

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, DC 20001

June 5, 2007

SPARTAN MINING COMPANY, INC., : CONTEST PROCEEDINGS
Contestant :
: Docket No. WEVA 2004-117-RM
: Citation No. 7224650; 04/13/2004
v. :
: Docket No. WEVA 2004-118-RM
: Citation No. 7224651; 04/13/2004
: :
SECRETARY OF LABOR, : Docket No. WEVA 2004-119-RM
MINE SAFETY AND HEALTH : Citation No. 7224652; 04/13/2004
ADMINISTRATION, (MSHA), :
Respondent : Docket No. WEVA 2004-120-RM
: Citation No. 7224654; 04/13/2004
: :
: Docket No. WEVA 2004-121-RM
: Order No. 7228963; 04/13/2004
: :
: Docket No. WEVA 2004-122-RM
: Order No. 7228964; 04/13/2004
: :
: Ruby Energy
: Mine ID 46-08808
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 2005-34
Petitioner : A.C. No. 46-08808-41145
: :
v. : Docket No. WEVA 2005-53
: A.C. No. 46-08808-45208
SPARTAN MINING COMPANY, INC., :
Respondent : Ruby Energy

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC,
Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

These consolidated proceedings, consisting of six contest and two civil penalty matters, arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). The hearing was conducted on January 31 and February 1, 2007, in Charleston, West Virginia. The petitions for assessment of civil penalty filed by the Secretary of Labor against the respondent, Spartan Mining Company, Inc., pursuant to section 110(a) of the Mine Act, 30 U.S.C. § 820(a), sought to impose a total civil penalty of \$128,460.00 for six alleged violations of the Secretary’s mandatory safety standards. The violations were identified as a result of a Mine Safety and Health Administration (MSHA) investigation of a February 5, 2004, fatal electrical accident that occurred at Spartan’s Ruby Energy Mine. The accident occurred when the victim, Kenneth A. McNeely, a 33 year old electrician with six years mining experience, was electrocuted while repairing a continuous miner trailing cable that had been struck by the continuous miner’s ripper head. (Gov. Ex. 10).

At the hearing the parties advised that they had settled two of the six citations and orders in issue. Specifically, the parties agreed to settle 104(a) Citation No. 7224654 and 104(d) Order No. 7228964 that are subjects in the civil penalty proceeding in Docket No. WEVA 2005-53. The parties’ settlement agreement was approved on the record and is discussed below. This decision concerns the remaining two 104(a) citations, one 104(d) citation, and one 104(d) order.

I. Statement of the Case

At approximately 1:04 p.m. on February 5, 2004, a continuous mining machine ran over its high voltage distribution trailing cable causing a phase to phase fault that immediately de-energized the continuous miner and caused a loss of power to the entire mine facility, including an interruption of mine fan ventilation.¹ McNeely was killed when the continuous miner’s circuit breaker was closed by Spartan’s foreman while McNeely was attempting to repair the trailing cable. As a result of the accident, Spartan was cited for failing to withdraw miners from the working section after stoppage of the mine’s ventilation fan; failing to protect the trailing cable from damage by mobile equipment; failing to remove the continuous miner from service; and failure to lock out the high-voltage trailing cable prior to performing repairs. Spartan has stipulated that the trailing cable was not locked out at the time of the accident. (Tr. 53).

¹ Both the mine’s carbon monoxide sensor data base and the Appalachian Electric Power Company’s (Appalachian’s) metering base monitoring system reflect power was interrupted for 14 minutes. The carbon monoxide sensor reflects that power was lost from 1:04 p.m. until 1:18 p.m. (Tr. 116-18). Appalachian’s meters reflect a drop in mine milliwatt consumption at 1:01 p.m. and a return to normal electrical consumption at 1:15 p.m. (Gov. Ex. 10, p.7). For the purposes of this decision, the period of power loss is determined to be from 1:04 p.m. until 1:18 p.m. as reflected by the carbon monoxide sensor.

An important issue in these civil penalty matters is the degree of negligence that is directly attributable to Spartan for each of the contested violations, and whether the negligence of Spartan's hourly employees should be imputed to Spartan based on inadequate supervision and control of its mine personnel. In its post-hearing brief, the Secretary, noting that Commission judges make *de novo* findings with respect to the appropriate civil penalty based on the evidence adduced at trial, requests that consideration should be given for the imposition of higher civil penalties than those initially proposed by the Secretary. (*Sec'y br.* at pp.28-29).

II. Background

A continuous mining machine "cuts or rips coal from the face and loads it onto conveyors or into shuttle cars in a continuous operation." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 122 (2d ed. 1997). The ripper head of a continuous miner is the cutting drum that extracts the coal from the face. It contains angled steel tooth bits that are analogous to a circular saw. (Tr. 98-99). A continuous mining machine is a heavy piece of equipment weighing as much as several tons. (Tr. 157).

The continuous miner is energized by a high powered 995 VAC alternating three phase system trailing cable. The outer rubber jacket of the trailing cable houses the three insulated phase wires that carry the alternating current. (Tr. 87-90). The trailing cable also contains a metallic monitor wire and a ground wire. (Tr. 85-86, 93-94).

The trailing cable is connected at the power center by inserting the plug, also known as a "cathead," at the end of the trailing cable to a wall receptacle. (Tr. 103). Next to the wall receptacle is a circuit breaker and a toggle switch that renders the circuit breaker ineffective. The circuit breaker trips in the event of a short circuit. The toggle switch also trips along with the circuit breaker in the event of a phase to ground fault.

At the time of the accident the continuous miner was located in the No. 3 entry approximately six crosscuts inby and 1½ entries to the right of the power center. By way of measurement, facing in an inby direction at the power center, the continuous miner was 380 feet inby and 40 feet to the left of the power center. (Tr. 111-13; Gov. Ex 1).

A short circuit phase to phase power failure occurs when two phase wires come in contact with each other tripping (opening) a circuit breaker. (Tr. 125). A ground fault occurs when one phase connects with the ground. While a short circuit phase to phase failure trips a circuit breaker, it does not render the circuit breaker inoperable in that the circuit breaker can be closed restoring power to the shorted cable. (Tr. 134-35). A ground fault involving the monitor or ground wire also trips the toggle switch at the power center rendering the circuit breaker ineffective in that it cannot be closed. (Tr. 94).

The lock out procedure consists of removal of the trailing cable plug, or cathead, from the power center receptacle by the individual performing repairs. After the trailing cable is

unplugged from the power source, that individual places a padlock in a specially designed ring or lip at the end of the plug. Placing the padlock at the end of the plug prevents anyone from connecting the cable to the power source while the cable is being repaired. (Tr. 102-03).

