FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 8, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 95-500
	:	A. C. No. 24-00106-03516
v.	:	
	:	Savage Mine
KNIFE RIVER COAL MINING CO., Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Knife River Coal Mining Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $2,000.00. For the reasons set forth below, I affirm the citation and order and assess a penalty of $2,000.00.

A hearing was held on March 1, 1996, in Billings, Montana. In addition, the parties filled post-hearing briefs in this matter.

Background

The Basic facts are not disputed. On February 8, 1995, Bryan Carr and another miner were blasting in the Savage Mine pit. They were not able to detonate their last shot before

quitting time. Carr suggested to Rich Kalina, Mine Superintendent, that since Kalina was a certified blaster he could set off the shot.

Carr then proceeded to the bath house to shower and go home. As he was combing his hair after showering, Kalina came into the bath house and requested that Carr return to the pit with him because the shot had not detonated. Kalina was in a hurry. As he was leaving the bath house, Carr turned to go back in and get his hard hat and hard toe boots. At that point Kalina said, "We don't have time, let's go." (Tr. 52, 434.)[1]

Carr accompanied Kalina to the pit without his hard hat or hard toe boots. Once there, he proceeded to detonate the shot. He then returned to the bath house. The whole incident took about 20 minutes.

Carr filed a 103(g), 30 U.S.C. § 813(g), request concerning this incident.[2] MSHA Inspector James Beam conducted an investigation of this request on April 19, 1995. As a result of his investigation, he issued Citation No. 3591319 and Order No. 3591320 under section 104(d)(1) of the Act.[3]

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[1] The transcript in this case consists of 66 pages. In addition, the parties agreed that certain transcript pages from the hearing in Docket No. WEST 96-130-D would be considered as evidence in this case. Those transcript pages are 427-438, 442-443, 457-460, 467-483, 486-489, 492-496, 581-583, 611-622, 626-629, 693-702, 707-721, 754-758, 769-770, 785 and 794-796.

[2] Section 103(g) provides, in pertinent part, that: "Whenever . . . a miner has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . ., such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

[3] Section 104(d)1) provides:

> 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

The citation alleges a violation of section 77.1710(d), 30 C.F.R. § 77.1710(d), because "[a] miner was transported to the pit by the mine superintendent to assist in a coal shot on February 8, 1995. The miner was not wearing a suitable hard hat. The Superintendent said he knows the miner should of [*sic*] had a hard hat on." (Govt. Ex. 2.) The order sets out a violation of section 77.1710(e) in that "[a] miner was transported to the pit by the mine superintendent on February 8, 1995 to assist with a coal shot. The miner was not wearing suitable protective footwear. The Superintendent said he knows the miner should have had protective footwear on." (Govt. Ex. 3.)

The regulation states that:

> Each employee working in a surface coal mine or in the surface work area of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. . . .
>
> (e) Suitable protective footwear.

Findings of Fact and Conclusions of Law

There can be little doubt that these two sections of the regulation were violated when Carr went to the pit and detonated

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> 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

a blast without his hard hat and hard toe boots. Indeed, the Respondent does not even address the issue of whether the regulation was violated in its brief. Accordingly, I conclude that this conduct violated the regulation. The company does, however, contest the allegations that the violations were "significant and substantial" and resulted from an "unwarrantable failure."

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 1007 (December 1987).

As is usually the case, it is the third and fourth *Mathies* criteria, *i.e.*, whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury and whether there was a reasonable likelihood that the injury would be of a reasonably serious nature, which are at issue. The Respondent concedes that the first two criteria, a violation of a mandatory health standard and a discrete health or safety hazard contributed to by the violation, are present in this case. (Resp. Br. at 14.)

The inspector testified that the hazards that a hard hat and protective shoes would have shielded against were rocks falling from the highwall and flyrock or coal propelled through the air by the blast. He submitted that "[i]t wouldn't be very

difficult, it would be easy to be injured" under the facts in this case. (Tr. 12.) He stated that a fractured skull, broken toes, cuts or bruises serious enough to result in lost work time could occur.

