FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-111
Petitioner	:	A. C. No. 46-01318-04348
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Consolidation Coal Company ("Consol"), pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

A hearing was held in Morgantown, West Virginia.[1] The post-hearing briefs are of record. For the reasons set forth below, the order contested in the instant proceeding, as modified to a 104(a) citation, shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding and this contest

[1]Due to the court reporter's loss of portions of the testimony of Inspector Thomas and Jesse Skinner, the parties stipulated to a synopsis of Skinner's testimony, which was incorporated into the record on March 9, 1999, as Transcript Attachment A.

proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. Consolidation Coal Company is the owner and operator of the Robinson Run No. 95 Mine.

3. Operations at Robinson Run No. 95 Mine are subject to the jurisdiction of the Act.

4. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. section 820(a) will not affect the ability of the Consolidation Coal Company to remain in business.

5. A true copy of Order No. 4888994 was served on Consolidation Coal Company or its agent, as required by the Act.

6. Order No. 4888994 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

7. MSHA Inspector Charles J. Thomas was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 4888994.

8. Order No. 4888994 has not been the subject of previous review proceedings.

9. The alleged violative conditions were abated by the operator in good faith.

10. The conversation in which Inspector Charles Thomas instructed foreman Kevin Carter to count the posts on the 12-D section took place during the day shift of January 15, 1998.

II. Factual Background

On the day shift of January 15, 1998, while conducting a Triple A inspection of Robinson Run No. 95, MSHA Inspector Charles Thomas inspected the 12-D section. Mining on 12-D had been ongoing for about four months, since October 1997 (Tr. 36, 56). While checking safety devices on the section, Inspector Thomas noticed the absence of a centrally located supply of supplementary roof support, which occasioned a conversation between the inspector and the day shift foreman, Kevin Carter.[2] The essence of the conversation established that posts were scattered along the supply track, and that 20 should be made readily available on the section, in

[2]It is customary at Robinson Run No. 95 for working sections to maintain supplementary roof support supplies on a sled or tool car at the power center and track entry (Tr. 16-17, 104, Attachment A).

case of an emergency (Tr. 14, 96, 113-14). Carter assured Inspector Thomas that he would "take care of it," and the inspector did not count the posts along the track that day (Tr. 14-15, 71, 96). When Inspector Thomas left the mine, Dave McCullough, the safety representative who had accompanied him during the inspection, was aware of the inspector's concern, and the inspector alerted safety director Robert Church that attention to supplementary roof support was required on the 12-D section (Tr. 15).

Sometime toward the end of his shift on January 15th , Carter counted 11 posts and cap pieces on the section along the supply track, had the utility man, Charlie Davis, gather them together alongside the supply car at the end of the track, and called general mine foreman Tom Harrison for a delivery of additional posts and related roof support materials (Tr. 96-97, 100-01, 120, 131-32, 136-37). Around 3:30 or 4:00 that afternoon, Harrison ordered the posts from the supply yard at the Robinson Run portal, some ten miles from the Oakdale portal where the 12-D section is located, anticipating that the supply crew would load and deliver the additional materials on the next day, during their working shift (Tr. 132-36).

Subsequently, Inspector Thomas, continuing his Triple A inspection of Robinson Run No. 95 during the midnight shift on January 17th, found outby foreman Frank Slovinsky substituting for the foreman regularly assigned to 12-D (Tr. 15, 28). When Slovinsky was unable to identify the location of the emergency posts for Inspector Thomas, Slovinsky and the inspector searched the section's tool car, down the belt, track and return entries, and found a total of 11 posts, some cap pieces and wedges along the supply track outby the mantrip station, approximately five to eight blocks from the tailpiece; a saw could not be located on the section (Tr. 15, 25-28). Consequently, Inspector Thomas issued 104(d)(2) Order No. 4888994 at 3:30 that morning, charging a violation of 30 C.F.R. § 75.214, describing the violation as follows:

> No supply of supplementary roof support material was available at a readily accessible location within four crosscuts of the 12D (MMU 072-0) working section. This section has been in coal production since October of 1997 and no supply of supplementary roof support has been stored within four crosscuts of the face. To abate the order post[s] were obtained on mainline haulage between 12D-5 North and 11D-5 North, a distance of over 2500 feet. Also a timber saw was obtained off or outby the mouth of this section

(Ex. P-1; Tr. 40).

The order was abated between 3:30 and 5:00 that morning, when miners Jesse Skinner and Danny Harbert, driven by foreman Slovinsky in a personnel carrier (jeep), rounded up nine additional posts from the crosscuts along the supply and the main tracks, and ultimately stored 20 posts, a saw, cap pieces and wedges at the No. 11 crosscut (Tr. 26-27, 67-68, 79-80, Attachment A).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. § 75.214 requires the following:

> (a) A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section.
>
> (b) The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall.

Robinson Run No. 95's approved roof control plan specifies the quantity and type of supplementary roof support material that shall be maintained in accordance with section 75.214:

> The quantity of supplementary roof support material required by C.F.R. 30, 75.214(b) shall consist of a minimum of twenty (20) posts of proper length with sufficient cap pieces and wedges

(Ex. P-2; Tr. 20-21). It is clear from the evidence that Consol had failed to maintain a supply of 20 posts and associated installation tools and materials at a readily accessible location on the 21-D working section, or within four crosscuts of the loading point, at the time the order was issued, and Consol acknowledges the violation (Tr. 86-87; Resp. Br. at 6). However, Consol disputes that the violation was "significant and substantial," the result of Consol's "unwarrantable failure" to comply with the standard, and that Consol was highly negligent in violating the standard.

B. Significant and Substantial

Section 104(d) of the Mine Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete

safety hazard--that is, 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 in question will be of a reasonably serious nature. *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* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.,*6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.,* 10 FMSHRC 498, 501 (April 1998).

Inspector Thomas determined that the violation was S&S. He testified that the strata above the Pittsburgh coal seam running through Robinson Run No. 95 is unconsolidated slate which, exposed during continuous miner or longwall advance and retreat, becomes bad top (Tr. 28). He opined that, in the event of a roof fall between roof bolts, it is reasonably likely that a miner would suffer lacerations, contusions, broken bones, trauma or, in the case of a major roof fall, death (Tr. 28). The importance of having supplementary roof support at the ready, he asserted, is to stop or contain the fall, and to create a safe pathway for rescuers to reach and assist the injured miner, as quickly as possible (Tr. 23, 29, 31). The inspector emphasized that 14 coal miners had been killed due to roof fall in 1998, and four roof falls had occurred in West Virginia in January 1998, alone (Tr. 23, 28). He also noted some of the telltale signs of roof fall -- ribs showing weight, roof sloughage and cracking -- but concluded that roof conditions can change rapidly and that one cannot predict when a fall will occur (Tr. 28-29, 32).

The evidence, evaluated in terms of continued mining operations, indicates that the roof conditions on the 12-D section were good and that a roof fall was unlikely (Tr. 43-44, 100, 138). However, as the Secretary points out, section 75.214 contemplates unforseen or emergency circumstances requiring swift attention, irrespective of existing roof conditions. As such, while Consol was able to establish that alternative roof support materials were available in different locations throughout the section, locating and gathering these materials is time consuming and left to happenstance at best, contrary to the standard's purpose of insuring a consolidated, readily accessible store of emergency supplies. This point is illustrated by the fact that it took 1½ hours to locate and gather the nine additional posts and related materials to abate the order. The standard does not bar use of other roof support materials, depending on the circumstances, but does insure that a supply, ready for immediate use, exists at all times. I find it reasonably likely that, in the event of an unforseen emergency, failure to maintain the supply of supplementary roof support materials, tools and equipment in the manner required by regulation, would escalate the injuries of a roof bolter or other miner to the extent of delayed rescue, and/or result in serious injury to rescuers who might enter an area of bad top. Therefore, I conclude that the violation was S&S.

C. Unwarrantable Failure

"Unwarrantable failure" is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

Inspector Thomas testified that he attributed the violation to Consol's unwarrantable failure to comply with section 75.214 because Robinson Run No. 95 had been previously cited for the same violation in October 1997, foreman Slovinsky lacked knowledge of the whereabouts of emergency supplies on 12-D, two miners had reported to the inspector that the section had never maintained emergency supplies in a readily accessible location and, despite focusing management's attention on the condition during the day shift of January 15th, Consol had not remedied the situation by the time he had returned on the midnight shift of January 17th (Tr. 32, 35-36, 39, 41, 57, 62, 75, 83; Exs. P-3, P-4).

The record makes clear that Consol was aware of the requirements of the standard, and that the company was notified on January 15th that remedial measures for compliance were necessary. Consol has established, through the Pre-Shift Mine Examiner's Report of December 15, 1997, and foreman Carter's credible testimony, that emergency posts had been available on the 12-D section, contrary to the information upon which Inspector Thomas relied (Ex. R-1; Tr. 93-95). The evidence also establishes that foreman Carter and general mine foreman Harrison acted promptly on January 15th in assessing the deficiency and ordering additional supplies (Tr. 96-97, 132-37). While Harrison testified credibly to the probability that the supply crew had already left the supply yard by the time he had ordered the additional posts on the afternoon of January 15th, Consol has advanced no explanation for the lack of delivery during the supply crew's next working shift -- the day shift on January 16th. Carter testified credibly that lack of delivery on that shift did not cause him concern, but that no delivery on the next day shift, January 17th, would have merited his attention (Tr. 124-27). However, Inspector Thomas issued the order prior to that shift. Based upon Inspector Thomas's attention to 12-D's supplementary roof support on January 15th, I find that Consol assumed the risk of being cited by failing to ensure delivery to the section during the supply crew's first available shift, i.e., the day shift of January 16th. I do not find Consol's lack of follow-up, to the time of the second inspection on the midnight shift of January 17th, to constitute intentional misconduct, recklessness or serious lack of reasonable care that would amount to more than ordinary negligence. Accordingly, I find that the Secretary has not proven that the violation was the result of Consol's unwarrantable failure.

IV. Penalty

While the Secretary has proposed a civil penalty of $5,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty

criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F. 2d 1147 (7th Cir. 1984).

Consol is a large operator, previously cited for violation of the same standard in October 1997, with an overall history of violations that is not an aggravating factor in assessing an appropriate penalty (Ex. P-6). As stipulated by the parties, the proposed penalty will not affect Consol's ability to remain in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Consol in causing it. I find the gravity of the violation to be serious, since time is of the essence in providing safe passage for rescue of miners who have been injured by unforseen adverse roof conditions. Considering that supplementary roof support materials had been maintained on the 12-D section prior to the instant inspection, and crediting Carter and Harrison's efforts to come into compliance with the standard, I ascribe moderate, rather than high negligence to Consol. Therefore, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, moderate degree of negligence, good faith abatement and no other mitigating factors, I find that a penalty of $2,000.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Order No. 4888994 is **MODIFIED** from a 104(d)(2) order to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation and reducing the level of negligence to "moderate," that the citation is **AFFIRMED**, as modified, and that Consol pay a penalty of $2,000.00 within 30 days of the date of this decision.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

\nt