As evidenced by the fatality, a damaged high power electrical cable poses an extreme danger to anyone coming in contact with exposed wires. In recognition of this electrocution hazard Spartan has a policy of protecting cables that consists of maintaining cables against ribs to keep them out of the path of mobile equipment. Spartan also has a policy of disciplining personnel who fail to ensure that trailing cables are protected. (Tr. 159-60).

MSHA Inspector James Humphrey described the proper actions a mine operator should take if a trailing cable is run over, even if there is no interruption of power. Humphrey explained:

[t]he proper action that the mine operator should take once being made aware of this condition, he should have a certified electrician de-energize the power from that cable and have it checked, the ground, the ground fault and the phases, and see if there's any problems in [the cable].

(Tr. 466-67).

Similarly, Steven Neace, Spartan's Ruby Energy Mine Superintendent, testified:

Neace: If a cable's run over and they determine it is unsafe, they're to pull the cathead, have the electrician check it and check it with a meter, see if its grounded. If its not grounded, then they can go back to resume operations, put the cable back in service, put that equipment back in service.

Court: O.K. So it's either remove it from service and check to see if the cable is damaged. And if the cable is not damaged, return it to service; right?

Neace: Right.

(Tr. 657-58).

Keith Hainer, a certified electrician employed by parent company Massey Coal Services as its Director of Maintenance, also testified regarding procedures to be followed when a trailing cable is struck by mobile equipment. Hainer opined that, "in my experience, I have seen cables with internal damage and the outer jacket intact." (Tr. 718). Hainer described the method to "discern if there's damage or not." (Tr. 720). Hainer testified:

Well, I'm saying instead of cutting into [the cable], I may use other methods. For example, to go to the power center and use different electrical devices [meters] to test insulation integrity without physically cutting into the cable. And that's not uncommon to do.

(Tr. 722-23).

Thus, Humphrey, Neace and Hainer all agree the proper action after a cable is run over is to first immediately de-energize the cable at the power station and then check the cable by using meters to ensure that the cable is not damaged and unsafe. If the cable is damaged it must be kept out of service. As discussed below, Spartan failed to follow its own safety policy.

Section 75.313, 30 C.F.R. § 75.313, governs the evacuation procedures when power to a mine ventilation fan is interrupted. In the event of a mine fan stoppage, electrically powered equipment in each working section must be de-energized. Miners must immediately be withdrawn from the working section to a location outby the loading point where they may remain for 15 minutes.² If mine ventilation is not restored within 15 minutes, all miners must be evacuated to the surface. As discussed herein, McNeely and other crew members were not withdrawn from the working section despite a loss of mine fan power. Although the crew should have been required to retreat from the working section, the crew was not required to leave the mine because power was restored in less than 15 minutes.

III. Findings of Fact

The following factual summary primarily is based on stipulated facts that are supported by MSHA's investigative findings. Factual findings based on testimonial evidence are indicated by reference to the transcript.

Spartan's Ruby Energy Mine is located near Delbarton, in Mingo County, West Virginia. The mine utilizes the room and pillar method. On February 5, 2004, the 002 section crew, under the direction of section foreman Gilbert W. Sada, entered the mine at their regular starting time of 7:00 a.m., arriving at the 002 section at approximately 7:20 a.m. Sada's crew included electrician Kenneth McNeely, continuous miner operator Jamie Hatfield, shuttle car operator Kenneth Collins and scoop operator Charles Smith.

There were two continuous mining machines on the 002 section. The continuous miner on the left side of the section was used to mine a line of pillars from the No. 4 entry to the No. 1 entry. The continuous miner on the right side of the section mined pillars from the No. 8 entry to the No. 5 entry.

² Section 75.2, 30 C.F.R. § 75.2, of the Secretary's regulations defines the "working section" as "all areas of the coal mine from the loading point of the section to and including the working faces."

Hatfield began operating the left continuous miner in the No. 4 entry at approximately 7:35 a.m. Mining continued in the No. 3, No. 2 and No. 1 entries as the day progressed. Upon completion of the No. 1 entry, Hatfield backed the continuous miner two crosscuts outby the pillar line in the No. 3 entry for servicing. Hatfield and McNeely serviced the continuous mining machine while the right continuous miner was used to mine the next row of pillars from the No. 8 entry to the No. 5 entry. At the time power was lost at 1:01 p.m., the right continuous mining machine was in the No. 7 entry.

According to Hatfield, McNeely left the area in the No. 3 entry where the machine had been serviced. After McNeely left, Sada instructed Hatfield to move the continuous mining machine into the No. 4 entry to start mining. It was Spartan's practice to keep the trailing cable against the rib to prevent damage from the continuous miner. (Tr. 538). Hatfield was unaware that one loop of the cable had migrated from the rib into the path of the continuous miner. (Tr. 526, 538). As Hatfield trammed the continuous miner a distance of approximately 21 inches, one of the bit lugs on the ripper head, also called the cutting drum, struck the trailing cable damaging the phase wire insulation, causing the phase wires to contact each other ultimately resulting in a phase to phase short circuit. (Tr.156-57, 174). The continuous miner immediately ceased to operate having lost power the instant the ripper head made contact with the trailing cable. At that time, it was also apparent that power had been lost for all section equipment at the power station. Ventilation was simultaneously interrupted as the mine fan ceased operating. The mine's carbon monoxide sensor data base reflects that mine power was lost at approximately 1:04 p.m.

Although Hatfield now claims that, at the time of the accident, he believed the loss of power was caused by a widespread Appalachian Power Company outage, Hatfield reluctantly conceded his initial belief was that the continuous miner lost power because the trailing cable had been damaged. Hatfield testified:

Court: Okay. I just want to understand in my mind. When you say that the cable was not that bad, how do you mean that?

Hatfield: Well, it didn't appear to me that it was hurt. Like I say, the outer jacket wasn't even hurt. The bit lug, it didn't smash through the cable. It was just - - barely had it caught to where I couldn't pull it out. It wasn't - -.

Court: Did you have any reason to believe that the cable was damaged?

Hatfield: No.

Court: Did the power to the continuous miner go off at the same time that the bit lug hit the - - came into contact with the cable?

Hatfield: When I went to tram backwards in order to reposition my miner, that's when the power went off on the miner. I went walking toward the miner, and as I was walking toward the front of the miner to look at the cable, I noticed that all the power was off.

Court: All right. Did you make a - - was there any connection in your mind between the power to the continuous miner going off and the ripper head hitting the cable?

Hatfield: When I was operating the miner, the first thought I had was that it was the cable problem. That's what I thought first.

(Tr. 511-13).

