FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 12, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 94-639
KELLYS CREEK RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is Commission Administrative Law Judge Avram Weisberger=s decision that the conceded violation by Kellys Creek Resources, Inc. (AKellys Creek@) of 30 C.F.R. ' 75.388(a)(2),[2] involving the failure to drill required boreholes, was not significant and substantial (AS&S@) or the result of the operator=s unwarrantable failure.[3] 17 FMSHRC 1325 (August 1995) (ALJ). The Commission granted the Secretary=s petition for discretionary review. For the reasons that follow, we reverse the judge=s determinations that the violation of section 75.388(a)(2) was not S&S or the result of an unwarrantable failure on the part of Kellys Creek, and remand this matter for penalty reassessment.

I.

Factual and Procedural Background

Kellys Creek operated the No. 78 Mine in Whitwell, Tennessee. Tr. 12. On January 27, 1994, while using conventional mining, it inadvertently cut through from a working place into an adjacent sealed mine area. 17 FMSHRC at 1326; Tr. 17, 35. The flame in the safety lamp of foreman Jerry McGowan was extinguished when the cut-through occurred. Tr. 27-28. Because that was an indication that the oxygen level at the cut-through had fallen below 16%, the miners were immediately withdrawn from the mine and the local Mine Safety and Health Administration (AMSHA@) office notified of the incident. Tr. 16-17, 19, 27-28.

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[2] Section 75.388(a) provides:

> Boreholes shall be drilled in each advancing working place when the working place approaches--
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> (1) To within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined;
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> (2) To within 200 feet of any area located in the mine not shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined; or
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> (3) To within 200 feet of any mine workings of an adjacent mine located in the same coalbed unless the mine workings have been preshift examined.

[3] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), which distinguishes as more serious in nature any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@ The unwarrantable failure terminology is also taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation.

Tommy Frizzell, then a Coal Mine Inspector and Ventilation Specialist in MSHA=s Jaspar, Tennessee, field office, went to the mine that day. 17 FMSHRC at 1326; Tr. 9, 19-20. Before entering the mine, Inspector Frizzell examined maps of the mine area in question at the Kellys Creek office trailer. Tr. 21-27, 30.

The sealed area in question was shown on the mine map then in effect to be an abandoned mine that had been previously sealed at three locations. Tr. 17-19, 46-47; Gov=t Exs. 5, 5A. Most of the boundaries of the worked-out areas of the abandoned mine were denoted on the map by solid lines, but certain boundaries were denoted by broken lines, including some which were shown as being within 200 feet of the January 27, 1994 working place. Tr. 43-44; Gov=t Exs. 5, 5A. Hollis Rogers, Kellys Creek=s President, estimated that, at the time of the cut-through, mining operations were 90 feet away from the area denoted by broken lines. 17 FMSHRC at 1326-27; Tr. 124. The map confirmed Rogers= estimate. Tr. 44-45.

Once Inspector Frizzell was within 200 feet of the cut-through, he began inspecting the ribs for test boreholes. 17 FMSHRC at 1326; Tr. 32-33. When he found none, he asked foreman McGowan why boreholes had not been drilled in advance of the work. 17 FMSHRC at 1327; Tr. 38. McGowan told Inspector Frizzell that Rogers said Ahe didn=t have to drill those test holes until he got within 50 feet of that area.@ 17 FMSHRC at 1327. Inspector Frizzell eventually determined that a cut the full width of the working place, approximately 17 **2** feet wide, had been made, which resulted in a hole into the sealed area measuring 3 feet wide and 6 to 8 inches high. 17 FMSHRC at 1326; Tr. 34-36.

Inspector Frizzell issued a citation alleging that Kellys Creek had violated section 75.388(a)(2) by failing to drill boreholes as the working place approached within 200 feet of an area of the mine not shown by certified surveys. 17 FMSHRC at 1326. The inspector designated the violation S&S and the result of the operator=s unwarrantable failure. Gov=t Ex. 4.

The operator stipulated to the violation. 17 FMSHRC at 1326. With respect to the S&S issue, the judge held that the likelihood of an injury-producing event, such as a fire, explosion, or exposure to low oxygen, would depend upon the manner in which the continuous miner was being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. *Id*. at 1328. Because the judge found those factors operated independently of failure to drill boreholes, he concluded the Secretary had not established that an injury-producing event was likely to have occurred as a result of the violation, and that the violation was therefore not S&S. *Id*. With respect to the allegation of unwarrantable failure, the judge concluded that the Secretary had also not established that the operator=s negligence rose to the level of aggravated conduct. *Id*. at 1327. The judge refused to accept as conclusive Inspector Frizzell=s testimony that the broken lines are a universal mine map symbol used by engineers that indicated the area in question was uncertified, and noted that on the mine map legend in this case a broken line was being used to indicate a line curtain. *Id*. at 1326-27. In addition, the judge was persuaded by evidence that the operator thought that only the 50-foot standard of section 75.388(a)(1) was applicable in this instance. *Id*. at 1327.

