FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 16, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-29
Petitioner	:	A.C. No. 46-08909-70032 A
	:	
v.	:	
	:	
KENNETH D. BOWLES ,employed by	:	
NEW RIVER MINING COMPANY,	:	
Respondent	:	Mine No. 1

DECISION

Appearances: Karen M. Barefield, Esq., U.S. Department of Labor, Arlington, VA, on behalf of the Petitioner
Kenneth D. Bowles, Princeton, WV, *pro se*

Before: Judge Barbour

This case is before me on a petition for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") against Kenneth D. Bowles ('Bowles"), an employee of New River Mining Company ("New River" or "the company") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("the Act") (30 U.S.C. §§ 815, 820). The Secretary alleges Bowles, as an agent of New River, knowingly violated one of the Secretary's safety standards for underground coal mines. She also alleges the violation was a significant and substantial contribution to mine safety hazards ("S&S") and was caused by Bowles's high degree of negligence. The Secretary seeks a civil penalty of $1,500. The alleged violation is set forth in an order issued pursuant to 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)). Bowles denies the Secretary's allegations. The case was tried in Bluefield, West Virginia on August 14, 2007.

The order was issued for the company's alleged failure to comply with its roof control plan ("the Plan") at the company's Mine No. 1 ("the mine"), a bituminous underground coal mine located in Greenbrier County, West Virginia. The company was cited for the violation after slickensides were discovered in the 001-0 Mechanical Mining Unit ("MMU") of the mine without at least two cable bolts per row installed between rows of the section's primary roof

support.[1] Tr.21. The conditions were found during an inspection conducted by MSHA inspectors on August 6, 2004.

THE INSPECTION

Harold Hayhurst ("Hayhurst") is employed by MSHA as an inspector. Hayhurst's job duties include the inspection of coal mines, accident investigations, and the review of roof control plans. Tr. 18-19. Prior to his employment with MSHA, Hayhurst accumulated 21 years of experience in the mining industry as an equipment operator, section foreman, mine foreman, and mine superintendent. Tr. 18. Hayhurst has completed the roof control specialist and accident investigation training provided by MSHA. Tr. 19.

On the evening of August 6, 2004, Hayhurst, along with 3 other MSHA inspectors, arrived at the mine. The inspectors proceeded underground and traveled to the mine's active section. There, Hayhurst observed slickensides in the roof. Tr. 21. Hayhurst described the slickensides as "glassy," "highly polished," "easy to see," (Tr. 24) and "real slippery." Tr. 30. Hayhurst also testified "there hadn't been any cable bolts installed [in the roof] between the rows of bolts as required by the [P]lan." Tr. 21. In Hayhurst's opinion, the presence of the slickensides and the lack of cable bolts was obvious.

Another MSHA inspector took several photographs of the conditions. One of the photographs showed a gray shelf of slickenside and a sandstone slickenside. Tr. 24; Gov't Exh. 4. Another photograph showed a "big drag fold in the roof" that contained slickensides. An additional photograph showed portions of the roof that had fallen and lay next to one of the entry's ribs. Tr. 24; Gov't Exh. 5.

The approved roof control plan, stated "[w]here slickensided formations are present, the primary roof support shall be supplemented with a minimum of 2 cable bolts per row installed between the rows of primary support. These cable bolts shall be a minimum of 8 feet in length." Gov't Exh. 7 at 3. As a result of the slickensides and the lack of cable bolts, Hayhurst concluded the roof control plan had been violated and he issued an order of withdrawal to New River charging the company with a violation of section 75.220(a)(1).[2]

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[1] "Slickensides" are defined as "striations, grooves, and polish on joints and fault surfaces." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 513 (2d ed. 1997). They are frequently indicative of unstable and weak roof. *See* Tr. 27-28.

[2] 30 C.F.R. §75.220(a)(1) requires each operator of an underground coal mine to:

> 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. Additional measures shall be taken to protect persons if unusual hazards are encountered.

Hayhurst testified at the time of the inspection Bowles was the mine superintendent. Tr. 40. Hayhurst discussed the order with Bowles. Tr. 47. He questioned Bowles as to why the cable bolts had not been installed. According to Hayhurst, Bowles replied he didn't feel they were needed. Tr. 48. Hayhurst believed that Bowles, as the mine superintendent, was responsible for ensuring the roof control plan was followed. Tr. 48.

THE ORDER, THE ALLEGED VIOLATIONS, AND THE PROCEEDINGS AGAINST NEW RIVER AND AGAINST KENNETH BOWLES

The subject order, Order No. 7227134, states:

> The approved roof control plan was not being complied with on the 001-0 MMU. The mine roof, on the 001-0 MMU contains high angled slips and slickensided formations in the numbers 1, 2, 3, 4, 5, 6, and 7 entries, and adjoining crosscuts, and the primary roof support has not been supplemented with a minimum of 2 cable bolts per row at any of these locations. The approved plan states that where slickensided formations are present the primary roof support will be supplemented with at least 2 cable bolts per row installed between the rows of primary support. These conditions were extensive and obvious to anybody traveling on the section including foremen and examiners. The section started mining in this area of the mine on 7/29/2004. This citation is an unwarrantable failure to comply with the approved roof control plan.

Gov't Exh. 8.

Following issuance of the order, the Secretary proposed the company be assessed a civil penalty of $3,700 for the alleged violation of section 75.220(a)(1). In addition to the allegation of the violation of section 75.220(a)(1), the Secretary's petition proposed assessments for several other alleged violations. The petition was filed with the Commission as Docket No. WEVA 2005-51. When New River failed to answer the petition, a default order was issued and the company was assessed the proposed penalties. *See* Amended Order of Default (November 29, 2005).