Foreman Sada and shuttle car operator Collins were a few feet outby the continuous mining machine when contact with the ripper head occurred. (Joint Stip. No. 15). Sada described his position as "approximately 45 feet from the ripper head," and he agreed that he was "in close proximity" to the ripper head when the cable was struck. (Tr. 550, 561). As Sada observed Hatfield tramping the continuous miner, the continuous miner lost power and there was a loss of power throughout the section. Sada asked Hatfield if he had struck the cable. Sada testified Hatfield responded that "I'm on it, but I'm barely on this cable." (Tr. 557).

Sada admits he noticed the loss of power at the same time Hatfield told him the ripper head had contacted the cable. (Tr. 562, 563-64). Although Sada, like Hatfield, now claims that, at the time McNeely was electrocuted, he believed there was a wide spread utility company outage, he conceded that his "first instinct" was that the loss of power was attributable to the damaged cable. (Tr. 554).

Sada left Hatfield and Collins at the continuous miner and walked four crosscuts outby and one entry to the right arriving in the No. 4 entry where the section phone was located by the feeder. (Gov. Ex. 1). Sada phoned outside to the surface and spoke to superintendent Neace who informed Sada that all underground power, power to the preparation plant, and power to the mine fan were out.

Neace and Sada claim that Sada did not inform Neace that the trailing cable was struck when power was lost. Neace and Sada also claim Neace told Sada that "Appalachian's got us out." (Tr. 275-79). MSHA accident investigators interviewed Sada and Neace shortly after the accident during interview sessions conducted on February 8, February 10, and February 23, 2004. (Gov. Ex. 10). MSHA's accident report did not find that Spartan was acting under the mistaken belief that a power company failure had occurred at the time of the accident. *Id.* Moreover,

it is significant that Neace does not assert that he told McNeely that the loss of power was due to a utility company failure when McNeely telephoned Neace moments after Neace had spoken to Sada.

Surprisingly, both Sada and Neace testified that, even with the benefit of hindsight, they still do not believe the striking of the cable and simultaneous loss of power should have alerted them that the cable was damaged. (Tr. 561, 648-53). In fact, despite a mandatory company policy of testing cables that have been run over for potential damage, Neace testified that he continues to believe that the loss of power at the exact time the cable was struck could have been “a coincidence” that occurred at the exact moment a utility company power outage occurred. (Tr. 652, 657-58).

At approximately 1:06 p.m.,³ while Sada was at the feeder speaking to Neace on the phone, Hatfield and Collins attempted to remove the trailing cable from beneath the continuous miner’s ripper head. However, their attempts failed. Collins walked approximately six crosscuts outby to the section belt head to retrieve a scoop for the purpose of using the scoop to bump the ripper head from the trailing cable. Collins met scoop operator Charles Smith at the belt head. Collins and Smith brought the scoop back to the continuous miner.

As Sada left the area of the feeder where the section phone was located, McNeely approached the section phone. Between 1:07 p.m. and 1:08 p.m., McNeely phoned Neace who remained on the surface. Neace states that McNeely inquired what Sonny Vance, the chief electrician, had done to de-energize the high voltage. Neace stated he told McNeely that he did not know, and that all personnel would have to leave the mine if the ventilation fan did not resume operation within 15 minutes. (Joint Stip. No. 7). Significantly, as previously noted, Neace apparently did not tell McNeely that the loss of power was due to an Appalachian Power Company failure.⁴

Sada returned to the continuous miner at approximately 1:09 p.m.. As he approached he could see the scoop being operated in front of the continuous miner. At that time, McNeely had returned from the section phone and was sitting on a personnel carrier in the crosscut adjacent to

³ Reconstruction of the timing of events is based on Spartan’s chronology admitted into evidence as a DVD. (Tr 712-14; Resp. Ex. B). The record was left open for a written synopsis of the DVD summary of events. (Tr. 773-74). Spartan submitted the written summary on May 1, 2007.

⁴ McNeely phoned Neace at 1:07 p.m. McNeely began the repair shortly thereafter and was killed at approximately 1:18 p.m. Neace requested an ambulance at approximately 1:20 p.m. It is difficult to determine the purpose of McNeely’s telephone call if McNeely and Neace did not discuss the cause of the power loss only minutes before McNeely was to begin repairing the cable.

Sada's position between the No. 3 and No. 2 entries. Sada states he told McNeely that the power was off, the mine fan was down, and that they would have to go outside in 15 minutes.

Smith bumped the scoop against the ripper drum, allowing Hatfield to pull the trailing cable free. According to Hatfield and Sada, at that time, Sada overheard Hatfield say the cable was freed, and, that the cable jacket "was not even busted." (Joint Stip. 11).

After Sada left to go to the right side of the section to inform miners that they may have to evacuate the mine, McNeely arrived at the continuous mining machine and told Hatfield and Collins "that he needed to check the damaged area of the cable." (Stip. No. 12). Although Hatfield and Sada deny they had any reason to believe the cable was damaged, it is apparent that McNeely immediately recognized the short circuit in the cable.

McNeely also informed Hatfield and Collins that they had 15 minutes until they had to leave the section. McNeely began cutting the outer jacket off the trailing cable "at the damaged area." (Joint Stip. 12).

Smith returned the scoop to the section belt head. After traveling to the right side of the section, Sada returned to the section mine phone.

McNeely and Hatfield continued repairing the cable as Collins pulled on the waterline, that was also stuck, in an attempt to remove it from under the ripper drum. McNeely cut about 14 inches of the outer jacket off the trailing cable, exposing the three power phases, a ground wire, and a monitor wire. Two of the power phases were burned and needed to be cut and spliced. The outer jacket on the third power phase was damaged and needed to be re-insulated. The ground and monitor wires were not damaged. McNeely walked to his personnel carrier to get tape and connectors. He returned on his personnel carrier, parking it behind the continuous mining machine.

As McNeely worked on the second power phase, Hatfield heard a humming noise and felt air movement. The mine carbon monoxide sensor data base reflects power was restored to the mine at 1:18 p.m., approximately 14 minutes after power was lost. McNeely asked Collins to go to the section power center to see if mine power had been restored. After repairing the first two phases, McNeely began work on the third phase. He cut the third phase apart and prepared both ends for the connector.

Sada was at the dumping point area at 1:18 p.m., waiting for a call from Neace, when the main re-closer switch located on the surface apparently was closed restoring power to the mine. Sada noticed air pressure on the back-up check curtains indicating that the mine fan was operating and he realized that mine power had been restored.

Sada went to the section power center and started closing the circuit breakers for all of the face equipment. All cable plugs were still attached to their receptacles on the power center.

Sada knew that the trailing cable had not been locked out because the cathead was plugged into the power station receptacle. (Tr. 602; Gov. Ex. 3K). Sada first closed the circuit breaker for the right continuous mining machine. At approximately 1:20 p.m., Sada next closed the circuit breaker for the left continuous mining machine. McNeely, who was still working on the third power phase, received a fatal electrical shock when the electrical energy was transferred through McNeely when the circuit breaker was closed. The trailing cable's circuit breaker momentarily closed and instantaneously opened as the phase to ground fault tripped the ground fault toggle switch. Sada continued to engage the circuit breakers for the shuttle cars, scoop chargers, and pumps.