The Commission granted the Secretary=s petition for discretionary review, which challenged the judge=s findings that the violation of section 75.388(a)(2) was not S&S or the result of the operator=s unwarrantable failure.[4]

II.

Disposition

1. S&S

The Secretary contends that the judge erred in his analysis of whether the violation was S&S by failing to address evidence showing that exposing miners to an environment devoid of the requisite boreholes was reasonably likely to result in an injury-producing event. S. Br. at 5. He alleges that exposing mine personnel to an atmosphere deficient in oxygen could reasonably be expected to result in serious injury and even death, and that in the instant case there was evidence of a low level of oxygen. *Id*. at 5-6. The Secretary also warns that the unplanned cut-through could have resulted in an inundation of water or methane, raising the possibility of an explosion. *Id*. at 6.

A violation is S&S if, based on 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 Div., Nat=l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (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.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988)

[4] Kellys Creek did not participate in the case beyond the trial stage. The record shows that Kellys Creek ceased operations approximately 2 months before the hearing took place. Tr. 119.

(approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established, as the judge found that Kellys Creek violated section 75.388(a)(2) and thereby contributed to a measure of danger to safety. 17 FMSHRC at 1327. The issue on review is whether substantial evidence supports the judge=s conclusion that the Secretary failed to establish the third element of *Mathies*, the reasonable likelihood of an injury-producing event.[5]

By tying the S&S determination solely to an analysis of the reasonable likelihood of injury resulting from low oxygen or methane ignition, the judge misapprehended the prophylactic purpose of the borehole requirement. The borehole drilling requirements of section 75.388 track and expand upon those imposed by section 317(b) of the Mine Act, 30 U.S.C. ' 877(b). The borehole provision was originally enacted in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976), and carried over without change to the Mine Act. Its legislative history is short, but telling: AThe necessity of maintaining drill holes in advance of the face in any working place approaching abandoned mine openings known or suspected to contain dangerous quantities of water or noxious or explosive gases is obvious and such holes are required by law in many coal-mining States.@ S. Rep. No. 411, 91st Cong., 1st Sess. 84 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 210 (1975).

[5] The Commission is bound by the substantial evidence test when reviewing an administrative law judge=s factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Inspector Frizzell testified at trial that the purpose of borehole drilling in the vicinity of a sealed mine area is to attempt to safely detect in the sealed area the presence of water or an atmosphere containing methane or an abnormally low level of oxygen, referred to as Ablackdamp.@ 17 FMSHRC at 1327; Tr. 79-80.[6] He explained that if water, methane, or blackdamp were to escape in an unplanned cut-through in sufficient quantities, the result could be fatal to miners in the area. 17 FMSHRC at 1327; Tr. 80-82. Thus the 50-foot and 200-foot requirements of section 75.388(a) are essentially safety zones, with the size of the zone dependent upon the degree of certainty regarding the boundaries of the inaccessible area.

The text of section 75.388(a) makes plain that the borehole drilling requirements apply in lieu of the preshift examination required by 30 C.F.R. ' 75.360, which by its nature cannot take place in inaccessible areas of a mine, such as areas that have been sealed off from a mine=s active workings. In its twin goals of preventing entry into sealed areas containing unknown hazards and promoting the timely ascertainment of those hazards, section 75.388 is similar in function to the preshift examination requirement; both standards seek to prevent the exposure of miners to undetermined hazards. In *Buck Creek Coal Co.*, 17 FMSHRC 8, 13-15 (January 1995), the Commission, describing the preshift examination requirement as one Aof fundamental importance in assuring a safe working environment underground,@ held that a preshift violation was S&S irrespective of the absence of a specific hazardous condition disclosed upon the inspector=s examination of the mine.

