FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 11, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-453 A.C. No. 42-01715-31669
v.	:	
GENWAL RESOURCES, INC., Respondent	: :	Crandall Canyon Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-454 A.C. No. 42-01715-31882A
v.	:	
GARTH J. NIELSON, employed by GENWAL RESOURCES, INC., Respondent	: : :	Crandall Canyon Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ned Zamarripa, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado for Petitioner; Noelle M. Holladay, Esq., and Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for Respondents.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Genwal Resources, Inc. ("Genwal") and Garth J. Nielson, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petitions allege that the respondents violated 30 C.F.R. § 72.630(a), which governs the control of dust created by drilling. An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Genwal operates the Crandall Canyon Mine, an underground coal mine in Emery County, Utah. On May 29, 2003, MSHA Inspector Randy E. Gunderson issued Order No. 7616128 under section 104(d)(1) alleging a violation of 30 C.F.R. § 72.630(a). The body of the order provides as follows:

> On the 3½ east longwall recovery face (MMU 010), during the full bolting process conducted by the crew, drilling of the rock roof is being conducted without the means of controlling the dust generated by the drilling. Dust shall be controlled by the use of permissible dust collectors, or by water, or by ventilation. None of these preventative measures were in effect. The mine operator engaged in aggravated conduct by acknowledging a safety hazard and not taking corrective action.

The inspector determined that an illness or injury was reasonably likely, that the violation was of a significant and substantial nature, and that the violation was the result of the operator's unwarrantable failure to comply with the standard. The cited standard provides that "[d]ust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling the dust." The Secretary proposes a penalty of $6,600.00 against Genwal and a penalty of $600.00 against Mr. Nielson.[1]

Inspector Gunderson testified that during his inspection on May 29, 2003, he parked his vehicle about 500 feet from the face and walked up the headgate side onto the longwall. As he walked along the face, he noticed that miners were drilling into the roof in order to install roof bolts. (Tr. 16). The inspector walked past Joe Fielder, the longwall coordinator, as he inspected the longwall. Gunderson could hear a drill operating as he walked between the shields and the pan line. When he arrived at the first drill, he could see dust coming off the drill. (Tr. 19; Ex. G-5). Gunderson believes that this drill was at or near shield 86. (Ex. G-4). Garth Nielson, the mine superintendent, was sitting near the drill. The air movement was from the headgate to the tailgate. (Tr. 21).

Inspector Gunderson determined that the drilling at shield 86 should cease because the miners were "drilling dry" and he could hear at least one other drill being operated downwind from the drill. *Id.* The inspector testified that the dust was airborne and that the only ventilation

[1] On February 8, 2004, MSHA Inspector Donald Durrant issued Citation No. 7613354 at the mine. A penalty of $6,300.00 was proposed by the Secretary in Docket No. WEST 2004-453. At the hearing, the Secretary agreed to vacate this citation. (Tr. 8).

in the area was face ventilation which was moving toward the miners at the second drill further along the longwall.

Gunderson testified that he asked Nielson if he knew that he had to use water while drilling and that Nielson replied, "I know." (Tr. 22). After the drill was shut down, Gunderson and Nielson walked down the face to the second drill, which was about 100 feet away. The inspector ordered that drill shut down. After that, Inspector Gunderson walked further down the longwall toward the tailgate to where miners were getting ready to operate a third drill and he ordered them not to drill. (Tr. 24, 116). Inspector Gunderson asked Section Foreman Mike Allred, who was at the third drill, why water was not being used with the drill. Gunderson testified testified that Allred replied that he wanted to stay dry. (Tr. 25).

Miners were drilling into the roof using stoper drills to install roof bolts. These drills are relatively small and are supported by a pneumatic cylinder which provides thrust while drilling. (Ex. G-5). A water hose can be attached to each stoper drill to suppress dust. Roof bolts and matting are installed along the longwall in preparation of a longwall move in which the shields and all the other longwall components are removed from the section. The longwall was about 680 feet long (Tr. 20). There have been about 19 longwall moves at this mine. (Tr. 82, 164).

