2001-42, because he had not filed an Answer to the Secretary's Petition for Civil Penalty. On December 18, 2001, an Order to Show Cause was issued to the Respondent, ordering him to file an Answer within 21 days of the date of the order or to show good cause for his failure to do so. When no response to the order was received, a Default Decision was entered on January 17, 2002.

Subsequently, a response to the order was received by the Commission on January 22, 2002. The Commission treated the response as a timely filed Petition for Discretionary Review of the Default Decision and granted the petition. However, the Commission was unable, based on the record before it, to determine whether Stanley was entitled to relief. Therefore, it vacated the default decision and remanded the case to the judge to determine whether the case should be reopened. *Tony M. Stanley*, 24 FMSHRC 144 (February 25, 2002).

At a prehearing conference held before the hearing, the matter of reopening Docket No. VA 2001-42 was discussed with Gary Royalty, President of MMC, Stanley and counsel for the Secretary. After hearing Royalty's and Stanley's explanation of what had happened, and receiving no objection to reopening by the Secretary, I determined that the case would be reopened. (Tr. 6-7.) Since trial was ready to proceed that day, Stanley obviously did not receive the 20 day written notice of hearing required by Commission Rule 54, 29 C.F.R. § 2700.54. However, Stanley stated that he was ready to proceed and waived the 20 day requirement. (Tr. 7-8.)

Accordingly, this decision will concern both Docket Nos. VA 2001-37 and VA 2001-42.

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[4] The coal seam in this area was between 44 and 45 inches high.

[5] Section 110(c) provides, in pertinent part, that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . .

Findings of Fact and Conclusions of Law

Section 75.202(b) provides that: "No person shall work or travel under unsupported roof unless in accordance with this subpart." The parties do not dispute that on July 7, when seen by Inspector Jessee, the last row of roof bolts was more than four feet from the face,[6] the survey stations were inby the last row of bolts, a warning reflector was hung from the last row of bolts and gob was pushed up into the face. However, MMC and Stanley claim that on June 29, when the survey points were installed, the last row of roof bolts was within four feet of the face, no reflector was present and there was no gob in the face. I find that a preponderance of the evidence supports the Secretary's position in this case.

The only witnesses at the hearing who actually saw the area in question on June 29, were Stanley and Paul Mullins. Their testimony is diametrically opposed and cannot be reconciled.

Stanley testified that he was aware that the mine's roof control plan required that the last row of roof bolts be four feet from the face. (Tr. 42.) He said that he did not see any warning device at the last row of roof bolts. (Tr. 44-45.) He related that he did not check to see if the last row of roof bolts was within four feet of the face, but that Adams did. (Tr. 45.) He said Adams did not measure the distance, but that "he estimated it less than 4 feet because that's what we do everyday, and he told me when he got there. He said, 'This is the last row of bolts.' He said, 'It's less than 4 feet.' He said, 'I can set the spad.'" (*Id.*) Stanley testified that he was 70 feet away at the time. (*Id.*) He maintained that there was no gob in the area. (Tr. 46.) He claimed that when he set up his transit two and one half feet inby the last row of bolts, to shoot the second point, his elbow hit the face. (Tr. 52.) When he left the mine, Stanley stated that he told the outside man to tell Paul Mullins to be careful, that "they'd cut that spad out it was so close." (Tr. 55.)

Paul Mullins testified that when they finished working on June 28, the entry in the 2 Right Crosscut had been cleaned, gob had been pushed into it and it had been rock dusted. (Tr. 18.) He said that he could not remember whether a reflector had been hung at the last row of roof bolts. (*Id.*) He stated that there had not been any mining in the 2 Right Crosscut between June 28 and July 7. (*Id.*) Mullins declared that the reason he knew no mining had taken place during that time period was that the mine had been notified of some violations on the belt line and he had all his miners working on those during that week. (Tr. 158.) He further testified that the entry had not been bolted within four feet of the face because they could not get the roof bolter far enough into the entry to bolt it. (Tr. 28-29, 35.) Finally, he averred that there was no difference in the entry between when he saw it on June 28 and when he saw it with Inspector Jessee on July 7. (Tr. 158.)

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[6] The mine's roof control plan permits a maximum of four feet between the face and the last row of roof bolts. (Govt. Ex. 2, pp. 15-18.)

To explain the difference between what Stanley claims that the entry was like on June 29 and what Inspector Jessee observed on July 7, the Respondents argue in their brief that a little bit more of the entry was mined after June 29. In addition, they assert that it would have been impossible to set up a transit on a tripod in a place where there was only four inches of clearance.

Turning to these last arguments first, I find that they are not persuasive. There is no evidence to support the Respondents' speculation that additional mining of the entry was performed after June 29. Further, such a hypothesis is plainly refuted by Paul Mullins' testimony that no such mining took place. Similarly, the claim that it would have been impossible to set up the transit in four inches of clearance ignores the evidence. While it is true that the transit could not have been used in four inches of clearance, no one claimed that the gob was uniformly four inches from the roof. Rather the evidence is that the gob was within four inches of the roof at the face and sloped downward toward the floor beneath the roof bolts.

This leaves the contradictory testimony of Stanley and Paul Mullins. In determining who to believe, it must be noted that not only is Stanley a party to this proceeding, having a personal stake in its outcome, but he testified that the penalty at MMC for going under unsupported roof is termination. On the other hand, Paul Mullins would appear to have no interest in the case's disposition. He does not work for MMC. At the time he testified, he did not even work for the Four O Mining Company. In addition, the No. 8 Mine was not issued a citation for this violation. Accordingly, I credit Paul Mullins testimony on this issue.