Subsequently, the Secretary brought the subject individual civil penalty case against Kenneth Bowles asserting he, as the agent of New River, knowingly violation the roof control plan as stated in the order.

Section 110(c) states:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section

> or section 105(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

THE ISSUES

The principal issues are whether the alleged violation occurred, whether Bowles was an agent of the operator as defined by the Act, whether Bowles knowingly authorized, ordered, or carried out the violation, and if so, the amount of the civil penalty that must be assessed, taking into consideration the applicable civil penalty criteria as set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

THE VIOLATION

To establish a violation of section 75.220(a)(1))the Secretary must prove the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources*, *Inc.*, 9 FMSHRC 903, 907 (May 1987). Additionally, the Secretary must prove the cited condition or practice violated the provision. *Id.* "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998)(*citing Jim Walter Resources, Inc.* 9 FMSHRC at 907). "The ultimate goal of the [plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord.... '[A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.'" *Id.* (*quoting Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981)).

Clearly, the Secretary met her burden as to the first part of the test. The plan states that when slickenside formations are present, the primary roof support shall be supplemented with cable bolts. The plan was in effect on the date of the inspection and the citation alleged a violation of the stated provision of the plan. The second part of the test also was met by the Secretary through testimony and photographs depicting the slickenside formations that were present and the lack of supplemental roof bolts to support the roof in the cited area. Bowles may have believed, as he told Hayhurst, that supplemental bolts were unnecessary (*see, e.g.* Tr. 48, 60, 63), but the plan called for their installation, and the plan had been approved. Therefore, I find the violation existed as charged.

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of the violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The first factor was satisfied as I have found the Secretary established a violation of section 75.220(a)(1). The other factors likewise were satisfied. Failing to comply with the roof control plan posed a discrete safety hazard by subjecting miners to the danger of falling rock due to unstable and inadequately supported roof, a hazard which could result in serious injuries to miners working in the 001-0 MMU. The record supports a finding that there was a reasonable likelihood of injury due to the failure to comply with the roof control plan. Slickensides frequently indicate weak and unstable roof making it reasonably likely that debris could fall and injure a miner. As Inspector Hayhurst persuasively testified, the cited roof was brittle and pieces of it were prone to fall between the permanent roof bolts. Moreover, the height of roof (six feet in most areas) meant miners were likely to be cut or even fatally injured by the falling debris. Tr. 30. Therefore, I conclude that there was a reasonable likelihood that failure to comply with the approved roof control plan could result in injury. In addition, the violation was serious as the effect could seriously injure or possibly kill a miner.

SECTION 110(c) LIABILITY

As previously noted, under Section 110(c) of the Act, "whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty." *Maple Creek Mining, Inc*., 27 FMSHRC 555, 566-67 (August 2005); 30 U.S.C. § 820(c)). Pursuant to Section 110(c), the judge must determine whether the corporate agent knew or had reason to know of a violative condition. *Id.* at 567. In order for a violation to be knowing, it must occur when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Id.*; *quoting Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981).

Bowles testified that he was aware of the requirements of the approved roof control plan. Tr. 103. Bowles had discussions with some of the roof bolters and other miners regarding the roof control plan and Bowles told them to "[d]o it like you've always done it." Tr. 109. Bowles stated that when the top was taken down and it was solid, slickenside was not present and no cable bolts were required. *Id*.; *see also* Tr. 116-119. However, Inspector Hayhurst persuasively testified and presented photographic evidence that slickensides were present, and that they had existed for approximately one week without cable bolts. Tr. 48; Gov't. Exh. 4-5. Therefore, I find that Bowles knowingly violated the standard as he was aware of the requirements of the roof control plan, had reason to know of slickenside conditions, and did not ensure cable bolts were installed.

An agent under Section 3(e) of the Act is defined as "any person charged with the responsibility for the operation of all or a part of any coal or other mine, or the supervision of the miners of a coal or other mine." Bowles testified on August 6, 2004, he was acting as the mine manager. Tr. 100. Bowles also stated that should miners need to be disciplined the mine or section foreman would come to him to determine the proper company procedure. *Id.* Moreover, Bowles said "yes" when asked if he was "the voice of the owner on the property." Tr. 101. Additionally, Bowles had the authority to fire a mine foreman after discussion with the mine owner. Tr. 102. Bowles played a major supervisory role, if not the major supervisory role, at the mine and was therefore an agent of the operator at the time of the violation.

The Commission has held that a "violation under section 110(c) involves aggravated conduct, not ordinary negligence." *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1245 (August 1992). Bowles' actions constitute more than ordinary negligence as he knowingly disregarded the approved Plan and made his own determination as to what should be done without regard to miners' safety. Therefore, I conclude Bowles was liable under section 110(c), for the violation of section 75.220(a)(1) cited in Order No. 7227134.

CIVIL PENALTY CRITERIA

This was a serious violation, and Bowles exhibited more than ordinary negligence in failing to comply with the roof control plan because he had reason to know of the slickensides yet failed to ensure compliance with the Plan. In addition, Bowles had a history of previous

knowing violations in that he was previously cited for a knowing violation while employed by another company. *See* Gov't Exh. 10; Tr. 49-51. Finally, there is no evidence in the record to suggest paying the penalty proposed by the Secretary will prevent Bowles from meeting his day-to-day financial obligations. For these reasons, I conclude the penalty of $1,500.00 proposed by the Secretary is appropriate.

ORDER

Kenneth Bowles **SHALL** pay a civil penalty of $1,500 within 40 days of the date of this decision, and upon payment of the penalty this proceeding **IS DISMISSED**.[3]

David F. Barbour
Administrative Law Judge
(202) 434-9980

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/sf

[3] If payment within the time ordered proves onerous, Bowles may wish to try to arrange a structured payment plan with the Secretary.