As Collins walked toward the power center to see if the power had been restored, he saw Sada closing the circuit breakers. Collins called out to Sada, telling him not to close the circuit breaker for the left continuous mining machine. Collins heard Sada say, "Oh, no." (Joint Stip. 18).

Hatfield checked McNeely for vital signs and called for help. He immediately started performing CPR. Randy Mahon, the right continuous mining machine operator, who was in the No. 4 entry, heard Hatfield calling for help and called out to Sada and Collins to go to the left continuous mining machine. Mahon traveled to the mine phone at the section dumping point and called outside to Neace. He told Neace that a person had been electrocuted and that an ambulance was needed. Sada, Collins, Vance and other members of the crew helped with first aid and the transportation of McNeely out of the mine.

The ambulance service was notified by Neace at approximately 1:20 p.m. The ambulance arrived at the mine site at 1:35 p.m., just before McNeely was brought to the surface. The ambulance departed the mine with McNeely at 2:08 p.m., arriving at Williamson Memorial Hospital at 2:40 p.m., where it was determined that McNeely had died.

There is a re-closer, also known as a closure switch or main circuit breaker, located on the surface that feeds electrical power throughout the mine property on the surface and underground. Circuit breakers are tripped (opened) as a consequence of under-voltage or loss of power. Circuit breakers are designed with intentional delays of as little as hundredths of a second to allow the circuit breaker closest to the fault to open before the main mine re-closer senses a loss in power and de-energizes the entire mine. (Tr. 677). When the re-closer opens, all circuit breakers in the mine trip as a safety precaution, so that when the re-closer is closed and power is restored to the mine, equipment does not automatically re-energize. (Tr. 681-82).

An MSHA accident investigation team arrived at the mine shortly after the accident. The investigation team included MSHA Inspector James R. Humphrey and MSHA Electrical Engineer Marcus Smith, both of whom testified at the hearing. The accident investigators found that a bit lug on the right side of the ripper drum damaged the cable, bursting the inner voltage insulation, allowing two power phases to contact each other. Although such an event would normally only cause a loss of power to the mining machine at the power center, in this case, the

resulting phase-to-phase short circuit nearly burned through the conductors and caused the main mine re-closer that supplies electricity underground and on the surface to de-energize, resulting in a loss of power to entire underground mine, the mine fan and the preparation plant. The left side continuous mining machine circuit breaker also opened as a result of the fault. The opening of the main mine re-closer caused all other mine section circuit breakers to open.

The investigators determined the widespread power failure occurred because the tolerance, or timing, between the two breakers was close enough for the fault to pass through the circuit breaker for the continuous miner opening the re-closer. (Tr. 678-79). In other words, the short circuit response time of the re-closer was improperly set. (Gov. Ex. 10, p. 7). The malfunction was corrected by resetting the timing for the re-closer.

As previously noted, Spartan is contesting two 104(a) citations, one 104(d)(1) citation, and one 104(d)(1) order in these proceedings. Namely, Citation No. 7224651, issued under 104(a) of the Mine Act, cites a violation of the mandatory safety standard in 30 C.F.R. § 75.606 for failure to protect trailing cables from damage from mobile equipment; Citation No. 7224650, issued under section 104(a) of the Mine Act, cites a violation of the mandatory safety standard in 30 C.F.R. § 75.511 for failing to lock out high-voltage cables prior to repair; Citation No. 7224652, issued under section 104(d)(1) of the Mine Act, cites a violation of the mandatory safety standard in 30 C.F.R. § 75.1725(a) for failing to remove unsafe equipment from service; and Order No. 7228963, issued under section 104(d)(1) of the Mine Act, cites a violation of the mandatory safety standard in 30 C.F.R. § 75.313(a)(3) for failing to immediately withdraw mine personnel from the working section to a position outby the loading point when mine fan ventilation was interrupted. The merits of the citations and order, as well as their appropriate civil penalties, are addressed below.

IV. Further Findings of Fact and Conclusions

Before addressing the merits of the contested citations, it is helpful to address the underlying issues of negligence and the penalty criteria that apply in these matters. The issue of duplicative citations will also be addressed because the lock out procedure is required for both removal from service and for repair.

a. Imputation of Negligence

As a threshold matter, the degree of negligence attributable to a mine operator is an essential element of a civil penalty proceeding. While there are several contributing causes of this accident, the proximate cause of the fatality is the failure to lock out the trailing cable prior to performing repairs. Spartan attempts to diminish its responsibility by asserting that McNeely was a certified electrician familiar with tag and lock out procedures who had participated in annual training that emphasized the importance of following such procedures. (*Spartan br.* at p.14).

Obviously, McNeely's failure to lock out was a grievous mistake. Sada told McNeely he would have to leave the mine in 15 minutes. McNeely attempted to repair the cable during this 15 minute period. McNeely continued to repair the cable even after he apparently realized that mine power had been restored. Perhaps McNeely, an experienced electrician, believed that the continuous miner would remain de-energized based on his conversations with Neace and Sada. In the final analysis, McNeely's explanation for his conduct cannot be ascertained. Lacking the benefit of McNeely's perspective, I am unable to conclude that McNeely's failure to follow fundamental lock out procedures rose to the level of employee misconduct. In other words, given the facts in this case, it is inappropriate to place blame primarily on the victim.

Nevertheless, the Secretary's regulation in 30 C.F.R. § 75.511 requires electrical equipment undergoing repair to be locked out only by "the persons who perform such work." Thus, the Secretary's mandatory safety standard clearly required McNeely to lock out the trailing cable. However, with respect to Spartan's negligence and culpability in these proceedings, the analysis does not stop there.

Operators are liable without regard to fault for violations of the Mine Act. *See e.g., Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). Thus, even in the event of serious employee misconduct, the Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. *See, eg. Allied Products*, 666 F.2d at 893-94. In this regard, in *Ideal Cement Co.*, 13 FMSHRC 1364, 1351 (Sept. 1991), the Commission noted that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct."

While a mine operator's fault, or lack thereof, is not determinative on the issue of a fact of occurrence of a violation, it is an important factor to be considered in assessing a civil penalty. *Asarco, Inc.*, 8 FMSHRC at 1636. Ordinarily, the conduct of rank-and-file miners is not imputable to the operator in determining the degree of negligence for penalty purposes. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). Rather, the operator's supervision, training, and disciplining of its miners is relevant. *Id.*; *Western Fuels-Utah, Inc.*, 10 FMSHRC at 261.