The Respondent argues that Carr was not working near the highwall or falling material, that injuries sustained when failing to wear protective footwear would not be reasonably serious and that Carr was only exposed to a potential hazard for a short period of time. These arguments are not persuasive.

The testimony indicated that the highwall was approximately 55 feet high. Carr testified that he went within 15 feet of the highwall to check the misfire and to make sure that the deta cord was properly attached to the charges. He estimated that this took him five or six minutes. He then went about 30 feet from the highwall to attach the blasting cap to the deta cord. After the shot, he related that he again went within 15 feet of the highwall to make sure that all rounds of the explosive had detonated.

In addition, both Carr and the inspector testified that there was a lot of sloughage off of the highwall. Carr stated that the highwall was at the worst end of the pit for sloughage because there was a significant gravel pocket and a spring at the top of the highwall. Furthermore, both asserted that February was a bad time for sloughage because of the thawing and freezing that occurs. Carr explained that in walking near the highwall he kept his head up because he expected something to fall.

Add to the danger of sloughage the possibility that the blast could send flyrock farther than the miners anticipated, and it becomes apparent that an injury as the result of not wearing a hard hat or protective footwear is reasonably likely. I find that this is so even in the short time that Carr was at the pit. I further find that bruised or broken toes or feet could result in lost work time and are, therefore, reasonably serious injuries. Accordingly, I conclude that these two violations were "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).

When Kalina went to the bathhouse to get Carr after the misfire, he was in a hurry. Carr was in his street clothes. Carr was not sure whether he told Kalina whether he wanted to return to get his hard hat and protective shoes. He testified:

> Q. Do you remember if you said anything to him about not having hard-toed shoes or a hard hat?
>
> A. I don't think he would have -- I don't think he would have said, "We don't have time for that, let's go," if I wouldn't have said that.
>
> Q. Okay. Do you have a specific recollection of whether you said it or not?
>
> A. I really have a hard time with that one. I would like to say yes, but the only thing I do remember for sure is when Rich said, "We don't have time for that, let's go." And that makes me feel that, yes, that is what I said.
>
> Q. And are you sure that you indicated to him that you were about to go back?
>
> A. Oh, yeah.
>
> Q. Was that through you physical motion?
>
> A. Yeah, we were walking out the door at the same time.

(Tr. 52.)

On the other hand, Kalina could only state that he could "not recall" Carr specifically stating that he wanted to get his protective gear. (Tr. 616, 617.) He did not testify concerning whether Carr attempted to return to the bath house or whether he told Carr, "We don't have time for that, let's go." He did testify, however, that he was not "thinking about hard toes and hard hat," he was thinking about the misfire. (Tr. 616.) He further testified that he "was not concerned with" the fact that Carr was in street clothes and did not have a hard hat on. (Tr. 694.)

Mr. Kalina was the superintendent of the mine. He had 21 years of mining experience. Wearing a hard hat and protective boots was not a sometime requirement at the mine, it was required every day. I find that if Carr did not specifically tell Kalina that he wanted to get his protective gear, he indicated such by turning to go back into the bath house. Kalina told him they did not have time for that even though he was aware that Carr was in his street clothes. I find that this was inexcusable on the part of Kalina.

Accordingly, I determine that requiring Carr to go to the pit to set off a shot that had just misfired without his protective equipment, was aggravated conduct. Therefore, I conclude that the two violations resulted from the Respondent's unwarrantable failure to comply with the regulations.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $1,000.00 for each of these violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six 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).

In connection with the six criteria, the parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business and that the Respondent is a large mine operator with 5,200,979 tons/hours of production in 1994. (Tr. 6.) The *Assessed Violation History Report* for the two years preceding these violations indicates only one citation, for a technical reporting violation. (Govt. Ex. 1.) Nonetheless, the gravity and negligence involved in these violations are very serious. Therefore, taking all of this into consideration, I conclude that a penalty of $1,000.00 for each violation is appropriate.

ORDER

Accordingly, Citation No. 3591319 and Order No. 3591320 are **AFFIRMED**. Knife River Coal Mining Company is **ORDERED TO PAY** a civil penalty of **$2,000.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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