FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 15, 2004

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEVA 2002-138
Petitioner	:	A.C. No. 46-08603-03527
	:	
v.	:	Docket No. WEVA 2002-144
	:	A.C. No. 46-08603-03528
INDEPENDENCE COAL CO., INC.,	:	
Respondent	:	Cedar Grove Mine
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEVA 2003-188
Petitioner	:	A.C. No. 46-08603-03529 A
	:	
v.	:	
	:	
FREDDY TERRAL, employed by	:	
INDEPENDENCE COAL CO., INC.,	:	Cedar Grove Mine
Respondent	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEVA 2003-189
Petitioner	:	A.C. No. 46-08603-03530 A
	:	
v.	:	
	:	
BRUCE GILMOUR, employed by	:	
INDEPENDENCE COAL CO., INC.,	:	Cedar Grove Mine
Respondent	:	
	:	
INDEPENDENCE COAL CO., INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2002-27-R
	:	Citation No. 7205804; 8/27/2001
v.	:	
	:	Docket No. WEVA 2002-28-R
	:	Order No. 7205805; 8/2715/2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2002-29-R
ADMINISTRATION (MSHA),	:	Order No. 7205806; 8/27/2001
Respondent	:	
	:	Docket No. WEVA 2002-30-R
	:	Order No. 7205807; 8/27/2001
	:	
	:	Docket No. WEVA 2002-31-R
	:	Order No. 7205808; 8/27/2001
	:	
	:	Docket No. WEVA 2002-5-R
	:	Order No. 7205802; 8/28/2001
	:	
	:	Docket No. WEVA 2002-6-R
	:	Citation No. 7205803; 8/28/2001
	:	
	:	Cedar Grove Mine No. 1
	:	Mine ID 46-08603

DECISION

Appearances: Robert S. Wilson, Esq., and Francine A. Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor;
David J. Hardy, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Independence Coal Co., Inc.;
Robert B. Allen, Esq., Allen Guthrie McHugh & Thomas, PLLC, Charleston, West Virginia, for Freddy Terral and Bruce Gilmour.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty brought by Independence Coal Co., Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Independence Coal and Freddy Terral and Bruce Gilmour, both employees of Independence, pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820(c). The company contests the issuance of Order No. 7205802, an "imminent danger" order under section 107(a) of the Act, 30 U.S.C. § 817(a), and two citations and four orders alleging violations of the Secretary's mandatory health and safety standards. The petitions allege six violations of the Secretary's mandatory health and safety standards by Independence Coal and three violations each by Terral and Gilmour. The Secretary seeks penalties of $284,500.00 against Independence Coal and $1,500.00 each against Terral and Gilmour. A hearing was held in Charleston, West Virginia. For the reasons set forth below, I dismiss Docket Nos. WEVA 2003-188 and WEVA 2003-189, dismiss three of the contest

dockets, modify four citations and assess a penalty of $34,750.00.

Settled and Dismissed Matters

At the beginning of the hearing, the parties announced that they had settled Citation No. 7205803 in Docket No. WEVA 2002-144. The agreement, which I approved, provides that the negligence alleged will be reduced from "high" to "moderate" and that Independence Coal will pay a penalty of $4,750.00. (Tr. I. 8-9.)[1] The terms of the agreement will be carried out in the order at the end of this decision.

Also, at the start of the hearing, counsel for the Secretary moved to dismiss the 110(c) charge with respect to Order No. 7205807 against Freddy Terral and the 110(c) charge with respect to Order No. 7205808 against Bruce Gilmour. The motions were granted without objection, (Tr. I. 13-14), and will be carried out in the order at the end of this decision.

On May 21, 2004, counsel for Independence Coal moved to withdraw its Notice of Contest in Docket No. WEVA 2002-5-R contesting the issuance of Order No. 7205802, the "imminent danger" order. Noting that that order was included in the citation modified and settled in Docket No. WEVA 2002-144, the company moved to withdraw the contest because it considered the imminent danger order moot.

Commission Rule 11, 29 C.F.R. § 2700.11, provides that: "A party may withdraw a pleading at any stage of a proceeding with approval of the Judge or the Commission." Accordingly, the request to withdraw the Notice of Contest in Docket No. WEVA 2002-5-R is **GRANTED** and the docket will be dismissed in the order at the end of this decision.

Background

Independence Coal Company operates the Cedar Grove underground coal mine in Raleigh County, West Virginia. Independence Coal is a subsidiary of Massey Energy.