Inspector Gunderson determined that the violation was a result of Genwal's unwarrantable failure to comply with the standard because the violation was "obvious" and a "hazard," and because management knew of "this problem" and were not "taking care of it." (Tr. 26, 42-43). Because the miners were "drilling dry," Inspector Gunderson believed that Genwal was not controlling the dust generated by the drills. He concluded that the miners were drilling into quartz-bearing rock because the dust produced was a white powder. It is Inspector Gunderson's understanding that the roof was sandstone. He could see this white dust in the air, on the pan line, and on the miners working with the drills.

The inspector determined that the violation was of a significant and substantial nature ("S&S") because, if the practice of drilling without controlling the dust were to continue, it is reasonably likely that miners would develop silicosis, which is a serious illness. (Tr. 35). He believes that everyone along the longwall face was exposed to the hazard because they were either around a drill or were in the airstream containing dust particles. (Tr. 36). Two miners were operating the first drill and the other two drills were operated by three miners each. (Tr. 47). The shift started at 7:00 a.m. and Inspector Gunderson observed the condition at 8:00 a.m. Although he is not certain, the inspector believes that drills were used on the previous shift without controlling dust because a few roof bolts had already been installed along the longwall face and there was quite a bit of dust that had settled along the pan line. (Tr. 37). Inspector Gunderson terminated the order when the drills were shut down. The drills were connected to the waterline along the longwall before drilling resumed. (Tr. 46).

Danny Vetter, an MSHA special investigator, conducted an investigation into the circumstances surrounding the citation that was issued. (Tr. 247). He determined that "there was

an obvious and blatant violation" of the standard at the time Inspector Gunderson entered the longwall section and Garth Nielson was present. He stated that dust samples are not required to be taken under the cited standard. Vetter believes that if dust is visible, then respirable silica dust is also present. (Tr. 253). He also stated that relying on face ventilation does not meet the requirements of the standard and may, in fact, put more dust into suspension. (Tr. 255). As a consequence, he recommended that a civil penalty be proposed against Nielson.

David Jensen, who was an assistant to the mine's safety director, was working at the third drill on the day of the inspection. (Tr. 77). He testified that the drills were not connected to the water line that morning. (Tr. 78). He said that the miners in the longwall face typically do not use water when drilling. *Id.* He further testified that when he provides annual safety and health training at the mine, he discusses the need to use water as a method of dust suppression on drills. (Tr. 80-81). He also stated that he had discussed this issue with Garth Nielson in the past when miners complained to him about the lack of dust suppression. (Tr. 81-82). Jensen testified that he felt uncomfortable operating the drill without water on May 29 because, as a safety trainer, he instructed miners to use water and he believed he would lose the respect of the miners by drilling dry. (Tr. 83). He did not wear a respirator on May 29.

Jensen believes that the ventilation along the face of the longwall was insufficient to direct dust away from miners. He could see the dust and there were no ventilation curtains present to direct air away from miners. (Tr. 84). Jensen stated he could see dust everywhere around the first drill where Nielson was sitting. (Tr. 87). Jensen also testified that whenever a longwall move was scheduled, miners would start complaining to him about the method of drilling without dust control. (Tr. 89). Jensen overheard Nielson telling Inspector Gunderson that he has tried to get the miners to hook up water lines to the drills but he could not get them to use water. (Tr. 91-92). Jensen disagrees with this assessment because, from his perspective, miners often complained to him about the lack of water when installing roof bolts in preparation for a longwall move. (Tr. 81, 89, 92).

Jensen testified that he had been on the longwall during several longwall moves. (Tr. 99). He could only remember one occasion when water was used to control dust on the stoper drills. Jensen admitted that he did not take any steps on the morning of May 29 to get water to the drills. (Tr. 101-103). Jensen testified that several years earlier, he told Joe Fielder, the longwall coordinator, that water lines should be connected to the stoper drills when roof bolting along the longwall. (Tr. 103-05). According to Jensen, Fielder told Jensen that "we're not going to do it so just get out of here." (Tr. 103).

David Turner, a longwall mechanic, testified that he helped operate the second drill along the face from the headgate. (Tr. 126). He was drilling dry. He said that usually four stoper drills are used. He could see a drill operating on each side of him. (Tr. 128). Turner testified that he could "most definitely" see dust in the area coming from the drills. *Id.* He does not think it would be feasible to use ventilation to control the dust because an "enormous amount of curtains" would be required to direct the contaminated air away from the miners working along

the face. (Tr. 130). Water was available along the face so it took about 30 to 45 minutes to supply water to each drill after the withdrawal order was issued. *Id.* Some of the fittings necessary to connect water to the drills had to be located elsewhere on the section. (Tr. 131, 139).

