

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 6, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-116
Petitioner	:	A.C. No. : 15-17165-164681
	:	
v.	:	
	:	
STILLHOUSE MINING	:	Mine: No. # 1
Respondent	:	

DECISION

Appearances: Matt Shepherd, Esquire, for the Secretary of Labor, United States Department of Labor
Richard D. Cohelia, Black Mountain Resources, Benham, Kentucky

Before: Judge Moran

Introduction

On January 16, 2008 section foreman Bobby Sexton took over the operation of a continuous miner so that an employee who was under his supervision could take his lunch break. In the process of operating the continuous miner, which process is carried out using a remote control box, Sexton placed himself in a “red zone,” which is not allowed under the mine’s roof control plan. As the continuous miner was being moved to the heading, it caught an uneven portion of the mine floor. This caused the continuous miner to pivot, with the result that Sexton became wedged between its tail boom and the rib. His injuries were not minuscule; he was knocked unconscious, had broken ribs, and missed several days of work from the incident.

There is agreement that the there was a violation, specifically that the conduct constituted a violation of the roof control plan. What remains in dispute is limited to whether the accident was the result of an unwarrantable failure on the part of the Respondent and whether the penalty sought by the Secretary, \$60,000.00, is excessive. Tr. 14.

Given that the primary issue is whether there was an unwarrantable failure, it makes sense to begin with a review of the meaning of that term.

Unwarrantable failure

The oft-repeated starting point for describing “unwarrantable failure” is found at *Emery Mining Corp.*, 9 FMSHRC 1997, (December 1987) wherein the Commission explained that the term refers to aggravated conduct constituting more than ordinary negligence. It noted that it is “characterized by such conduct as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference’ or a ‘serious lack of reasonable care.’” *Virginia Crews Coal*,¹ 15 FMSHRC 2103 (Oct. 1993), quoting *Emery* at 2003-04. In *Gatliff Coal Company*,² 14 FMSHRC 1982 (December 1993), the Commission further discussed the distinction between negligence and unwarrantable failure. It noted that the subject is not simply a matter of semantics as an unwarrantable failure may trigger “the increasingly severe enforcement sanctions of section 104(d) [whereas] [n]egligence . . . is one of the criteria that the Secretary and the Commission must consider in proposing and assessing . . . a civil penalty.” It went on to note that “[h]ighly negligent’ conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.”

The Commission’s decision in *Midwest Material Company*, 1997 WL 24292 (January 1997), looks at the other side of the coin; an instance wherein the administrative law judge’s determination of no unwarrantable failure was reversed. There, the Commission found that the foreman was more than negligent in the dismantling of a crane boom, determining that his conduct was “intentional and deliberate” and therefore “aggravated conduct.” The Commission noted that the foreman’s negligent conduct resulted in a highly dangerous situation and it observed that it has considered a high degree of danger posed by a violation as supporting an unwarrantable failure.

¹ Although cited, *Virginia Crews Coal*, is very distinguishable from the case at hand. In that case the Commission held that the Secretary had blurred the distinction between negligence and unwarrantable failure. The Secretary had argued that the operator knew of the violation through the preshift examination report but the Commission noted that Virginia Crews had only “a brief period of notice of the existence of a violation as a result of the preshift examiner’s report.” In contrast, here, as explained in more detail in the body of this decision, it was the mine’s section foreman who committed the violation, and did so knowing that it was contrary to the roof control plan.

² *Gatliff Coal* also involved a foreman’s actions and while the Commission noted that the foreman drove off the mine property with the two-way radio, the record showed that conduct was no more than inadvertence. In contrast, as explained in this decision, foreman Sexton’s actions were not a consequence of “inadvertence.”

It added that it is important to “recognize that the violation took place in the presence of a foreman,³ who, under Commission precedent, is held to [a] high standard of care.” *Id.* at *4.