Here, substantial record evidence establishes both the violation of the prophylactic borehole standard and presence of one of the hazards against which the standard is designed to protect: exposure of miners to dangerously low levels of oxygen. Had the operator been drilling

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[6] When a borehole penetrates an area of the mine that cannot be examined, a certified person is required to determine, if possible: (1) airflow direction in the borehole; (2) the pressure differential between the penetrated area and the mine workings; (3) the concentrations of methane, oxygen, carbon monoxide, and carbon dioxide; and (4) whether water is impounded within the penetrated area. 30 C.F.R. ' 75.388(d). Moreover, concern that blackdamp, accumulations of water, or concentrations of dangerous gases, such as methane, may lurk behind sealed areas of a mine prompted MSHA to require that a sampling pipe or pipes, as well as a water pipe, be installed as part of each mine seal constructed after November 15, 1992. 30 C.F.R. ' 75.335.

boreholes within 200 feet of the area denoted on the mine map by broken lines, as required by section 75.388(a)(2), the near boundary of the sealed area would have been ascertained, the miners would have been safely alerted to the presence of low oxygen within that area, and the unplanned cut-through would have been avoided.

While 30 C.F.R. ' 75.321(a)(1) requires an oxygen content of at least 19.5% in any mine area where persons work or travel, Inspector Frizzell testified that the oxygen level in the sealed area in question had been measured almost 3 months earlier at 10.68%. Tr. 75-78; Gov=t Ex. 9. The cut-through was extensive enough that the flame in the foreman=s safety lamp was extinguished when the cut-through occurred, indicating that the oxygen level at the cut-through had fallen below 16%. Tr. 27-28. Oxygen levels less than the required level constitute substantial evidence of a reasonable likelihood of an injury-producing event occurring. The dangers of low oxygen are well-known and obvious.[7]

Accordingly, we reverse the judge=s determination that the third *Mathies* element was not established by the Secretary.[8] In addition, given the dangers outlined above, we find that the fourth element of *Mathies* has also been established, as injuries resulting from the hazard posed were reasonably likely to be of a reasonably serious nature.

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[7] Miners exposed to air containing less than 16% oxygen may experience dizziness, a buzzing in the ears, blurred vision, rapid heartbeat, and headaches. 1 *Training Manual for Miners: Underground Mining* 160 (Nicholas P. Chironis ed., 1980).

[8] Commissioner Marks states that reversal and a finding of S&S is appropriate because the risk to the miners= health and safety was neither purely technical nor remote or speculative. Furthermore, and as indicated in his concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), notwithstanding his present adherence to the construction of S&S as set forth in *Alabama By-Products Corp.*, 7 IBMA 85 (November 1976), the case expressly cited with approval in the Senate Committee Report on the 1977 Mine Act (S. Rep. No. 181, 95th Cong., 1st Sess. 31 (1977)), he continues to Aremain open to revisit this issue after it has been thoroughly briefed and argued.@ *U.S. Steel*, 18 FMSHRC at 875 n.6.

2. Unwarrantable Failure

The Secretary argues that the judge erred in his analysis of the unwarrantable failure issue by failing to address material record evidence regarding the extent of the violation cited. S. Br. at 7-8. He asserts that the judge also failed to consider the operator=s past history of compliance problems. *Id*. at 8. The Secretary also contends that the judge failed to take into account the operator=s knowledge of the requirements for compliance with the standard in question, maintaining that the operator=s specific experience and expertise in the field of mining should have alerted him to the dangers of unplanned cut-throughs. *Id*.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

Substantial evidence does not support the judge=s finding that the operator=s negligence did not constitute aggravated conduct. 17 FMSHRC at 1327. In making that finding, the judge failed to take into account the high degree of danger posed by a violation of the borehole drilling requirements. The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, e.g., Midwest Material Co.*, 19 FMSHRC 30, 34 (January 1997) (citing cases).

The Commission=s treatment of unwarrantable failure in the context of the analogous preshift examination requirements is instructive. In *Buck Creek*, the Commission held that the failure to comply with preshift examination requirements Awas the result of aggravated conduct, constituting more than ordinary negligence@ because A[b]y sending miners underground prematurely, Buck Creek exhibited >the serious lack of reasonable care= that constitutes unwarrantable failure.@ 17 FMSHRC at 15 (quoting *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994)).

Given that the borehole drilling requirements are designed to substitute for a preshift examination when the latter is not possible, we conclude that, by failing to comply with the borehole drilling requirements, Kellys Creek exhibited a similar Aserious lack of reasonable care.@ That failure to comply led to the dispatching of miners underground to mine coal in an area adjacent to a sealed mine whose boundaries were uncertain and whose oxygen level had been measured less than 3 months earlier at 10.68%, a level which borders on the deadly range. Tr. 75-78.