As Spartan's mine foreman, Sada was acting as Spartan's agent at the time of the accident. Thus, Spartan is liable for Sada's direct acts of negligence. For example, for degree of culpability purposes, Spartan can be properly charged with Sada's direct acts of negligence such as Sada's failure to order the withdrawal of personnel from the working section although he knew mine fan ventilation had been interrupted. Moreover, as discussed below, negligence

associated with the lock out failure can be directly attributable to Spartan as Sada concedes he knew the cathead had not been locked out when he closed the continuous miner's circuit breaker. His spontaneous utterance of "Oh, no" when Collins cautioned him not to close the circuit breaker is evidence of Sada's awareness that the trailing cable required repair.

Although McNeely was the person responsible for placing the padlock on the cathead, Hatfield apparently knew the trailing cable had not been tested for damage or otherwise locked out prior to repair. Notwithstanding the negligence that can be directly attributed to Spartan, the negligence of McNeely and Hatfield must also be imputed to Spartan as a consequence of Sada's lack of supervision and control of his subordinates. Spartan cannot escape the imputation of negligence of rank-and-file personnel by asserting that its foreman was unaware of the actions of his crew. *Id.* In this regard, Spartan's assertion: that Sada did not direct Hatfield and Collins to retrieve a scoop for the purpose of freeing the cable; that Sada did not direct Collins and Smith to use the scoop to bump the ripper head off of the cable;⁵ and that Sada did not know McNeely was repairing the cable; are aggravating rather than mitigating circumstances. Moreover, all of these activities were permitted to occur during a period when the loss of ventilation required the removal of everyone from the working section.

Finally, any claimed mitigation based on Spartan's assertion that Sada had not informed Neace, the mine superintendent, of the potential hazard caused by the trailing cable is unavailing. It is well settled that the principal (Spartan) is charged with the knowledge of its agent (Sada).

b. Civil Penalty Criteria

Section 110(i) of the Mine Act 30 U.S.C. § 820(i), sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

⁵ Despite observing the immediate loss of power when the cable was struck, Hatfield and Sada now allege that they did not think the trailing cable was damaged because the ripper head had barely touched the cable and the outer jacket "did not look bad." (Tr. 507-08). As discussed *infra*, it is difficult to imagine why Hatfield and Sada did not wait to tram the continuous miner off of the cable after power was restored if they believed the trailing cable was not damaged, instead of using the scoop to dislodge the cable.

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Spartan is a large mine operator and the imposition of the civil penalties in this matter will not impede Spartan's ongoing business operations. The history of violations and Spartan's abatement efforts are not a material factor in determining the appropriate penalty liability. As a general proposition, the material considerations concern gravity and negligence. The magnitude of gravity associated with subject violations is self evident. As discussed below, the magnitude of negligence revealed by the trial testimony and documentary evidence that is attributable to Spartan, either directly or through imputation, requires the imposition of civil penalties that are higher than those initially proposed by the Secretary.

c. 104(a) Citation No. 7224651 - Protection of Cable

_____ Citation No. 7224651 alleges a violation of the mandatory safety standard in section 75.606, 30 C.F.R. § 75.606. The citation states:

The 2/0 AWG trailing cable that provides 995 VAC power to the Joy 14CM15 left continuous mining machine, serial number 1408, was not protected to prevent damage by mobile equipment. When the mining machine, which was parked about 20 feet outby surveyor spad 3463, was trammed forward about 21 inches, the cutter head smashed the cable. This forced energized conductors from two phases to come into contact, creating a short circuit that caused a loss of electrical power to the entire mine. This violation is a contributing factor to the fatal accident which occurred on February 5, 2004, on the 001 MMU, 10th right section, at a location approximately 20 feet outby surveyor spad 3463 in the number 3 entry.

(Gov. Ex. 4). The citation was designated as significant and substantial (S&S) and it was alleged that it was reasonably likely that the hazard caused by the cited condition will result in a fatality. The gravity of the violation was characterized as severe in that a fatality had occurred. The degree of negligence attributed to Spartan by the Secretary was moderate. The Secretary proposed a civil penalty of \$32,500.00 for Citation No. 7224651.

Section 75.606 of the Secretary's regulations provides that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment." Section 75.606 implements a miner safety statute. Thus, the goal of section 75.606 is to protect miners not cables. This mandatory standard furthers safety by requiring mine operators to protect miners from the hazard posed by damaged cables.

Spartan argues that the facts do not support a violation of section 75.606 because Spartan has a policy to prevent cables from damage, as well as a personnel policy whereby persons causing damage to a trailing cable will be disciplined. (*Spartan br.* at p.9). Spartan summarized its policy in its post-hearing brief:

Ruby Energy's policy is that, if a cable has been run over and it is determined to be unsafe, the electrician would remove the cathead, effectively removing it from service, and the electrician checks it to determine if it is grounded. (Tr. 657). If the cable is not damaged, the equipment may be placed back in service. (Tr. 658).

Id.

With respect to the fact of occurrence of the violation, as previously noted, the Mine Act is a strict liability statute. Substance governs over form. Thus, a policy of protecting miners from the hazard associated with damaged trailing cables does not insulate an operator from liability in the event of cable damage. The fact that the trailing cable was run over and damaged by the continuous miner is beyond dispute. Accordingly, the facts support a violation of section 75.606.

The degree of negligence that should be attributed to Spartan is a more complex issue. The evidence reflects Spartan tried to keep trailing cables out of the path of mobile equipment by keeping the cables against the ribs. In this instance, the cable was damaged because, unbeknownst to Hatfield who was tramming the continuous miner remotely, a portion of the cable had become dislodged from the rib and looped in front of the continuous miner. Thus, the act of running over the cable while tramming the continuous miner evidences, as the Secretary suggests, no more than a moderate degree of negligence. However, analysis of the degree of negligence issue does not stop here.

As Spartan recognizes, the section 75.606 obligation placed on mine operators to prevent damage to cables from mobile equipment includes the obligation to ensure that cables struck by mobile equipment are not damaged. In other words, operators cannot satisfy their responsibility of protecting cables by turning a blind eye after cables are struck. That is why Spartan admits it has a policy of removing a cathead from service and checking for damage if a cable is run over. However, Spartan failed to follow its own policy. The question is the degree of negligence that should be attributed to Spartan for its failure to follow its basic safety policy.