The Commission noted that a section foreman is “held to a ‘demanding standard of care in safety matters,’” and that there is a “heightened standard of care required of the section foreman and mine superintendent.” *Id.*, citing *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987), *Wilmington Mining Co.* 9 FMSHRC 684,688 (April 1987)(“*Wilmington*”) and *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

In the Court’s view, *Capitol Cement Corp.*, 21 FMSHRC 883 (August 1999) is particularly instructive. There, a shift supervisor’s conduct in failing to deenergize the rail of a crane and not wearing a safety belt were deemed to constitute aggravated conduct.

The Commission observed that both violations were obvious and dangerous. Further, the supervisor knew the consequence of his failure to deenergize and that not wearing a safety belt was dangerous. The Commission noted that “a high standard of care was required of [the]shift supervisor.” It then added that “Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.” 21 FMSHRC 893, citing *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). Finally, the Commission observed in *Capitol Cement* that the supervisor “had been entrusted with augmented safety responsibility and was obligated to act as a role model for [his] subordinate, who was watching him.” *Id.*

Although already made clear by its decision, the Commission expressly stated that it “is well established that a supervisor’s violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes.” *Id.*, citing R&P, 13 FMSHRC at 194-97. Further, no *Nacco* defense⁴ is available for violations that are the result of unwarrantable failure pursuant to section 104(d) of the Mine Act. *Id.* at 893.

Findings of fact⁵

³ *Midwest Material Company*’s principle applies *a fortiori* here, as the foreman was not merely in the presence of the violation, *he was committing it*. Significantly, the Commission expressed in that case that the “lapse of judgment or presence of mind on the part of the mine foreman with respect to the proper procedures for dismantling the crane boom, . . . qualifies as the type of ‘indifference’ or ‘serious lack of reasonable care’ that constitutes unwarrantable failure” *Id.* at *5.

⁴ The “*Nacco*” defense arose where the Commission declined to impute a supervisor’s *negligence* to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor’s conduct did not expose other miners to risk of injury. 3 FMSHRC at 849-850.

⁵ The parties entered into the following stipulations: Stillhouse Mining LLC was the operator of Mine No. 1; that mine is a mine as that term is defined by Section 3(h) of the Mine Act; the mine was engaged in commerce within the meaning of the Mine Act; more than 600,000 tons of coal were

As noted in this decision's introduction, Respondent's representative conceded: "We do not dispute that Mr. Sexton, who was both the foreman and the operator at the time, was standing in a precarious position . . . what we dispute is the unwarranted failure and aggravated conduct [assertion by the government]. Tr. 12 Therefore, this decision addresses unwarrantability and the appropriate civil penalty.

Inspector Kevin Doan, an employee with MSHA since 1999, and presently out of their Harlan, Kentucky field office, is a roof control specialist. Tr. 15. He has also been trained as an accident investigator. Doan had been called to the mine on January 16, 2008 to investigate an accident there, which occurred about 11 p.m. Tr. 24. Doan drove to the hospital first to check on the injured miner, and after that he proceeded to the mine, arriving between 12 p.m. and 1 a.m. The accident occurred on a working section where some 8 to 10 miners were working. As part of his investigation, Doan spoke with those miners who had knowledge about the accident. Tr. 26.

Based on his investigation through interviews and witness statements, Doan stated that there had been a malfunction with the continuous miner and its tail was turned out by for repairs. The machine was repaired but, as the continuous miner's operator was on a break,⁶ the section foreman, Bobby Dean Sexton, took control of the continuous miner so that coal mining could be resumed. The machine is operated by a remote control box. As the section foreman began tramming the continuous miner back to the face, the machine contacted a ledge in the mine floor, causing it to pivot. This machine pivoting resulted in the foreman becoming pinned against the rib. Seconds later, the shuttle car operator came upon the scene, took over the remote control and backed the continuous miner away from the trapped foreman. Tr. 27-28. Doan augmented his testimony with a freehand drawing depicting the scene and he marked on the drawing where he believed the section foreman should have been standing. Tr. 29, 42 and Ex. 1A.

The section foreman, Mr. Sexton, was in by the tail boom of the continuous miner when he began 'tramming,' that is, moving, the continuous miner. Tr. 34. Doan confirmed that the section foreman, being located in by the tail boom while he was tramming the miner, was in violation of the roof control plan. Tr. 35, 39. This is not in dispute.