Turner could not recall ever being told to use water when operating the stoper drills, but it was common knowledge that water was necessary to "handle" the dust. *Id.* Turner was wearing a respirator because it was his normal practice to do so whenever he was working on a longwall section. (Tr. 132). He does not recall anyone else wearing a respirator that day. Turner has participated in about seven longwall moves and, if he is asked to operate a drill, he tries to operate the drill at the headgate end so that he can stay out of the dust generated by drilling. (Tr. 133-34). He has never been told that he had to drill without water. (Tr. 138).

Rodney Cox, a fireboss at the mine, testified that because the mine was shorthanded on May 29, he worked on the longwall face that day. (Tr. 143). He operated the second drill and Dave Turner assisted him. Cox said that he did not use water on the drill because he "chose not to." (Tr. 146). It would not have been hard to hook up water to the drill. (Tr. 152). He knew that some method of dust control was necessary when operating a drill in order to control the silica. (Tr. 146). He did not wear a respirator that day. Cox testified that he had previously operated a drill with water as well as dry. (Tr. 147). He is not aware of any methods to control dust with stoper drills other than water. He does not believe that ventilation would protect miners further down the air course. (Tr. 148-49).

Garth Nielson, the mine superintendent, testified that he does not have direct responsibility for planning, organizing, or scheduling longwall moves. (Tr. 162). He also does not schedule daily work assignments. The longwall coordinator and general mine foreman are responsible for longwall moves.

Nielson testified that Genwal always complies with section 72.630(a) by using water or ventilation. (Tr. 164). Ventilation is used if there is sufficient air in the longwall. The mine has never been cited by MSHA for using ventilation on the longwall section to control dust from stoper drills. (Tr. 164-65). The approved ventilation plan requires 45,000 cubic feet per minute ("cfm") on the intake of the longwall when coal is being mined. (Tr. 166, Ex. R-1 p. 21-22). During a longwall move, the mine is required to have 20,000 cfm on the intake end. There is nothing in the ventilation plan that addresses any special requirements when miners are drilling into rock on the longwall face. (Tr. 166). Nielson understood that when bolts were being installed on the longwall section prior to a longwall move, Genwal was required to move enough air through the longwall to stay in compliance with all dust standards. Mine records show that prior to the start of the shift, the quantity of air entering the longwall was 53,504 cfm. (Tr. 169; Ex. R-2).

Nielson is the superintendent for several mines. He traveled to the Crandall Canyon Mine on May 29 because he knew that there was a longwall move scheduled. (Tr. 170). He arrived at

the mine at about 5:30 a.m. and, after checking the books, traveled underground. He parked near the tailgate entry of the longwall panel and proceeded to walk up the return air course on the tailgate side. He checked the roof for abutment pressures and, when he arrived at the tailgate end of the face, he looked into the gob to see if there was a good tight cave. (Tr. 180). Because the cave was tight, ventilation along the face was excellent. He walked along the face toward the headgate and checked to see if the roof was well meshed. When he reached the midpoint of the longwall face he could see two people and a stoper drill. (Tr. 183). It was still the graveyard shift at the time. The miners were installing matting to the roof with roof bolts. (Tr. 184). There was no water supplied to the drill. There was a large amount of air moving through the area, but Nielson did not take any air measurements. As he approached the miners drilling into the roof, he could see dust coming from the drill from a distance of about 40 to 50 feet from the drill. (Tr. 185-86). He did not believe that there was enough dust present to be concerned about. Nielson helped the miners until the end of their shift.

At the end of the graveyard shift, Nielson walked further along the longwall and sat down to wait for the day shift crew. (Tr. 187). Mike Allred was the first to arrive on the day shift. He told Nielson that he was shorthanded so he would help run a drill. There was no discussion of putting water on the drills. Nielson testified that he has never ordered anyone to drill without water and if a miner wanted to drill with water he could have done so. (Tr. 190). He stated that no miner has ever complained that he could not get water to his drill. Dave Jensen was on the crew that day, but Nielson did not recall seeing him and he does not recall discussing anything with him. (Tr. 191).

Insepctor Gunderson arrived on the section early that morning and walked past Nielson and walked toward the tailgate. When the inspector returned he said to Nielson, "Garth, we got a problem." (Tr. 192). Inspector Gunderson told Nielson that because Genwal was not running water on the stoper drills he was going to issue a (d)(1) order. In response, Nielson said, "I see then we have a problem." (Tr. 193). Nielson testified that, by making that statement, he meant that the withdrawal order was a problem, not that he agreed that the stoper drills created a problem. Nielson told the Gunderson that he would shut down the drills, but the inspector told him that he had already done so.

Nielson does not believe that the mine was in violation of section 72.630(a) on May 29. The amount of silica dust being emitted was not enough to be out of compliance with the "milligram standard that we have to meet." (Tr. 195). MSHA has never taken dust samples when miners were drilling along the longwall. Nielson testified that a miner complained to MSHA about excessive silica dust along the longwall in January 2005 when the shearer was cutting more than two feet of rock for the length of the longwall. MSHA placed five dust pumps on longwall employees to test for respirable dust. (Tr. 197). Nielson testified that the test results revealed that the miners were not overexposed to silica dust. Nielson admitted that in the January 2005 situation, the miners wearing the pumps were about 2,000 feet downwind from the shearer cutting into the rock. (Tr. 211). Nielson further testified that any employee can request that he be fitted for a respirator to wear when working around drills. (Tr. 199).

Nielson testified that Genwal makes sure that water is available for the stoper drills along the longwall. (Tr. 199). He stated that connections and fittings to connect water to the drills were readily available. *Id.* He further stated that water is used on the drills about half of the time during longwall moves. (Tr. 203). Miners tend to use water when the roof is damp and some miners prefer to use water not only to control the dust but because it is faster to drill with water. Face ventilation is used to control the dust at all other times.

Robert Oviatt, shift foreman, testified that the face ventilation on May 29 was twice the volume required by the ventilation plan. (Tr. 232). He believes that this ventilation was controlling the dust. He admitted, however, that any miner downwind from one of the stoper drills would have been exposed to dust. (Tr. 237-38). He did not tell any miners that they could not use water with the stoper drills. (Tr. 233).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Violation of Section 72.630(a)

I find that the Secretary established a violation of the standard. Section 72.630 was drafted to address a specific problem: dust that enters the mine environment when drilling into rock in underground mines. This requirement is separate and distinct from any standards regulating the amount of respirable dust that is permitted in underground mines. The standard is violated if an operator is not using one of the specified methods to control dust resulting from drilling regardless of the actual level of exposure. Nothing in section 72.630 requires that the Secretary must establish there was an actual overexposure to drill dust at the time the citation is issued.[2] Section 72.630 is not vague or confusing on this issue. It clearly provides that any dust resulting from miners drilling into rock must be controlled. There is no dispute that miners were using stoper drills to install roof bolts in the longwall section, that these miners were drilling into rock to perform this task, and that visible dust was being created. It can be inferred that invisible respirable silica dust was also being produced. As a consequence, the issue is whether the dust being produced as a result of the drilling was being controlled in a manner required by the standard.

One method to control drill dust is by using water, as set forth in section 72.630(c). There is no dispute that water was not being used. Respondents argue that the mine was using ventilation to control the dust. Section 72.630(c) provides, under the heading "Ventilation Control," that to "adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator and any other miners in the area." Respondents contend that the ventilation provided at the longwall face met the requirements of subsection (c). Respondents point to the fact that the mine was providing at least

[2] Indeed, the preamble to the standard provides that the "final rule is a work practice standard that does not require sampling." 59 Fed. Reg. 8317, 8323 (Feb. 18, 1994).

53,500 cfm of air to the area while the ventilation plan only requires 20,000 cfm. Genwal also relies on the mine's history of compliance with MSHA standards with respect to respirable silica dust. Genwal argues that because the citation is not supported by any sampling for respirable silica dust, I should assume that the mine was in compliance with all respirable dust standards.

Inspector Gunderson took a rather practical approach to his interpretation of the standard. He stated that he probably would not have issued the order if Genwal had only one stoper drill operating so long as there were not any miners working downwind from the drill. In this instance, however, at least three drills were going to be operating during the day shift and these drills were operating about 100 feet apart. Gunderson believed that miners working downwind from the first drill would be exposed to the dust.

I agree with Inspector Gunderson's assessment of the conditions at the mine. The drill dust was not "dispersed and carried away from the . . . miners in the area" by the longwall ventilation. There was no dispute that drill dust was being produced because it was readily visible in the air and it had settled on longwall components. This dust that had not settled was blowing directly toward the miners at the downwind drills. The Secretary is not required to establish that Genwal violated threshold limit values for silica. I do not agree with Genwal's argument that, if it is complying with its approved ventilation plan, it is in compliance with the requirements of section 72.630(c). The requirements of section 72.630 are separate and distinct from the ventilation plan requirements and an operator can violate this health standard without violating the ventilation plan.

Genwal argues that the language of section 72.630 clearly provides that ventilation may be used to control dust. Genwal contends that because the language of the standard is clear, I should "give effect to the unambiguously expressed intent of the regulation" that ventilation is a permissible control method. (G. Br. 4, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Councit, Inc.*, 476 U.S. 837, 843 (1984). If ventilation is used to control dust, however, it must be effective. *Consolidation Coal Co.*, 23 FMSHRC 392, 397-98 (April 2001). I find that the face ventilation along the longwall did not effectively control the drill dust as required by the standard.

Genwal also argues that, even if I find that the language of the standard is ambiguous, the Secretary's interpretation of the standard is not entitled to deference because it is contrary to the plain meaning of the words. It maintains that Genwal was not provided with fair notice of the requirements of section 72.630. The Commission has held that the language of section 72.360 is clear and unambiguous. *Id.* at 397. If ventilation is used to control drill dust, it must carry the dust away from drill operators and other miners in the area. The evidence clearly establishes that the longwall ventilation used by Genwal did not carry the dust away from miners in the area but rather blew the dust toward them. This "carry away" requirement is clearly set forth in the standard. It is Genwal, not the Secretary, who is interpreting the standard beyond its plain meaning. The Secretary provided fair notice of the requirements of this standard as applied to the facts of this case. The Secretary clearly set forth her intended requirement that, if ventilation

is used to disperse drill dust, the air current must carry the dust away from miners working in the area.[3] Respirable dust samples are not required to establish a violation. *Accord Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ); *aff'd Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F. 3d 1020, 1024 (D.C. Cir. 1997). I find that the ventilation used by Genwal on the longwall face did not effectively carry the dust away.

B. Significant and Substantial

I also find that the violation was S&S. A violation is classified as S&S "if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). As applied to a health standard, such as section 72.630, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986). The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that there was a violation of the health standard and that a discrete safety hazard was contributed to. I also find that there is a reasonable likelihood that the health hazard contributed to will result in an illness. It is important to recognize that the violation need only "contribute to" a health hazard. The violation is not required to create a health hazard to be considered S&S.

I rely on the phrase "hazard contributed to" in this element of the *Mathies* test in reaching this conclusion. 6 FMSHRC at 3. A single exposure to respirable silica dust may not result in an illness, but an exposure to respirable silica dust is a hazard that contributes to the development of an illness. *See Consolidation Coal Co.*, 8 FMSHRC at 894-99. When promulgating the standard, the Secretary noted that during drilling "there is the potential for extremely high exposures in short periods of time to both miners doing the . . . drilling and to other miners in the immediate area." (S. Br. 4 *quoting* 59 Fed. Reg. 8318 (Feb. 18, 1994)). The inhalation of freshly fractured silica particles from rock drilling may contribute to the development of acute silicosis.

[3] In addition, the preamble to the standard provides that "[g]eneral ventilation is not usually effective in underground coal mines for drill dust control, unless it can rapidly disperse and carry away the drill dust as well as direct the dust away from workers in the area." 59 Fed. Reg. at 8324.

(S. Br. 3; Tr. 38-41; Ex. G-6 p. 8-9; 59 Fed. Reg. at 8319). "Silicosis has been recognized . . . as a disease associated with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease." *U.S. Steel Mining Co., Inc.* 8 FMSHRC 1274, 1279 (Sept. 1989). The Secretary was unable to establish whether any miner was overexposed to silica dust because Inspector Gunderson ordered drilling to stop immediately so he did not take respirable dust samples. When taking into consideration continued normal mining operations, I believe that it is reasonable to presume under the facts of this case that miners would have been exposed to silica dust for at least a short period of time. I find that the Secretary was not required to sample for dust in order to establish the S&S nature of the violation in this case. *Contra Jim Walter Resources*, 17 FMSHRC at 1446-48 (ALJ). Any illness contributed to by the violation would be of a reasonably serious nature. "The fibrosis associated with silica-bearing dust is irreversible and may continue to develop after the exposure has ended." *Id.* at 1281.

C. <u>Unwarrantable Failure</u>

I find that the Secretary established that the violation was the result of Genwal's unwarrantable failure to comply with the safety standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. I find that Genwal's conduct does not reach that level of negligence. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The Secretary argues that Genwal had knowledge of the violation because it knew that it was not using dust collectors or water to control the drill dust and it knew that ventilation would not carry the dust away from downwind miners. She contends that Nielson knew that stopers were being used and that miners downwind from other stopers would be breathing dust generated by the stopers. The Secretary states that Nielson acknowledged that he knew that water should have been used to control dust when Inspector Gunderson issued the order of withdrawal. In addition, Nielson was present at the time drilling started and could see and hear the drills operating. Foremen and other mine managers are held to a high degree of care regarding safety matters.

Genwal argues that it reasonably believed that it was complying with the standard by providing more than sufficient ventilation along the longwall. It was providing more than twice the volume of air required by the ventilation plan during longwall moves. In addition, Genwal

maintains that because it has moved the longwall equipment about 19 times over an 8 year period without being cited by MSHA, an aggravated conduct finding is not appropriate. It contends that any of the miners could have used water to control dust as the company has no policy against using water on stoper drills and the equipment to do so was present on the section. Finally, it contends that the Secretary misconstrued Nielson's statement to Inspector Gunderson that "I see then we have a problem" when he was told about the unwarrantable failure order. Genwal argues that Nielson simply meant that if an order was being issued, then there was a problem, not that he admitted that he knew that was a violation.

Jensen, who worked for the safety department, and Oviatt, who was a shift foreman, testified that they knew that any miners in the area who were downwind from a stoper would be exposed to drill dust. (Tr. 83-87, 236-38). Nielson observed drill dust being produced when he walked in the longwall on the graveyard shift. In addition, the testimony of miners demonstrates that it was "common knowledge" that the only way to control dust on the stoper drills when used on the longwall was to drill with water. (Tr. 131). The drills were close enough to each other that they could be seen and heard by the miners. Nielson was at a location where he could have seen and heard the first drill operating. Turner, a mechanic, and Cox, a fireboss, testified that miners on the section were well aware of the hazard created by the drill dust and knew that face ventilation would not control the dust. (Tr. 128-30; 146-49). Jensen testified that miners complained to him about the lack of water on the drills. (Tr. 81). Although these miners may not have been well versed on the requirements of section 72.630, they knew that the drill dust was not being dispersed and carried away. This violation should have been obvious to mine management.

It appears that the violation had only existed for a short time and Genwal had never been placed on notice by MSHA that greater efforts were necessary to comply with the standard. Nevertheless, miners and an employee in the safety department had complained about the lack of dust control for the drills. Mine management was put on notice by its own employees that greater efforts were necessary to control dust when installing roof bolts prior to a longwall move. I find that the violation demonstrates a serious lack of reasonable care. Genwal management did not recklessly disregard the standard and their conduct does not rise to the level of intentional misconduct, but I find that the violation was caused by Genwal's aggravated conduct constituting more than ordinary negligence.

D. <u>Penalty Against Garth Nielson</u>

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. § 820(c). The Commission held that "knowingly" means "knowing or having reason to know." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan 1981); *aff'd* 689 F.2d 623 (6th Cir. 1982). "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Richardson*, 3

FMSHRC at 16. "If a person in a position to protect employee 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." *Id.* "In order to establish section 110(c) liability, the Secretary must prove only that the individual knowingly acted not that [he] knowingly violated the law." *BethEnergy Mines*, Inc., 14 FMSHRC 1232, 1245 (August 1992).

Genwal is a corporate operator and Mr. Nielson was an agent of the corporation. In addition, as discussed above, the corporate operator violated section 72.630. I find that Nielson knowingly authorized the violation of section 72.630. He knew that drill dust was or would shortly be blowing through the longwall where miners were working. He had walked through drill dust being created by a stoper drill on the graveyard shift. He testified that the dust was readily apparent and that he could see dust for 40 to 50 feet from the drill. From where he was positioned when Inspector Gunderson arrived on the day shift, he should have been able to see and hear the first drill operating. A person exercising reasonable care would have realized that the drill dust was not being controlled by the face ventilation because the dust was not carried away from miners in the area. Although he apparently believed that the 53,500 cfm of air provided to the longwall section was sufficient to dilute the dust to meet MSHA's threshold limit value for respirable dust, he had reason to know that the dust was not being carried away from miners as required by the standard. Hazardous short term exposures to silica-bearing dust were highly likely. I credit the testimony of Jensen that miners had complained to him about dust control from stoper drills on the longwall and that he discussed this issue with management while Nielson was present. (Tr. 81-82). Nielson also attended a training class when Jensen instructed miners to use water on stoper drills. (Tr. 80-81). Thus, Nielson knew or had reason to know that face ventilation was not sufficient to carry drill dust away from miners and that using water was the most practical method to control dust. In reaching this conclusion, I did not give weight to the Secretary's evidence concerning the conversation between Nielson and Inspector Gunderson at the time the order was issued. I believe that when Nielson acknowledged that there was a problem, he was most likely confirming that, if Inspector Gunderson was issuing an order of withdrawal, then there was a problem that must be corrected.

The Secretary cites *U.S. v. Gibson*, 409 F.3d 325, 336 (6th Cir. 2005), for the proposition that "mine superintendents or foremen can be said to have knowingly authorized, ordered, or carried out violations of the [Mine Act] when they enter mines and observe violations but do nothing to stop or correct them." (S. Br. 17). In that criminal case, a mine superintendent and foreman were charged with "authorizing, ordering, and carrying out the violation of the mining regulation that requires the mine operator to adopt and follow a ventilation plan." *Id.* Apparently, ventilation curtains were down at the face and throughout the mine so that there was insufficient ventilation at the face. *Id.* at 335. Such a violation would be obvious to anyone with even a casual understanding of underground coal mining. I believe that the language quoted by the Secretary is a little too broad to fit all circumstances. I am not basing my conclusion on the mere fact that Nielson was at the mine and observed the conditions. I find that the Secretary established that Nielson failed to act on the basis of specific relevant facts within his knowledge

that should have given him reason to know that the mine was in violation of section 72.630. Nielson's conduct demonstrated aggravated conduct constituting more than ordinary negligence" on the part of a mine superintendent. *BethEnergy Mines*, Inc., 14 FMSHRC at 1245.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Crandall Canyon Mine had a history of about 205 paid violations in the two years prior to May 29, 2003. (Ex. G-1). The parties stipulated that Genwal is a large mine operator. The order was abated in good faith. The violation was serious and Genwal was negligent. The penalty assessed in this decision will not have an adverse effect on Genwal's ability to continue in business. Based on the penalty criteria, I find that a penalty of $6,000.00 is appropriate for this violation.

The Secretary did not present evidence with respect to the penalty criteria for Mr. Nielson. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997). There is no evidence that Mr. Nielson has a history of previous violations of the Mine Act. There is no evidence concerning his income and family obligations. The parties stipulated that the proposed penalty will not affect his "ability to continue in business." (Ex. J-1 ¶ G). The violation was serious, Nielson's negligence was high, and he was the mine superintendent. He rapidly abated the violation in good faith. Based on the penalty criteria, I find that a penalty of $200.00 is appropriate and that Nielson has the ability to pay the penalty.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

WEST 2004-453 (Genwal)

7616128	72.630(a)	$6,000.00
7613354	75.380(f)(3)(iii)	Vacated

WEST 2004-454 (Garth Nielson)

7616128	72.630(a)	$200.00

For the reasons set forth above, Order No. 7616128 is **AFFIRMED** as written and Citation No. 7613354 is **VACATED**. Genwal Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $6,000.00 within 30 days of the date of this decision.

For the reasons set forth above, Garth Nielson violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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