On August 27, 2001, Bruce Gilmour, a section foreman on the first shift, told continuous miner operator George Bailey to shear the right hand rib in the No. 5 entry, because the entry was too narrow. This occurred at about 2:20 p.m. as Gilmour was beginning to perform the preshift examination for the oncoming second shift. As directed, Bailey sheared the right rib and took a partial cut out of the face. By the time he did that, the shift ended and Bailey backed the miner out of the face and proceeded to the surface to go home.

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[1] A separate transcript was printed for each of the three hearing days. Accordingly, transcript citations will be "Tr. I.," "Tr. II.," or "Tr. III." depending on the transcript volume being cited.

When Gilmour completed his preshift examination, he called it out to Freddy Terral, the second shift section foreman, to be recorded in the preshift book. Then, he also proceeded to the surface. He did not return to the No. 5 entry after he examined it and told Bailey what to do.

Terral performed an on-shift examination of the No. 5 entry at 3:52 p.m. Shortly after that time, Gregory Barron, a continuous miner operator, began mining in the entry. The shuttle car operator taking the coal from Barron's miner to the dumping point at the belt was Brandon Davis. When he returned from his thirteenth trip, at about 4:45 p.m., Davis found Barron under a large rock that had fallen on him. Barron was in a sitting position and the rock was lying on his back and shoulders. Davis was unable to move the rock by himself and called for help. When help arrived, the rock was lifted and Barron was removed from under it. He was not breathing and Terral began administering CPR. Barron was then moved out of the mine and taken to a hospital where he was pronounced dead.

Accident investigators from MSHA and West Virginia arrived at the mine around 9:00 p.m. Roger Richmond was the lead investigator for MSHA and was in charge of the investigation. He was accompanied by Jon Braenovich, a Supervisory Roof Control Specialist in the Mt. Hope, West Virginia, District Office, and by Joseph Cybulski, a Supervisory Mining Engineer in the Roof Control Division of MSHA's Pittsburgh Safety and Health Technology Center.

The MSHA investigators, along with state investigators and representatives of the company, went underground to the No. 5 entry about 9:30 p.m. Once there, the investigators made observations, took notes and made measurements. Photographs were also taken of the accident scene. The next day, the investigators interviewed witnesses and took more measurements. Among other things, the investigators observed the rock which had fallen on Barron. It measured 83 inches long, was 27 inches wide and was 8 inches thick. (Jt. Ex. 1, stip. 24.) They also saw that the head had been cut off of a roof bolt in the second row of bolts from the face and that there were no reflectors hanging anywhere in the entry.

As a result of the investigation, one citation and four orders were issued to Independence Coal. A subsequent 110(c) investigation resulted in Terral and Gilmour being individually charged with three of the violations.

Findings of Fact and Conclusions of Law

It is the Secretary's theory that the fatal accident occurred as follows: (1) Bailey sheared the right rib in the No. 5 entry, leaving an obvious and hazardous brow where the rib and the roof come together; (2) Bailey also sheared the head off of a roof bolt and knocked down reflectors, which were hanging from the second row of roof bolts from the face, and did not replace them; (3) Gilmour failed to conduct an adequate preshift examination because he did not return to the No. 5 entry even though he should have known that Bailey's shearing of the rib would result in a hazardous condition; and, if he had done so, he would have seen the hazardous brow, the sheared

bolt and the missing reflectors; (4) Terral did not conduct an adequate on-shift examination because he did not observe the hazardous brow, the sheared bolt or the missing reflectors; and (5) Barron mined in the No. 5 entry for almost an hour, without observing the hazardous brow, the sheared bolt or the missing reflectors, until the brow fell on him.

As always, the Secretary has the burden of proof. In this case, the Secretary's theory requires that it be concluded that all of the Independence employees who testified at the hearing, including two who were called by the Secretary, were untruthful. However, even if that conclusion is reached, the Secretary still presented no evidence, other than the fact that the accident occurred, to prove her case. Neither Cybulski nor Braenovich, the only other witnesses who testified, saw what the No. 5 entry looked like after Bailey finished shearing the rib, or when Terral conducted his on-shift examination, or when Barron began mining or when the accident happened. Thus, while some of the violations must be affirmed, because they existed after the accident, the Secretary has failed to prove that anything occurred as she theorizes.

The individual violations will be discussed in the order that they were issued.