As Doan noted, a section foreman is responsible for the running the mechanized mining unit. That includes "the management of that unit, as far as production and safety, and basically all aspects of that he's in charge of everything there." Tr. 39. Thus, Sexton was the supervisor of the eight to

produced at the mine in 2008 and Stillhouse Mining is a large operator; a copy of the citation in issue in this proceeding was served on the Respondent by an authorized agent of the Secretary and Respondent timely contested the citation; Respondent is subject to the jurisdiction of the Mine Review Commission and the presiding judge in this proceeding; the judge has the authority in this matter and to issue a decision; and the proposed penalty will not affect Respondent's ability to remain in business. Tr. 9-10.

⁶Tr. 82.

ten miners that work in that section.⁷ Tr. 39, 87. Also, as section foreman, he is to have knowledge of the roof control plan and all other applicable plans. Tr. 40. Doan stated that, under the roof control plan, one is to be out of the way of “pinch points.” There are numerous places one could be to be out of the way of such pinch points and the remote control box has an effectiveness range within which one can still control the continuous miner. Accordingly one does not have to be extremely close to the continuous miner in order to use the remote control device. Tr. 42.

Exhibits 2 and 5 complement Ex 1A in terms of understanding the place where the section foreman was pinned by the tail boom against the rib and Doan circled on Ex 5 the approximate location where the tail boom pinned Sexton against the rib. Exhibit 8 shows the ledge, or uneven floor, that caused the machine to pivot and as a consequence pin Sexton. Tr. 49.

Doan believed that Sexton would have had the opportunity to have seen the broken mine floor because he would have had to make a gas check of the area before he trammed the continuous miner. This is a requirement of the law. Tr. 50-51. Of course, while Sexton was well aware of the ‘ledge,’ or uneven floor problems, the violation existed apart from whether he had such knowledge.

As a consequence of his investigation, Doan issued a citation on January 24, 2008 for a violation of the roof control plan. Tr. 52-53. At that time the mine’s roof control plan provided that when one is operating a continuous mining machine one must be in a safe location, and away from pinch points created by that machine and/or by haulage equipment. Tr. 53-54. Ex 11, item 1C, at page 7.

Doan also agreed that it was “common knowledge” that one operating a continuous miner is to position himself outby the end of that machine. This is well understood because there have been numerous accidents from people failing to position themselves safely. In providing this testimony, Doan was specifically including situations where a miner has been pinned by a continuous miner. Tr. 55. Thus, as a section foreman, Doan expressed that Sexton should have been aware of that, as well as all provisions of the roof control plan. Tr. 56. Sexton’s error was placing himself in the turn radius. Tr. 58. Doan agreed that Sexton was in the “sheared” area⁸ of the crosscut at the time of the accident.

Doan expressed that a “d” citation requires more than ordinary negligence, and that it may be associated with management’s knowledge. Tr. 65. In his view Sexton’s conduct was unwarrantable because he “violated the provisions of the Plan, [and] that as the section foreman and the leader of that crew he should have been familiar with that Plan. And so being the section

⁷That number includes the section foreman. Tr. 43.

⁸ Thus, instead of a right angle for the entry, the corner is trimmed so that it is more like a 45 degree angle. Another way to visualize this is to imagine a trimmed corner of a crosscut so that the miner could enter the crosscut. Tr. 74. Doan marked the shear on Exhibit 1A. Such sheared areas are created so that the continuous miner can make the turn into the mine face.

foreman he should have known of the provisions of that Plan and he shouldn't have positioned himself in an area that would violate that Plan." Tr. 68. As he further explained, it was not simply one placing oneself where Sexton did that made it an unwarrantable failure. Rather it was "because he was the foreman and should have intimate knowledge of those plans." Tr. 69. Here, Doan considered Sexton's placing himself in the red zone that was deliberate. Tr. 70. He added that his determination did not rely solely upon Sexton placing himself in the shear area, nor would he consider the unwarrantable failure aspect to be eliminated if the tail of the continuous miner had been straight and no pinch point were created. Instead, the key determination from Doan's perspective was that Sexton had placed himself in the red zone. Tr. 70-71. Thus, Sexton placing himself in the sheared area did not insulate him from violating the Plan because he was still in the red zone. Tr. 76. As Doan summed up his unwarrantable determination, "[i]f a foreman knowingly violates a provision of any Plan . . . it would be unwarrantable." Tr. 72. In contrast, he expressed that the same analysis would not necessarily apply if the person who violated the Plan was not a foreman, because such person may not be familiar with the provisions of the Plan. Tr. 73.