This brings us to the fundamental issue that is present throughout these proceedings. Namely, whether there is substantial evidence that Sada, as Spartan's agent, knew or should have known that there was at least a reasonable likelihood that the trailing cable was damaged. The Commission has held that "the substantial evidence standard may be met by reasonable

inferences drawn from indirect evidence.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Inferences based on indirect evidence are “inherently reasonable” if there is a “logical and rational connection between the evidentiary facts and the ultimate fact to be inferred.” *Id.*

Sada’s assertion that he did not believe the cable was damaged is not supported by the facts. Sada was standing in close proximity to the continuous miner when he observed the instantaneous loss of power when the destructive and invasive ripper head of a multi-ton piece of equipment came to rest on top of the trailing cable. (Tr. 550, 557, 561). Both Sada and Hatfield concede they initially believed the loss of power was caused by the damaged trailing cable. (Tr. 511-13, 554, 562, 563-64). It is difficult to reconcile the purported subsequent belief of Hatfield and Sada that the trailing cable was not damaged, with the decision to bump the ripper head with the scoop to dislodge the cable, instead of waiting to tram the continuous miner off of the cable after power was restored. Rather, it appears that the use of the scoop was motivated by a desire to access the damaged portion of the cable so that it could be repaired. Sada and Hatfield’s exculpatory assertions to the contrary are entitled to little weight.

Finally, Spartan has not explained the discrepancy between McNeely’s immediate realization that the cable was damaged with Sada’s purported belief that the cable remained intact. In the final analysis, a person familiar with electrical equipment used in the mining industry should have appreciated the significance of the loss of power upon contact with the trailing cable. *Alabama By-Products Corp.*, 4 FMSHRC 2128 (Dec. 1982). The assertion that Sada did not have a substantial basis for believing the cable was damaged simply is not credible.⁶

However, even if Sada believed the cable was undamaged despite the continuous miner’s loss of power, Sada still knew the trailing cable had been run over by the continuous miner. Under such circumstances, Sada’s failure to ensure that the cathead was disconnected from the power station and tested to determine if it had been damaged constituted a reckless disregard of an electrocution hazard. As its agent, Sada’s negligence is directly attributable to Spartan.

Resolution of the questions of significant and substantial and gravity are self-evident. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *Nat’l. Gypsum Co.*, 3 FMSHRC at 825. The Commission has explained that an S&S finding requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission has also emphasized it is the

⁶ Obviously, Sada did not intend to harm McNeely. This was a tragic accident. One can only speculate why the trailing cable circuit was closed. It may have been closed by mistake during a moment of inattention while Sada was closing other section equipment breakers at the power station after the restoration of power.

contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that, as part of any “S&S” finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

The hazard contributed to by failing to ensure that distribution cables remain undamaged is illustrated by this accident. When damaged electrical cables are ignored, they are not de-energized or otherwise isolated to prevent hazardous contact. In short, they present the hazard of electrocution. Accordingly, the violation of section 75.606 is properly designated as S&S. Obviously, the gravity of the violation is extreme as evidenced by the fatality in this case.

As noted, Spartan is a large mine operator. It has neither been contended nor shown that the imposition of the civil penalties in this case will pose a financial hardship that will interfere with Spartan’s continuing mining operations. Given the S&S nature of the violation, the extreme gravity, and the reckless disregard that gave rise to its occurrence, **a civil penalty of \$50,000.00 shall be imposed for Citation No. 7224651.**

d. The Duplicate Citation Issue

Spartan has stipulated that the trailing cable was not locked out. Thus, it is undisputed that the continuous miner was neither removed from service nor locked out prior to repair. However, Spartan contends that Citation No. 7224650 citing a violation of 30 C.F.R. § 75.511 for failing to lock out high-voltage cables prior to repair, and Citation No. 7224652 citing a violation of 30 C.F.R. § 75.1725(a) for failing to remove unsafe equipment from service, are duplicate citations. In support of this argument, Spartan avers that both the repair of electric equipment and its removal from service require the equipment to be locked and tagged out. Thus, Spartan argues that these citations are duplicative because they do not impose separate and distinct legal duties on the mine operator.

It is well settled, as Spartan suggests, that citations are duplicative if the cited standards do not impose separate and distinct duties upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993). In determining if separate and distinct duties are required, the Commission looks to whether the cited mandatory standards require the same acts or omissions. *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006).

Here, Spartan was obligated to choose between distinct alternative duties. It could have immediately locked out the continuous miner for the purpose of initiating repairs, or, it could have postponed repairing this unsafe equipment by removing it from service by means of locking and tagging it out. Spartan chose to do neither. Its inaction constituted separate and distinct acts of omission. Consequently, Citation Nos. 7224650 and 7224652 are not duplicative. A discussion of the merits of each citation follows.

e. 104(a) Citation No. 7224650 - Lock Out Procedure

_____ Citation No. 7224650 alleges a violation of the mandatory safety standard in section 75.511, 30 C.F.R. § 75.511. The citation states:

The section electrician and the continuous mining machine operator performed electrical work on a distribution circuit while the disconnecting device was not locked out nor suitably tagged. They were splicing and repairing a damaged area in the 2/0 AWG trailing cable which provided 995 VAC power to the Joy 14CM15 left continuous mining machine, serial number 1408, while the cable plug was connected to the plug receptacle. While performing this work, the circuit breaker was closed, causing the section electrician to be electrocuted. This violation is a contributing factor to this fatal accident which occurred on February 5, 2004, on the MMU, 10th right section, at a location approximately 20 feet outby surveyor spad 3463 in the number 3 entry.

(Gov. Ex. 6). The citation was designated as significant and substantial (S&S) and it was noted that the hazard caused by the cited condition resulted in a fatality. Thus, the gravity of the violation was characterized as severe in that a fatality occurred. The degree of negligence attributable to Spartan by the Secretary was moderate. The Secretary proposed a civil penalty of \$32,500.00 for Citation No. 7224650.

Section 75.511 of the Secretary's regulations provides, in pertinent part:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work

Spartan has stipulated that the trailing cable's cathead was connected to the power center and not locked out at the time McNeely was performing repairs. Consequently, the facts demonstrate the fact of occurrence of a section 75.511 violation. With respect to negligence, it is true that the terms of section 75.511 required McNeely, as the certified electrician performing repairs, to lock out the cathead at the power source. McNeely's failure to do so was either a

careless act evidencing extremely high negligence, or a conscious omission based on his belief that power would remain off. In either event, McNeely's conduct was highly negligent.

The question is whether the negligence associated with the failure to utilize basic lock out procedures can be either directly attributed to, or, imputed to Spartan. McNeely was the only electrician at the section. McNeely immediately realized the cable was damaged and in need of repair. As previously discussed, Sada knew the continuous miner had lost power the instant the ripper head contacted the trailing cable. Sada also admits he knew the trailing cable had not been locked out at the power center even though it had been run over by mobile equipment. (Tr. 602; Gov. Ex. 3K). As previously discussed, Sada had reason to know that the cable was damaged. Sada's failure to respond to the potential hazard posed by a damaged cable constitutes a conscious disregard that is directly attributable to Spartan. As noted, even Sada's mistaken belief that the cable was undamaged is not a mitigating circumstance because it was brought about by Spartan's failure to follow its own safety procedures that would have confirmed the defective condition of the cable.

With respect to imputation, as previously noted, the negligence of a rank-and-file miner can be imputed to a mine operator if the miner is not properly supervised. As a threshold matter, proper supervision required withdrawal from the working section as a consequence of the interruption of mine ventilation. Thus, McNeely, Hatfield and Collins should have been ordered to withdraw from the working section rather than continue to work on the cable in an environment devoid of mine ventilation. Instead, Sada permitted McNeely, the only electrician at the section, to remain at the site of the damaged cable without ensuring that proper procedures were followed. Sada's lack of supervision as evidenced by his asserted lack of knowledge of the activities of the members of his crew, including his electrician, when ventilation was interrupted and a trailing cable had been struck, warrants the imputation of an extremely high degree of negligence.

It is apparent that Citation No. 7224650 was properly designated as S&S in that it is reasonably likely that the failure to lock out a damaged distribution cable prior to performing repairs will result in a fatal electrocution accident. The contribution of the violation to a fatality reflects the extreme gravity of the cited violation. Given the S&S nature of the violation, the extreme gravity, and the reckless disregard that enabled a splicing repair to occur on a damaged cable that Spartan knew was not locked, **a civil penalty of \$50,000.00 shall be imposed for Citation No. 7224650.**

f. 104(d) (1) Citation No. 7224652 - Removal From Service

_____ Citation No. 7224652 alleges a violation of the mandatory safety standard in section 75.1725(a), 30 C.F.R. § 75.1725(a). The citation states:

The operator, after witnessing the creation of an unsafe condition on a piece of mobile equipment, failed to cause the equipment to be immediately removed from service. When the 995 VAC Joy 14CM15 left continuous mining machine (serial

number 1408) trammed onto its 2/0 AWG trailing cable, the section foreman was present and knew that the cable was damaged. He also witnessed the mining machine losing power when this occurred. Afterwards, the section foreman closed the circuit breaker, thereby energizing the trailing cable, without first:
(A) causing the cable plug to be immediately disconnected from its receptacle and
(B) instructing the section electrician to do the necessary troubleshooting, testing, and repair work on the cable to restore it to a safe condition. The section electrician, who was splicing and repairing the cable, was electrocuted.

(Gov. Ex. 5). The citation was designated as significant and substantial (S&S) and it was noted that the hazard caused by the cited condition resulted in a fatality. Thus, the gravity of the violation was characterized as severe in that a fatality occurred. The degree of negligence attributable to Spartan was high and the Secretary attributed the cited violation to an unwarrantable failure. The Secretary proposes a civil penalty of \$56,000.00 for Citation No. 7224652.

Section 75.1725(a) of the Secretary's regulations provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The thrust of the alleged violative act is Spartan's failure to immediately remove unsafe equipment from service. The Commission has held that a mine operator should be charged with knowing that equipment was unsafe if a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. *Alabama By-Products, supra*, 4 FMSHRC 2129. Despite Neace and Hainer's description of a standard industry practice and company policy of removing an electrical cable from service that has likely been damaged by mobile equipment for testing and repair, Spartan failed to do so. It is obvious that the fact of occurrence of this cited violation is demonstrated by the circumstances in this case.

With respect to negligence, Spartan has been charged with an unwarrantable failure under section 104(d) of the Mine Act, 30 U.S.C. § 814(d). The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and encompasses conduct characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*").

Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the violation is obvious or possess a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consol*, 22 FMSHRC at 353.

Sada knew the cable was struck by the ripper head. Sada also knew that power was lost the moment the trailing cable was struck. Just as a light switch opens a circuit and interrupts power to a light fixture, Sada knew or should have known that cable damage is manifest by an interruption in power to the continuous miner. Spartan concedes that a damaged electrical cable constitutes an extremely hazardous condition. Spartan's failure under these circumstances to immediately remove the continuous miner from service by ensuring that the damaged trailing cable remained locked out and de-energized constituted a grievous departure from industry safety standards. There are no facts that mitigate these aggravating circumstances. In short, Spartan's conduct was unwarrantable.

It is apparent that Citation No. 7224652 was properly designated as S&S in that the failure to lock and tag out a damaged distribution cable was the proximate cause of a fatal electrocution accident. The contribution of the violation to the fatality reflects the extreme gravity of the cited violation. Given the S&S nature of the violation, the extreme gravity, and the unwarrantable conduct that resulted in the violation, **a civil penalty of \$60,000.00 shall be imposed for Citation No. 7224652.**

g. 104(d) (1) Order No. 7228963 - Withdrawal From Working Section

Order No. 7228963 alleges a violation of the mandatory safety standard in section 75.313(a)(3), 30 C.F.R § 75.313(a)(3). The citation states:

During an unplanned main mine fan stoppage the operator did not withdraw everyone from the working section. Air quality bottle samples taken [sic] last quarterly inspection results reveal 4320 CFM of methane is being liberated every 24 hours.

The trailing cable supplying power to the Joy 14CM1015 continuous mining machine serial number 1408 was damaged when the ripper head came in contact with the trailing cable, mashing the trailing cable between a bit lug and the mine floor. This condition caused the mine power to be deenergized at the closure switch which supplies electrical power to the entire mine property, which includes the preparation plant, mine office facilities, underground mine power and the underground mine ventilation fan.

The section foreman allowed the section electrician and several co-workers to perform electrical work on the trailing cable which is located 3 crosscuts inby the section dump point in the #3 entry, 20' outby survey station 2462, which is located one crosscut outby the pillar line during the power outage to the mine ventilation fan. The

electrical power [was] restored [at] approximately 1:15 p.m. to the underground mine and mine ventilation fan. The electrical circuit breaker that supplies power to the trailing cable is energized which results in an electrical fatal accident of the section electrician, who was allowed to work on this damaged trailing cable during the fan outage.

This violation was discovered during the investigation of the fatal electrical accident that occurred on February 5, 2004, and it has just been determined that this is a non-contributing violation.

(Gov. Ex. 9). The citation was designated as non-significant and substantial (non-S&S) because MSHA concluded that the violation did not directly contribute to McNeely's death. The non-S&S designation was also based on the fact that the Ruby Energy Mine did not liberate large quantities of methane. It was noted that eight miners were affected by the failure to withdraw from the working section. The degree of negligence attributable to Spartan was high and the cited violation was attributed to an unwarrantable failure. The Secretary proposes a civil penalty of \$3,700.00 for Order No. 7228963.

Section 75.313(a)(3) of the Secretary's regulations requires, in pertinent part, that all miners must be withdrawn from the working section if a mine fan stops and there is no adequate back-up fan system. Section 75.313(c)(1) requires everyone to be withdrawn from the mine to the surface if mine ventilation is not restored within 15 minutes. In this case, the parties agree that the interruption of mine fan ventilation lasted 14 minutes. Consequently, section 75.313 required the miners to retreat from the working section, although they were not required to evacuate from the underground mine.

The fact of occurrence of the cited violation is readily apparent. There was a 14 minute interruption of mine fan ventilation. Although Sada told his crew that they would have to return to the surface if ventilation was not restored in 15 minutes, Sada admits that he did not order his crew to retreat from the working section at any time during the 14 minute mine fan stoppage. (Tr. 567-70).

With regard to the issue of S&S, it is difficult to understand why the Secretary would characterize this violation as one that could not significantly and substantially contribute to the cause and effect of a mine safety hazard that is reasonably likely to result in a significant injury. As demonstrated by the provisions of the cited mandatory standard, loss of mine ventilation is a very serious matter. Methane is not diluted and swept from the working faces. Consequently, any ignition source poses an explosive hazard. As evidenced in this case, the loss of ventilation can cause a chaotic situation that breeds poor judgement and a lack of due diligence if miners are not removed from the working section. If McNeely had been withdrawn from the working section, instead of being allowed to repair an electrical cable while mine fan power was lost, he would not have been electrocuted. Thus, the Secretary's conclusion that Spartan's failure to withdraw all miners from the working section did not contribute to the fatality is surprising.

However, the Commission's role is adjudication rather than enforcement. The Commission does not have the authority to issue or modify citations. Thus, the Commission has concluded that its administrative law judges are not authorized to modify the Secretary's non-S&S designations on their own initiative. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996). Consequently, I am constrained by the Secretary's non-S&S designation.

Turning to the issue of gravity, the Commission has recognized that the focus on the seriousness of a violation is on the effect of the hazard if it occurs rather than the likelihood of injury. *Consolidation Coal Company*, 18 FMSHRC 1541, 1550 (Sept. 1996). Permitting mine operations to continue during a hazardous period caused by an interruption of mine ventilation exposes miners to serious or fatal injuries. As previously noted, it enables miners to work under abnormal conditions rather than waiting for conditions to stabilize before returning to normal mining operations. In this case eight miners were affected and a fatality occurred. Consequently, despite its non-S&S designation, the failure to withdraw from the working section was an extremely serious violation.

Turning to the issue of negligence, Sada knew the mine fan had stopped. Yet, instead of ordering miners from the working section, Sada stood by while Hatfield initially tried to free the cable, and, subsequently, while Hatfield and Collins attempted to dislodge the ripper head with the scoop. Moreover, at a minimum, Sada knew McNeely remained in the vicinity of the trailing cable that was likely damaged. Although Sada advised his crew that they would have to evacuate the mine if fan power was not restored within 15 minutes, his failure to withdraw personnel from the working section was a reckless disregard of proper safety procedures. Consequently, the cited violation was correctly attributable to Spartan's unwarrantable failure.

The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000). Thus, although the violation in Order No. 7228963 has been designated as non-S&S, greater weight must be accorded to the material facts that reflect that the cited condition affects the entire section's personnel, that is indicative of extreme gravity, and that it is attributable to unjustifiable and inexcusable conduct. In the final analysis, the Secretary's non-S&S designation cannot be allowed to unduly diminish the effects of extreme gravity and unwarrantable conduct that warrant a higher civil penalty.

Ensuring the rapid and safe withdrawal of miners faced with hazardous conditions is fundamental to mine safety. A conscious failure to withdraw miners immediately as a result of an interruption of mine fan ventilation warrants a significant civil penalty. Likewise the grave nature of the violation as well as the fatality that followed justify a substantial penalty. Although the Secretary has designated the violation as non-S&S, the failure to abide by the cited mandatory safety standard was not an insignificant violation. Accordingly, **a civil penalty of \$30,000.00 shall be assessed for Order No. 7228963.**

h. Approval of Settlement

At the hearing the parties presented a settlement agreement concerning 104(a) Citation No. 7224654 and 104(d)(1) Order No. 7228964. The parties settlement agreement was approved on the record. (Tr. 20-23). This citation and order are subjects of Docket No. WEVA 2005-53. The settlement terms follow.

The Secretary initially proposed a civil penalty of \$60.00 for 104(a) Citation No. 7224654. The citation, designated by the Secretary as non-S&S, cited a violation of the mandatory safety standard in section 75.310(b)(1) that requires a mine fan power circuit to operate independent of all other mine power circuits. The condition was attributed to a moderate degree of negligence. It was abated after the mine fan was separated from all other mine circuits. The parties have agreed to a reduced civil penalty of \$50.00 in satisfaction of Citation No. 7224654.

The Secretary initially proposed a civil penalty of \$3,700.00 for 104(d)(1) Order No. 7228964. The order, designated by the Secretary as non-S&S, cited a violation of the mandatory safety standard in section 75.3113(b) that specifies, if mine fan ventilation is restored within 15 minutes, certified persons must examine for methane in working places before work is resumed and before equipment is energized or restarted. The condition was attributed to an unwarrantable failure. The parties have agreed to a reduced civil penalty of \$2,800.00 in satisfaction of Order No. 7228964.

i. Summary of Liability

Thus, the total settlement amount is \$2,850. 104(d)(1) Order No. 7228963, that was assessed a civil penalty of \$30,000.00 in this proceeding, is the remaining order in the civil penalty proceeding in Docket No. WEVA 2005-53. Spartan's total civil liability for this docketed proceeding is \$32,850.00.

The total liability for 104(a) Citation No. 7224651, 104(a) Citation No.7224650 and 104(d)(1) Citation No. 7224652 that are the subjects of the civil penalty proceeding in Docket No. WEVA 2005-34 is \$160,000. Thus, the total civil penalty for the six violative conditions in issue is \$192,850.00.

ORDER

ACCORDINGLY, the parties' settlement motion **IS GRANTED**. Pursuant to the parties' agreement, Spartan Mining Company, Inc., **IS ORDERED TO PAY** \$2,850.00 in satisfaction of 104(a) Citation No. 7224654 and 104(d) (1) Order No. 7228964.

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation Nos. 7224651 and 7224650, 104(d)(1) Citation No. 7224652, and 104(d)(1) Order No. 7228963 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Spartan Mining Company, Inc., shall pay a total civil penalty of \$190,000.00 in satisfaction 104(a) Citation Nos. 7224651 and 7224650, 104(d)(1) Citation No. 7224652, and 104(d)(1) Order No. 7228963 that were adjudicated in these proceedings.

IT IS FURTHER ORDERED that Spartan Mining Company, Inc., **shall pay a total civil penalty of \$192,850.00** in satisfaction of the six citations and orders that are the subject of these contest and civil penalty proceedings. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned contest and civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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