Citation No. 7205804

This citation alleges a violation of section 75.202(a) of the Secretary's rules, 30 C.F.R. § 75.202(a), because:

> The roof and/or ribs were not supported or otherwise controlled to protect persons from hazards related to falls. A large rock brow measuring approximately 81 inches in length, 9 ½ inches to 25 inches wide and 7 inches to 15 inches thick fell and hit the continuous mining machine operator who was working under the unsupported brow. A fatal roof fall accident occurred on 8/27/01. The cited condition or practice resulted from evidence and information obtained during the fatal accident investigation that followed.

(Govt. Ex. 1.) Section 75.202(a) requires that: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Independence Coal does not assert, in its brief, that a violation of section 75.202(a) did not occur. Instead with regard to this citation, it argues only that the violation was neither "significant and substantial" nor an "unwarrantable failure." (Resp. Br. at 20-23.) Nonetheless, the facts support this apparent concession.

It is undisputed that the rock brow fell from the roof and struck Barron, who was working in the area. The Commission, noting that section 75.202(a) is broadly worded, has stated:

> Accordingly, we have held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (cited in *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988)).

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1277 (Dec. 1998).

As to whether the brow was adequately supported, Cybulski and Braenovich testified that "[a]ny brow poses a hazard" and that normally a rock brow is "either supported or taken down." (Tr. I. 157, 287.) The company witnesses, Norman "Red" Hill, Jr., Gilmour, Terral and John Adkins, would not admit that every brow was hazardous, but at least agreed that a brow could be hazardous, needed to be examined carefully and either taken down or supported.[2] (Tr. II. 229-30, 291, Tr. III. 79.)

In this case, the brow obviously had not been taken down. Nor had it been supported. (Tr. I. 288.) I find that, although no one saw the brow before it fell, except possibly Barron, based on the size of the brow and because such brows are usually hazardous, a reasonably prudent person would have concluded that the brow had to be supported or taken down. Consequently, I conclude that the brow was not adequately supported or otherwise controlled in violation of the regulation.

While there is no evidence in this case that anyone in authority was aware of the existence of the rock brow, "the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator." *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989). Thus, "the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees . . . ." *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991); *accord Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (Jul. 1995). Consequently, it makes no difference whether Bailey or Barron caused the brow; under the Act's scheme of strict

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[2] In her brief, the Secretary requested that I find that the company was judicially estopped from arguing "that rock brows are not inherently dangerous" because in another case involving Independence Coal, the company attorney stated that a brow "is a very dangerous condition in any mine, you don't want a rock brow hanging without support underneath it, it could fall." (Sec. Br. at 13-14.) In the first place, the company, as noted, has made no argument concerning the fact of violation. In the second place, the statement quoted does not claim that rock brows are *always* dangerous. Accordingly, I decline the Secretary's invitation to hold that Independence Coal is forever estopped from arguing that a particular brow might not be a hazardous condition.

liability, the fact that the brow existed makes Independence Coal liable for the violation.

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, 30 U.S.C. § 814(d)(1), 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 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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 (Dec. 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 (Jul. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 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.

The operator argues that "there is no evidence the brow was in such a condition that would present a hazard," and, therefore, the violation was not S&S. (Resp. Br. at 23.) This conclusory statement does not consider the *Mathies* criteria. Applying those criteria, I have already found the violation of a safety standard, section75.202(a). I further find that the violation of that standard contributed to the danger of a roof fall–which in fact occurred. In addition, I find that there was a reasonable likelihood that the hazard contributed to, a roof fall, would result in an injury. What the Commission said twenty years ago, that "[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining" and "remain the leading cause of death in underground mines," is just as true today. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984). Finally, since the fall resulted in a death, I find that there was a reasonable likelihood that the injury would be of a reasonably serious nature.

Clearly, the failure to support or otherwise control the brow "was a significant contributing cause to the fatal accident." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (Jan.

1997). Accordingly, I find that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also alleged to be an "unwarrantable failure."[3] 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 (Dec. 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC at 2010. "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 (Aug. 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 asserts that the failure of Gilmour and Terral "to detect and correct this hazardous condition constitutes inexcusable, neglectful conduct which meets the . . . definitions of unwarrantable failure and reckless disregard." (Sec. Br. at 18.) Unfortunately, there is no evidence to support this assertion.

Bailey, the continuous miner operator, testified that he did not observe anything that he considered to be a hazardous condition after he finished shearing the rib and that when he left the area there was no brow. (Tr. I. 72-73, 93.) Terral testified that: "There was no rock brow there when I did my examination." (Tr. II. 293.) Davis, the scoop operator who had only been a miner about eight months, was less positive, but stated: "I don't–I don't recall seeing anything loose or anything like that, that I thought, you know, might have been bad. Of course I might not have been paying as much attention as I should have." (Tr. I. 118.) He later said: "I know I don't recall seeing anything loose. . . . Nothing like that." (Tr. I. 127.) Gilmour, of course, left the area before the rib was sheared to complete his preshift examination and did not see it again.

Terral also testified that the company had a "scaler" and that "the scaler's the one–the man that's designated every week–he goes in and he runs the whole mine, face area, feeder in, and if there's any loose top or ribs he'll scale them, pull them down. . . . His job is to make the area safe. . . . at the beginning of the shift" (Tr. II. 258.) With regard to the scaler, he further testified as follows:

> Q Had he [the scaler] run into a condition that he felt was hazardous that he couldn't correct on his own, he would have been back to see you, wouldn't he?

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[3] The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, 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."

A He would have came [*sic*] and got me. Right.

Q Did he come and get you with regard to any conditions in that mine on August 27th?

A No, sir.

(Tr. II. 304.)

Against this direct evidence, the Secretary's case rests on the assumption that the brow was present after Bailey finished shearing the rib. As support for this assumption, the Secretary argues that since Bailey said he thought the entry was wide enough after he sheared the rib and Terral thought the entry looked wide enough when he did his on-shift examination, there was no reason for Barron to have sheared the rib. (Sec. Br. at 19.) But, there is no evidence that the entry was as wide when Bailey finished shearing the rib as it was after the accident, because neither Bailey nor Terral measured the width of the entry or estimated how wide it was. The Secretary also argues that Davis did not see Barron shearing the rib. (*Id.*) However, the fact that Davis did not see Barron shearing the rib does not prove that he did not shear it, because as Davis said: "If, you know, he did, maybe it was while I was at the feeder dumping." (Tr. I. 106.) Thus, I find that, based on the available evidence, the inference that Bailey left the brow is not as strong as the inference that Barron did.

Despite the fact that the Secretary's case is based solely on supposition and that the direct evidence is all contrary to that supposition, with the exception of Bailey, the Secretary does not discuss anywhere in her brief the credibility of the witnesses or attempt to impeach their testimony. With regard to Bailey, the Secretary suggests that: "Given the traumatic nature of what occurred, Mr. Bailey may actually believe, albeit incorrectly, that he did not leave a brow; however, this part of his testimony is not credible." (Sec. Br. at 21.) The Secretary goes on to argue that: "Given his description of the mining conditions, and being unable to see because of the dust, this description is simply not believable." (*Id.*) The Secretary has taken Bailey's testimony about mining conditions out of context.

Bailey's testimony concerning dust obscuring his vision was given as an explanation as to why the entry was originally cut too narrowly. (Tr. I. 52-53.) In other words, he said that because of the dust caused by the operation of the continuous mining machine he was unable to see that he was cutting the entry too narrowly. However, with regard to the brow, he was asked if *after* he had finished shearing the rib he *specifically* looked at the roof and made a *conscious decision* that no additional roof bolts were needed and he answered in the affirmative. (Tr. I. 73-74.) Thus, it is clear that he examined the roof after he had stopped mining and the miner was no longer creating dust. Moreover, as already noted, Bailey's testimony is corroborated by Terral and, to some extent, Davis.

Consequently, I find that the Secretary has not proven that the brow existed before Barron began mining in the entry. Nor has she foreclosed the possibility that Barron made the cut which left the brow. In this connection, I find it somewhat significant that Barron had been mining for about 45 minutes, Davis had made thirteen scoop runs, yet, according to the diagram of the scene after the accident, the mining machine is not shown as having advanced very far into the entry. Hence, a preponderance of the evidence does not indicate that either Terral or Gilmour was negligent, let alone acted with reckless disregard.

If Barron left the brow, he was clearly negligent. However, the Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott*, 17 FMSHRC at 1116; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). 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 necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464. Finally, while this standard is normally applied in determining the operator's negligence for penalty purposes, the Commission has confirmed that it also applies in determining whether an operator can be held responsible for a miner's aggravated conduct and, thus, be found to have unwarrantably failed to comply with a regulation. *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997).

Not surprisingly, in view of the Secretary's theory of the case, there is no evidence concerning Independence Coal's supervision, training and disciplining of its employees. Inasmuch as the Secretary has not shown that the company's supervision, training and disciplining of its employees was deficient, it must be concluded that the company had taken reasonable steps to prevent the violative conduct.

In conclusion, the Secretary has not established that either Terral, Gilmour or Independence Coal was negligent with respect to this violation. Further, the Secretary has not shown that Barron's negligence, whatever it was, is imputable to the company. Accordingly, I conclude that the violation of section 75.202(a) was not the result of aggravated conduct on the part of Independence Coal and, therefore, that the violation was not the result of an "unwarrantable failure." The citation will be modified to a 104(a) citation, 30 U.S.C. § 814(a).

110(c) Violations

The Secretary has charged Terral and Gilmour with being personally liable for this violation under section 110(c) of the Act.[4] The parties stipulated that both Terral and Gilmour

[4] 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 . . . ."

were "agents" of Independence Coal. (Jt. Ex. 1, stip. 21 & 22.) The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 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,* 16 FMSHRC at 1630; *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992); *Emery,* 9 FMSHRC at 2003-04.

As has already been discussed in the section on "unwarrantable failure," I do not find that either Terral's or Gilmour's conduct was negligent, much less aggravated. The Secretary has not proved that the brow existed when Terral conducted his on-shift examination, nor has the Secretary shown that Gilmour had a duty to return to the No. 5 entry after completing his preshift examination.[5] Therefore, I cannot conclude that they acted knowingly and will dismiss the citations against them.

Citation No. 7205805

This citation alleges a violation of section 75.220(a)(1) of the regulations, 30 C.F.R. § 75.220(a)(1), because:

> The approved roof control plan was not being followed in that reflectors were not placed on the fourth row of bolts outby the face to aid the continuous mining machine operator to determine his position for maximum safety during mining operations. The integrity of the first two rows was destroyed when a bolt was sheared off in the second row outby the face. A fatal roof fall accident occurred on 8/27/01. The cited condition or practice resulted from evidence and information obtained during the fatal accident investigation that followed.

(Govt. Ex. 2.)[6] Section 75.220(a)(1) requires that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

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[5] Terral's and Gilmour's conduct will be discussed more fully in the discussion of Orders No. 7205807 and 7205808.

[6] This citation was modified at the beginning of the hearing from a 104(d)(1) order to a 104(a) citation and the negligence was modified from "reckless disregard" to "high." (Tr. I. 10-11.)

The company's approved roof control plan provides that: "Two reflectors shall be placed on the second row of bolts outby the face, on each side of the crosscut, to aid the shuttle car operators and continuous mining operators in determining their positions for maximum safety during mining operations." (Jt. Ex. 2, p. 10, no. 16.) It is undisputed that when the investigators arrived at the accident scene, there were no reflectors hanging in the No. 5 entry. It is also undisputed that the head and plate of a roof bolt in the second row of bolts had been sheared off, thus rendering that row of bolts ineffective and making the maximum safety position for the continuous miner operator outby the fourth row of bolts. Accordingly, based on strict liability, the operator violated its roof control plan and, thus, section 75.220(a)(1).

Significant and Substantial

The inspector found this violation to be "significant and substantial." I agree for the following reasons. Applying the *Mathies* criteria, I have already found that the lack of reflectors was a violation of the roof control plan. The second criterion is met because without the reflectors a miner could think it was safe to proceed under what was unsupported roof, exposing him to the hazard of a roof fall.

The Secretary argues that the third factor is met because: "Had reflectors been properly placed in the No. 5 entry, it is most likely that Mr. Barron would have been positioned further outby than where he was struck by the fallen rock brow." (Sec. Br. at 27.) Obviously, this depends on Barron having been inby the fourth row of bolts when he was struck. The evidence, however, indicates that he was outby the fourth row of bolts. Davis, who found him, testified Barron was somewhere between the fourth and fifth row of bolts. (Tr. I. 115.) Terral, who came in response to Davis' calls for help, said he was outby the fourth row of bolts, with the outby end of the rock leaning against him. (Tr. II. 274-75.) Finally, the diagram of the scene shows the rock extending almost halfway between the fourth and fifth row of bolts. (Jt. Ex. 6.) While the rock may have been moved some in rescuing Barron, it could not have been very far since it weighed almost 2,000 pounds. (Tr. II. 14, 86.)

Consequently, I do not find that this accident proves that the third factor has been met. On the other hand, I agree with the Secretary that, "the absence of the reflectors made it more likely that the victim, or anyone else whom might have been in the entry, would be located inby the fourth row of bolts and more likely to have been exposed to hazards related to falls of the roof and ribs." (Sec. Br. at 27.) Hence, combing the fourth and fifth criteria, I find that the lack of reflectors was reasonably likely to result in reasonably serious injury. Therefore, I find that the violation was "significant and substantial."

Citation No. 7205806

This citation also charges a violation of section 75.220(a)(1) in that:

> The approved roof control plan was not being followed. The approved roof control plan requires cross-wise spacing of bolts not to exceed 5 feet and stipulates that under no condition shall any person proceed inby the next to last row of permanent roof supports. A bolt in the second row of bolts outby the face in the number 5 entry was sheared off. This resulted in two of the remaining bolts in this row being 8 ft. apart. This rendered the last two rows of bolts ineffective. The fourth row of bolts then became the next to last row of permanent supports. The continuous mining machine operator positioned himself inby the fourth row of bolts in violation of the plan. A fatal roof fall accident occurred on 8/27/01. The cited condition or practice resulted from evidence and information obtained during the fatal accident investigation that followed.

(Govt. Ex. 3.)[7]

The company's roof control plan provides that: "Crosswise spacing of bolts may be 5 feet provided four rows are maintained and bolts do not exceed 4 feet from the ribs." (Jt. Ex. 2, p. 8, no. 4.) It also states: "Under no conditions shall any person proceed beyond the next to last row of permanent roof supports." (Jt. Ex. 2, p. 9, no. 5.) As noted above, it is undisputed that a bolt in the second row outby the face was sheared leaving the second row with an eight foot space between bolts. Accordingly, while I do not find that the continuous miner operator was inby the fourth row of bolts, based on strict liability, I find that the company violated its roof control plan and, in doing so, section 75.220(a)(1).

Significant and Substantial

The inspector found this violation to be "significant and substantial." For the reasons set out in discussing S&S for Citation No. 7205805, above, I find that this violation was "significant and substantial."

Order No. 7205807

This order alleges a violation of section 75.360(b)(3), 30 C.F.R. § 75.360(b)(3), because:

> An inadequate pre-shift examination was conducted by the day shift section foreman on the number 1 section on 8/27/2001. Obvious hazards were not reported or corrected in the number 5 face of the number 1 section. A large rock brow was created by

[7] This citation was modified at the beginning of the hearing from a 104(d)(1) order to a 104(a) citation and the negligence was modified from "reckless disregard" to "high." (Tr. I. 11.)

> shearing of the right rib of the number 5 face of the number 1 section on the day shift. This condition was not reported in the preshift examiner's log prior to the evening shift starting to work. This was a contributing factor to a fatal accident.[8]

(Govt. Ex. 4.) Section 75.360, 30 C.F.R. § 75.360, sets out the requirements for preshift examinations. Section 75.360(b)(3) requires that:

> (b) The person conducting the preshift examination shall examine for hazardous conditions . . . at the following locations:
>
> . . . .
>
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places . . . and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

The parties stipulated that "[a] preshift examination of the No. 5 entry on the No. 1 section had been conducted by Bruce Gilmour on August 27, 2001." (Jt. Ex. 1, stip. 25.) It is undisputed that prior to performing his preshift examination of the No. 5 entry, Gilmour directed Bailey to "shear the rib, to widen the entry out. And I told him to be real careful. Watch the bolt spacing. And be sure everything's okay." (Tr. II. 206.) Then, Gilmour proceeded through the rest of the section, completed his preshift examination, called the results out to the surface and then left the mine. He did not return to the No. 5 entry.

It is the Secretary's theory that the preshift regulation was violated because, "if the preshift examiner has reason to know of a hazardous condition in an area that was previously examined, the examiner has an obligation to ensure that such hazardous condition is addressed, corrected, or adequately recorded." (Sec. Br. at 35.) Significantly, the Secretary does not cite any regulation or case law to support this assertion. Such a requirement is clearly not set out or implied in section 75.360(b)(3). Nor does it appear anywhere else in section 75.360. Indeed, in response to the question, "isn't it true that Mr. Gilmour was not required by the preshift examination regulation to go back to the No. 5 entry," Braenovich answered: "Correct." (Tr. II. 64.)

Preshift examinations are required to be performed within three hours preceding an oncoming shift. 30 C.F.R. § 75.360(a)(1). It follows then that a preshift examination can be

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[8] This order was modified at the hearing to insert this language in place of the language in the original order. (Tr. I. 11-12.)

started within three hours before the ongoing shift ends. This plainly contemplates that mining will proceed after a preshift examination has begun and, depending on how long the examination takes, after it has been completed. Any number of hazardous conditions could result from the continued mining, yet the regulation says nothing about rechecking areas where further mining is performed.

Moreover, the Secretary has not shown that shearing the rib was a particularly hazardous procedure. Braenovich admitted that when an entry is too narrow or off-center, it is part of the normal mining cycle to shear the rib to widen the entry and get it back on center. (Tr. II. 85.) Terral testified that if the miner operator determines that an entry is off-center, he has the authority on his own to shear the rib to straighten the entry. (Tr. II. 265.) Hill, who at the time of the accident was superintendent of the Justice Mine, but who two months before had been superintendent at Cedar Grove, agreed. (Tr. II. 141.) Bailey testified that he was aware that shearing the rib might require some spot bolting and he had roof bolters standing by in case he needed them. (Tr. I. 72-73.) Similarly, when a miner operator mines an entry he also has roof bolters standing by. In short, shearing the rib in this situation was not anything out of the ordinary. Thus, even assuming *arguendo* that the Secretary's theory is correct, there was no reason for Gilmour to expect that anything *unusually* hazardous was being done.

To sum up, there is no requirement in section 75.360 that a preshift examiner revisit areas he has already examined. Furthermore, even if the Secretary's implied addition to the regulation were reasonable, there was nothing in this situation to put the examiner on notice that anything other than normal mining was being performed.[9] Accordingly, I find that the operator did not violate the regulation and will vacate the order.

110(c) Violation

The Secretary seeks to hold Gilmour personally liable for this violation. During the hearing, at the close of the Secretary's case, I granted Gilmour's motion to dismiss this charge. (Tr. II. 114.) With her brief, the Secretary has filed a motion requesting that I reconsider that decision. In effect, my discussion of this violation has done that.

I find no violation of this regulation. Therefore, there is nothing for which Gilmour can be held personally liable. I affirm my original ruling and dismiss this allegation.

Order No. 7205808

This order alleges a violation of section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1), because:

[9] The Secretary has also not established that there were any hazardous conditions to observe, even if Gilmour had returned to the No. 5 entry.

> An inadequate on-shift examination was conducted in the number 5 entry of the number 1 section by the evening shift section foreman. Date: 8/27/01, time: 3:52 PM, and initials: F. T. of the examiner were present at the accident scene. Obvious hazards were not corrected prior to the continuous mining machine operator commencing mining in the number 5 face. A large unsupported rock brow was created by the day shift shearing of the right rib in the number 5 entry. This condition should have been observed and corrected by the section foreman prior to mining the number 5 face. A fatal roof fall accident occurred on 8/27/01. The cited condition or practice resulted from evidence and information obtained during the fatal accident investigation that followed.

(Govt. Ex. 5.) Section 75.362(a)(1) provides that: "At least once during each shift, or more often if necessary for safety, a certified person . . . shall conduct an on-shift examination of each section where anyone is assigned to work during the shift . . . . The certified person shall check for hazardous conditions . . . ."

As should be evident by now, the Secretary has not proven that the rock brow was in existence when Terral was performing his on-shift examination. To reiterate, Bailey testified that after he sheared the right rib in the No. 5 entry there was no rock brow, there was no sheared roof bolt and the reflectors where hanging from the second row of roof bolts. (Tr. I. 72-74, 83, 93.) Terral testified that when he examined the No. 5 entry during his on-shift examination there was no rock brow, there was no sheared bolt, the reflectors were hanging from the second row of roof bolts and the designated scaler did not report any problems to him. (Tr. II. 252-56, 293, 304.) Finally, Davis testified that he did not recall noticing whether there was a brow, a sheared bolt or reflectors. (Tr. I. 118,127.) The Secretary has offered nothing except theory and inferences on top of inferences to rebut this testimony.

I conclude that the Secretary has not proven that Terral conducted an inadequate on-shift examination. Consequently, I conclude that the operator did not violate section 75.362(a)(1) as alleged and will vacate the order.

110(c) Violation

The Secretary has attempted to hold Terral personally liable for this violation. However, since the Secretary has failed to prove the violation, it follows that 110(c) liability cannot attach. Therefore, I will dismiss this charge.

Conclusion

Because they existed at the time of the accident investigation, and because of strict liability, the Secretary has proved three violations against the operator. However, jumping from

the known, the Secretary has surmised that the violative conditions existed when Bailey finished working in the No. 5 entry and when Terral performed his on-shift examination. Based on this conjecture, she has then concluded that the operator and Gilmour and Terral were either "highly" negligent or acted with "reckless disregard" in connection with this accident.