Doan also considered it an aggravating factor if employees observe a foreman, as the leader of the crew, deliberately violating the Plan. Tr. 76. This is because the foreman is to set an example and see to it that the Plan is complied with and to make sure that those miners working under his authority comply with that Plan. Tr. 76. Doan's recollection was that the shuttle car operator saw the accident occur, a fortunate development, as that shuttle operator was able to rapidly come to Sexton's aid by using the remote to unpin Sexton from his trapped position against the rib. Tr. 77. Sexton, testifying later, asserted that the shuttle car operator did not see the accident actually occur but that he arrived shortly thereafter. However, Sexton stated that he was already pinned against the rib when the shuttle car operator came upon the scene. Tr. 86. The shuttle car operator arrived at that time because Sexton had started moving the continuous miner to the face and thus the shuttle car operator had arrived to get a load of coal from the miner. Tr. 86. The Court finds that no miner, other than Sexton himself, observed the accident.⁹

Bobby Dean Sexton, the foreman who was injured, also testified. Sexton has been a foreman for some 10 or 11 years. Tr. 80. He was operating the continuous miner because the usual miner operator had gone to lunch. Tr. 82. Sexton decided to put the continuous miner back to the task of mining coal, that is to say, he decided to tram the miner back into the heading and he volunteered with his answer that he knew "the bottom was busted up there . . ." Tr. 82- 83. He also agreed that in doing so, he was using the continuous miner's remote control and that he placed himself in the shear. Tr. 84. Thus, Sexton himself admitted that he knew of the problem with the floor and he eventually conceded that he was in the shear when the accident occurred.

Significantly, when Sexton was asked to concede that the shear is in the red zone, he

⁹ However, that is of no consequence to the finding of unwarrantability. With an accident requiring the foreman's treatment at a hospital, word would have quickly passed about the circumstances and where Sexton was located when the accident occurred. Thus, directly observed or not, Sexton set a bad example for his crew.

expressed that he did not agree that was the case, contending, by not answering the question, with his own challenge: “[w]here else are you going to get it?” Tr. 84-85. Accordingly, he expressed instead that, though in the shear, *he* thought he was in a “safe place.” Tr. 85, 89. With little choice but to admit the obvious, as he was then pinned against the rib, he then admitted that he was not in fact in a safe place. Tr. 85-86.

Sexton also advised the Court that his intention was to run the continuous miner and start mining coal. Tr. 88. Just prior to the accident, Sexton stated that he was focusing on the pan on the miner because he was trying to get it “up over the top of that rock [on the mine’s floor] where it was busting up.” Tr. 88.

Sexton would not concede that, were he to do it again, he would not have placed himself in that position, as, in his view, “that’s the only place to get to get out of the way.” Tr. 89. He did not feel he could be elsewhere because he had the shuttle car on its way and he knew of no other place to be away from that car’s arrival. As he put it, “[y]ou’re locked up there with nowhere to go.” Tr. 90. Thus, if faced with the same situation, though knowing he would be pinned, he would have stayed where he was at the time of his injury: “I believe I would, yeah.” Tr. 90. Despite holding that point of view, he agreed he was standing in a pinch point. Tr. 90. Sexton also agreed that it was a violation of the roof control plan to stand in a pinch point while tramming the continuous miner. Tr. 91. Still, he insisted that he could think of no safer place to have been than where he was. Tr. 92. By taking that stance, he demonstrated a failure to have learned from the event. This attitude, held prior to the accident as well, also speaks to the unwarrantability of his conduct. After several attempts to obtain an answer, Sexton eventually admitted that he did know that he was in the red zone at the time of the accident.¹⁰ Tr. 93-94.