I find that the entry in the No. 2 Right Crosscut was not bolted within four feet of the face on June 29, 2000, and that both Stanley and Adams worked inby the last row of roof bolts to install the two survey points. Therefore, I conclude that they worked under unsupported roof in violation of section 75.202(b).

Significant and Substantial

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 (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.

Having already found a violation of a safety standard, it next must be determined whether there was a measure of danger to safety contributed to by the violation. In *Consolidation Coal Co.*, 6 FMSHRC 34 (January 1984), the company contended that spacing roof bolts farther apart than permitted by the roof control plan contributed neither to a hazard nor a reasonable likelihood that such a hazard would result in an 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 roof that was between one foot, two inches and two feet wider than it was supposed to be created a measure of danger, i.e. being struck by a roof fall, to safety or health.

Turning to the third and fourth issues, I find it reasonably likely that a roof fall would result in a serious injury. Roof falls are one of the most serious hazards in mining and are among the leading causes of death in coal mines. *Id.* at 37 n.4.

Finding that all of the *Mathies* criteria are met, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also concluded that this violation resulted from an "unwarrantable failure" to comply with the rule on the part of the company. The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

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 inspector testified that he found the violation to arise from MMC's reckless disregard "based upon what I saw on July 7 in that area and what I was told having to do with the people that had operated a roof drill in that area," that is, that the roof was "softer" in the entry, that a warning device had been installed and that the gob served as a physical barrier to going inby the last row of roof bolts. (Tr. 79.) The facts that emerged at the hearing, however, present a different picture.

Stanley testified that there was not a warning device in the entry at the time he was there.[7] Paul Mullins could not remember whether a warning device was installed on June 29. Moreover, the inspector was unable to determine who installed the reflector or when it was installed. (Tr. 102.) Consequently, I accord MMC the benefit of the doubt on this question and find that the reflector was not present at the time the surveyors were installing the spads.

The other two factors cited by the inspector are not necessarily significant. Whether or not the roof was softer than elsewhere would be important, as far as unwarrantable failure is concerned, only if the surveyors knew that the roof was soft *and* unsupported and went under it anyway. Likewise, there is no evidence that gob is only pushed up in entries where the roof is unsupported. Thus, the fact that the gob was a barrier to going into the entry did not serve as a warning to the surveyors that they were going under unsupported roof.

Finally, the surveyors were briefed by Paul Mullins before they went into the mine. Although he knew that the roof was not bolted within four feet of the face, he did not warn them that they might have to place the spads in unsupported roof. (Tr. 32.) The only thing he advised them of was that they might have to set the spads "short" because he was afraid there was not enough distance from the center of the entry to the last roof bolt. (Tr. 159-60.)

Based on the facts available to Stanley and his crew when they began to work, it is apparent that they neither acted with reckless disregard of the facts, nor were highly negligent. They were not warned that the roof was unsupported, either by Paul Mullins or by a warning device that they knew indicated unsupported roof. They estimated that the last row of bolts was within four feet of the face. Their estimate was inaccurate. But the distance over four feet, from five feet two inches to six feet, was not so great that their failure to discern it can be characterized as indifference or a serious lack of reasonable care.

I find that Stanley should have discovered that the roof was unsupported, but because he was not informed prior to going into the mine that the roof was unsupported and because the lack of a warning device indicated that the roof was supported, his negligence and the

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[7] The inspector did not interview Stanley or any one else from MMC before issuing the citation. (Tr. 100.)

company's was only "moderate." Accordingly, I conclude that the violation did not occur as the result of the company's unwarrantable failure to comply with the regulation and will modify the citation appropriately.

110(c) Violation

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

As has already been discussed in the section on "unwarrantable failure," I do not find that Stanley's conduct was aggravated or involved more than ordinary negligence. Therefore, I cannot conclude that he acted knowingly. Consequently, I will dismiss the case against him.

Civil Penalty Assessment

The Secretary has proposed a penalty of $1,800.00 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 that the penalty in this case will not adversely affect MMC's ability to remain in business. (Tr. 9.) The company's Assessed Violation History Report reveals that it did not receive any citations in the two years prior to this violation. (Govt. Ex. 3.) Thus, I find that MMC has an excellent violation history. I further find that MMC is a small company. (Govt. Ex. 4.) Finally, since the Secretary did not present any evidence to the contrary, I find that the Respondent demonstrated good faith in abating the violation.

Turning to negligence, the parties have stipulated that Stanley was a supervisor and an agent of MMC at the time of the violation. (Tr. 10.) As such, his negligence is attributable to the company. *Southern Ohio Coal Co.*, 4 FMSHRC 1456, 1464 (August 1982); *Nacco Mining Co.*, 3 FMSHRC 848, 850 (April 1981). As has already been indicated, I find that he was "moderately" negligent. Hence, I also find that MMC was "moderately" negligent.

Lastly, on the question of gravity, I find this to be a serious violation. There are few activities more dangerous in underground coal mining than working or traveling under unsupported roof.

Taking all of these criteria into consideration, I assess a penalty of $300.00 for this violation.

Order

Docket No. VA 2001-42, the civil penalty proceeding involving Tony M. Stanley, is **DISMISSED.** With regard to Docket No. VA 2001-37, Citation No. 7305787 is **MODIFIED** by reducing the level of negligence from "reckless disregard" to "moderate," 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, and Mine Management Consultants, Inc., is **ORDERED TO PAY** a civil penalty of **$300.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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