Distressingly, the Secretary has presented little or no evidence to support this speculation, relying instead on "bootstrapping" inferences. Against this, the company has presented the testimony of four miners, two were actually called by the Secretary, who clearly refute the Secretary's case. Nonetheless, faced with this strong refutation, the Secretary has not even challenged the witnesses credibility, with the exception of the half-hearted attempt concerning Bailey. Indeed, their credibility is not even discussed in the Secretary's brief.

Aware that Gilmour and Terral, and to a lesser extent Bailey, have a pronounced interest in the outcome of this case, I, nevertheless, find them to be credible. Their testimony was not inherently incredible. It was consistent with the factual evidence. Their manner and demeanor while testifying did not indicate any evasiveness, dissembling or equivocation. Once their testimony is accepted, the Secretary's theory of high negligence and reckless disregard must fail.

Accordingly, I conclude that the operator committed a violation of section 75.202(a) and two violations of its roof control plan under section 75.220(a)(1), but did not violate sections 75.360(b)(3) or 75.362(a)(1). I further conclude that the violation of section 75.202(a) was not the result of an "unwarrantable failure" on the part of the operator. Finally, I conclude that neither Gilmour nor Terral are personally liable for any of the violations with which they have been charged.

Civil Penalty Assessment

The Secretary has proposed a penalty of $55,000.00 for each of the three violations that I have found the company to have committed.[10] 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 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that the maximum penalty in this case will not affect the ability of Independence Coal to remain in business. (Jt. Ex. 1, stip. 4.) Based on the Proposed Assessment Data Sheet, I find that Cedar Grove is a medium size mine and that Massey Energy is a very large company. (Govt. Ex. 6.) Based on the Proposed Assessment Data Sheet and the Assessed Violation History Report, I find that

[10] As counsel for the Secretary recognized, the proposed penalties for Citation Nos. 7205805 and 7205806 are no longer valid in view of the citations' modification at the hearing. (Tr. I. 25.) Nonetheless, the Secretary has not proposed any new penalties for these violations.

Independence Coal's history of previous violations is slightly better than average. (Govt. Exs. 6 & 7.) Based on the citation forms, I find that the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Govt. Exs. 1-3.)

A death occurred as a result of these violations. Therefore, I find that the gravity of the violations was very serious.

Finally, turning to negligence, I find that the company was not negligent in connection with any of the three violations. I make this finding based on the Secretary's failure to prove that either Gilmour or Terral performed inadequate examinations, or were otherwise aware of the violations, or that anyone else in a supervisory capacity with the company was aware of the violations. That being the case, since, as discussed above, the negligence of a rank-and-file miner cannot be imputed to the operator, I find that Independence Coal was not negligent.

Taking all of these factors into consideration, I assess a penalty of $10,000.00 for each violation. In addition, in accordance with the settlement agreement, I assess a penalty of $4,750.00 for Citation No. 7205803 in Docket No. WEVA 2002-144.

Order

In view of the above, with regard to Docket No. WEVA 2002-138 and contest Docket Nos. WEVA 2002-27-R, WEVA 2002-28-R, WEVA 2002-29-R, WEVA 2002-30-R and WEVA 2002-31-R, Citation No. 7205804 is **MODIFIED** from a 104(d)(1) citation to a 104(a) citation, by deleting the "unwarrantable failure" designation, and is further **MODIFIED** by reducing the level of negligence from "reckless disregard" to "none" and is **AFFIRMED** as modified; Citation No. 7205805 is **MODIFIED** by reducing the level of negligence from "high" to "none" and is **AFFIRMED** as modified; Citation No. 7205806 is **MODIFIED** by reducing the level of negligence from "high" to "none" and is **AFFIRMED** as modified; Citation Nos. 7205807 and 7205808 are **VACATED** and Docket Nos. WEVA 2002-30-R and WEVA 2002-31-R are **DISMISSED**. With regard to Docket No. WEVA 2002-144 and contest Docket Nos. WEVA 2002-5-R and WEVA 2002-6-R, Citation No. 7205803 is **MODIFIED**, in accordance with the agreement, by reducing the level of negligence from "high" to "moderate" and is **AFFIRMED** as modified and Docket No. WEVA 2002-5-R, in accordance with the Respondent's motion, is **DISMISSED**. Finally, Docket Nos. WEVA 2003-188 and WEVA 2003-189 are **DISMISSED**.

Independence Coal Company, Inc., is **ORDERED TO PAY** civil penalties of **$34,750.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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