We are not persuaded by the operator=s defense that its agents thought they were in compliance with applicable law. In *Cyprus Plateau*, 16 FMSHRC at 1615-16, the Commission held that if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the

circumstances, the operator=s conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator=s belief was in error. *See also Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628-29 (August 1994) (operator=s conduct was not aggravated where judge implicitly found that operator=s good faith belief that it was in compliance with regulations was reasonable under circumstances), *aff=d*, 81 F.3d 173 (10th Cir. 1996) (unpublished table decision); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996) (examining reasonableness of operator=s interpretation of regulation offered as defense to unwarrantable failure allegation).

The record in this case establishes that the operator believed the 50-foot standard of section 75.388(a)(1) applied, instead of the 200-foot standard of section 75.388(a)(2). 17 FMSHRC at 1327. The Secretary did not challenge the good faith of the operator=s belief, so we turn to the question whether the operator=s belief was reasonable.

If the mine map in effect on January 27, 1994 established that all parts of the sealed area within 200 feet of the working place were Ashown by surveys that are certified by a registered engineer or registered surveyor,@ borehole drilling was only necessary within 50 feet of the sealed area, pursuant to section 75.388(a)(1). However, if any part of the sealed area within 200 feet of the working place was Anot shown by surveys that are certified by a registered engineer or registered surveyor,@ drilling should have begun 200 feet in advance of the uncertified or unsurveyed area under section 75.388(a)(2). Thus, for the operator to reasonably believe that the 50-foot provision applied, it would have to reasonably believe that it was not within 200 feet of an uncertified or unsurveyed area.

At trial, to establish that the operator should have known that its mining operations had advanced within 200 feet of an uncertified area, the Secretary relied entirely on Inspector Frizzell=s testimony that the broken lines within the sealed area on the mine map are a universal symbol used to indicate an area that was not certified as accurate. 17 FMSHRC at 1326; Tr. 38-39, 43-44, 91. However, the judge correctly found that the legend on the MSHA-approved map being used by the operator indicated that broken lines were meant to signify a line curtain. 17 FMSHRC at 1327; Gov=t Ex. 5. Read literally, therefore, the map did nothing to put the operator on notice that it was mining near an uncertified area.

The operator, however, was not reading the map literally. From Rogers= testimony it is apparent that he did not rely on the map legend in determining at what point section 75.388 would be applicable. Rather, Rogers believed that the broken lines represented an area in which surveyors could not Aadequately@ survey because an area of gob, or loose rock within the gob area, prevented them from entering any further. 17 FMSHRC at 1327; Tr. 120-21.[9] The

[9] It is not surprising that Rogers did not interpret the broken lines to indicate a line curtain, as it would be unusual for a line curtain to be within a sealed area of a mine. In addition, a post-citation version of the mine map did include the word AGOB@ within the broken lines in question. Tr. 50-52; Gov=t Exs. 6, 6A.

Secretary claims that such an understanding is the equivalent of knowing that the area was not certified as having been accurately surveyed, because A[i]f surveyors and engineers could not enter the area in question, it follows that surveying and certifying were virtually impossible.@ S. Br. at 9.

We agree with the Secretary on this point. The import of Rogers= testimony is that he recognized that, with respect to the portion of the sealed area denoted by broken lines, the gob prevented a complete survey from being undertaken. In this case the mine map showed that the area recognized by Rogers as the gob area was between the seals and that part of the perimeter of the sealed area near which Kellys Creek was mining. Gov=t Ex. 5. In addition, the map contains no survey marks between the gob area and the area being mined. *Id*. Thus, not only should the map have alerted Rogers that the extent of the gob area was uncertain, but it should also have meant to him that it was impossible to know with certainty the exact boundary of that part of the sealed area. Accordingly, Rogers should have recognized that there was no way of knowing from the map exactly how close to the sealed area Kellys Creek was mining. Under these circumstances, we conclude that it was unreasonable for Rogers to believe that the 50-foot standard of section 75.388(a)(1) applied instead of the 200-foot standard of section 75.388(a)(2). That belief therefore cannot serve as a defense to the unwarrantable failure charge. We accordingly reverse the judge=s determination that the violation was not the result of the operator=s unwarrantable failure.

III.

Conclusion

For the foregoing reasons, we reverse the judge=s determinations that the violation of section 75.388(a)(2) was not S&S or the result of unwarrantable failure by Kellys Creek. We conclude that the violation was S&S and unwarrantable, convert the section 104(a) violation to a section 104(d)(1) violation, and remand this case for assessment of an appropriate civil penalty in light of our S&S and unwarrantable failure determinations.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner