

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-50
Petitioner	:	A.C. No. 42-01566-03635
	:	
v.	:	
	:	Skyline Mine No. 3
CANYON FUEL COMPANY, LLC.,	:	
Respondent	:	

**DECISION**

**Appearances:** Kristi Floyd, Esq. Office of the Solicitor, U. S. Department of Labor, Denver, Colorado on behalf of Petitioner.  
Anne Wathen O’Domell, Esq., Arch Coal, Inc., St. Louis, Missouri, on behalf of Respondent

**Before:** Judge Cetti

This case is before me upon a petition for civil penalty filed by the Secretary of Labor (Secretary) through her Mine Safety and Health Administration (MSHA), against Canyon Fuel Company, L.L.C. (Canyon Fuel), pursuant to Section 105(d) of the Federal Mine Safety and Health Act (Mine Act or Act), 30 U.S.C. § 801, *et seq.* Canyon Fuel filed a timely answer denying that the longwall foreman walked under an unsupported roof. The citation also charged that the alleged violation was an unwarrantable S&S violation of the standard. That standard 30 C.F.R. § 7512202(b) simply and plainly states:

No person shall work or travel under unsupported roof unless in accordance with this subpart.

Upon careful evaluation of all the evidence, I find and conclude that the preponderance of the evidence presented fails to establish the alleged violation of the standard. The reasons for this finding and conclusion are discussed below after the Stipulations entered into the record by the parties at the hearing.

**STIPULATIONS**

1. Respondent is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Skyline No. 3 Mine, MSHA Identification No. 42-015663.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, etc. of the Act.
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of respondent at the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issue and not for the truthfulness or relevancy of any statement stated there.
6. The exhibits to be offered by the Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.
7. The proposed penalty will not affect the respondent's ability to continue in business.
8. The operator demonstrated good faith in abating the violation.
9. Respondent is a large mine operator with 10,362,687 ton-hours of production in 1998.
10. The certified copy of the MSHA assessed violations entry accurately reflect the history of this mine for the two years prior to the date of this citation.

### **FINDINGS AND CONCLUSIONS**

Skyline Mine No. 3, on August 27, 1998, had an unintentional roof fall in the stageloader area of the 4 left Longwall Headgate, Entry #1, inby the 42 crosscut. No one was hurt. Canyon Fuel immediately reported the unintentional fall to MSHA.

The longwall foreman, Kenneth DeMille, is charged in Inspector Lemon's citation with walking under unsupported roof in the caved area. DeMille is the only fully percipient witness as to where he traveled and the conditions of the area traveled. When DeMille came to work the morning after the roof fall, he was instructed by his superior to check the longwall shields to make sure the tops of the shields were pressed against the roof. This was a necessary safety measure after a fall immediately outby the longwall shield. The longwall shield is shown to be immediately inby the fall area in Gov.'s Exhibit Nos. 3 and 5. This is also shown in the

Inspector's field notes received in evidence as Respondent's Exhibit No. 1, page 4. This longwall shield extended from the inby edge of the fall area about 800 feet to the tailgate area.

Just before foreman DeMille was going to start his inspection of the longwall, he was informed by the crew on the prior shift that the tailgate area was unsupported. Not being able to get to the longwall shield through the unsupported tailgate, he went to the headgate area by way of crosscut 42. His purpose was to make sure the shield supports were up against the roof and to make the tailgate entry passable. He stopped at the danger sign closest to the cave to evaluate the area. He did not hear any flaking of cribs or coal and detected no indication of movement in the strata. He observed that there was a narrow supported passageway along the right rib wall to the longwall shield. The passageway was between the right rib wall and the two eight-inch by eight-inch timbers that were on four-foot centers. The distance from the most inby timber to the tip of the protecting canopy of the longwall shield was four to five feet. He traveled along this supported passageway to the protection of the longwall shield. He then traveled along the 800-foot long shield to the tailgate area and observed that the tailgate entry was unsupported. Tr. 234, line 10-13. He then traveled along the shield back to the headgate.

As he stood under the protection of shields No. 1 and No. 2 of the longwall at the headgate, DeMille saw through the darkness of the caved area two cap lights and thought it might be some of his crew. To make sure they did not come through the fall area, he called out. "Don't come through here." The two cap lights were those of Inspector Lemon and Jack Hatch, the mine's safety person. Lemon was 30 or more feet away on the opposite side of the caved area. In the darkness, both men could only see cap lights and yelled to each other back and forth through the darkness. Inspector Lemon shouted asking DeMille if he got there through the tailgate. DeMille replied, "No," that he came along the rib and walked between the rib and the timbers. DeMille shouted back, "You shouldn't have done that. It's a dangerous thing to do. I am going to have to issue you a citation." He also told DeMille to return through the tailgate. DeMille apologized for doing something the Inspector thought was hazardous. DeMille testified he went back to the tailgate and only after working on it, he made it safe so he could exit through the tailgate.

The testimony of DeMille that he walked along the side of the right rib between the eight-inch by eight-inch timbers and the rib is corroborated by the testimony of the mine superintendent, Richard Parkins, who, on checking, observed the footprints in the 20-inch wide passageway between the rib and the eight-inch square timbers on four-foot centers adjacent to the cave area.

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### **FURTHER FINDINGS AND DISCUSSION**

After careful review of the testimony of each of the witnesses and the record as a whole, I determined and concluded that DeMille, the longwall foreman, did not walk under unsupported roof in violation of the cited standard. He did not travel through the fall area but through a passageway adjacent to it. This 20-inch wide passageway had all the support required by the roof-control plan. I credit DeMille's testimony.

A major portion of the Secretary's presentation was evidence of two specific roof-falls not in Skyline Mine No. 3 but in other mines that occurred a number of years ago where the original fall with the passage of time continued so as to encompass an area of the mine larger than the original immediate area of the fall. Gov. Exhibits 8 and 9 are investigation reports of falls at other mines, not reports of the mine at issue.

Since there was a possibility of the fall continuing, there was arguably some hazard for DeMille to travel the 20-inch wide passageway to the shield. I find, under the facts presented in the case, that this mere possibility is insufficient to carry the Secretary's burden of proof establishing a violation of the plain wording of the cited section which prohibits walking under an unsupported roof.

Although Inspector Lemon was under the impression that DeMille walked through a portion of the caved area, he was in a poor position to observe how DeMille traveled to the longwall shield. There were cribs in front of the Inspector as he peered into the darkness of the cave area where no bodies could be seen. It appears from the testimony of the safety man Hatch, who accompanied Inspector Lemon, that he and the Inspector only saw some flashes of light from DeMille's cap light. Hatch testified that it appeared to him that DeMille did, in fact, enter the 20-inch wide supported passageway by going between the eight-inch square timbers and the rib.

The fact that the mine made plans, after the unintentional fall, for a wider and more solid passageway for its miners to reach the face is not persuasive to establish that the 20-inch wide passageway traveled by DeMille was not supported as required by the mine's roof-control plan. See Respondent's Ex. 6 for measurements of the supporting roof structures. Likewise, I am not persuaded by DeMille's spontaneous apology for doing something that the Inspector apparently thought was hazardous. It only indicates DeMille's respect for the Inspector's opinion even though the Inspector took no measurements nor did he make any close inspection of the passageway that DeMille traveled. It appears from DeMille's testimony that he was always under supported roof.

I find that the preponderance of the evidence fails to establish that DeMille walked under unsupported roof. The citation should be dismissed.

### **ORDER**

Citation No. 4715196 is **VACATED** and this Penalty Proceeding is **DISMISSED**. Citation No. 4891490 was previously vacated by the Secretary.

August F. Cetti

Administrative Law Judge

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