Thus, Sexton believed there was no where else he could have positioned himself. He had to watch the bottom, as he was trying to have the continuous miner’s pan avoid the uneven floor and he was concerned about the shuttle car which was on its way to receive an anticipated load of coal. Tr. 102.

The shuttle car operator on the day of Sexton’s accident, Garland Gilliam, then testified. Much like Sexton, despite the accident, Gilliam did not agree that Sexton was in an unsafe location at the time of the accident. Tr. 106-107. He also felt there was no other place Sexton could have been. Tr. 107, 110. Accordingly, Sexton’s established dangerous location was also viewed by one

¹⁰Sexton stated that had the accident not occurred and had he been able to get the continuous miner back to the face, he would then have been out by the tail of the continuous miner and therefore out of the red zone at that time. Tr. 100. That is to say, had the continuous miner been trammed back to the face, once it had moved past the shear area on its way to the destination, that is, the face, he would not then have been in the red zone any longer. Tr. 102. Thus, the red zone is not a fixed position. It changes because it is relative to the location of the continuous miner at any given point in time. However, when the accident occurred, Sexton admitted that when he was struck by the tail boom of the continuous miner he *was* standing in the shear and that he was in by and that he was therefore in the red zone at that time. Tr. 101.

of his crew members as non-problematic. Gilliam was poised around the corner from the continuous miner, about 10 to 15 feet from it and he was waiting for the continuous miner to advance, at which point he intended to pull up behind it. Tr. 109. Thus, he stated that the normal mining process was that as the continuous miner is pulling into the face, the shuttle car operator is to be following in right behind. Tr. 111. Gilliam thought that a distinguishing factor was that the continuous miner was making the “second cut” and that he had no idea where the red zone was under such circumstances. Tr. 112. However, it is important to bear in mind that at the time of the accident, Sexton *was not in the second cut*. Rather, he was *trammimg the continuous miner to make the second cut*.¹¹ Gilliam agreed with counsel for the Respondent that Sexton was in a confined position because of the line curtain and the shuttle car and that therefore, in his view, there was no other safe place to be. Tr. 114.

However, critically, while Gilliam had asserted that between the twin concerns of the line curtain and his operation of the shuttle car, there was no safe place for Sexton to be and avoid those concerns, *he agreed* that if the shuttle car operator had simply slowed down and not been intent upon coming up behind the continuous miner within seconds of its intended arrival at the face, Mr. Sexton could have stood outby the tail of the continuous miner. Tr. 119-120. Thus Sexton *could have stood outby the tail* and then the shuttle car operator could have pulled in behind, albeit at a slower speed. As Gilliam expressed it, “It’s an option, yes.” Tr. 119. Further, Gilliam expressed that such an option *would* slow down coal production. That is, employing such a technique would not allow mining to resume as quickly as possible. Tr. 119-120.

In response to a question from the Court, Gilliam reaffirmed that, in fact, had they proceeded differently, *there was* a place where Sexton could have stood which would have been safer, although such a location would have, as just noted, slowed down the production of coal. Tr. 121.

After the government rested, for its part the Respondent called Gregory Halcomb as a witness. Halcomb’s experience includes having run a continuous miner for more than 20 years. Tr. 125. He has worked with Sexton for more than 10 years. Tr. 125. On the day of the accident, Halcomb was filling in as an “extra miner” for the individual who normally would have operated the continuous miner on that day. Tr. 126. He had started making the second cut and in doing so had placed himself in “the flat, shearing,” (i.e. he was standing in the shear) which location he considered to be the only place and the safest place he could be. Tr. 126, 128. As with Gilliam’s testimony, Halcomb agreed that Sexton *could have in fact* stood outby the shear if no shuttle cars would be coming up. Tr. 132. Thus one could stand back out into the entry. Tr. 132-133.

Respondent’s Post-Hearing Brief

¹¹To be particularly accurate, the second cut had been *started* but then the continuous miner broke down, requiring repairs. After the repairs were made, Sexton took over and began trammimg the continuous miner back to the face to continue making the second cut. Thus the continuous miner was on its way back to the face when it encountered the bad floor, causing it to pivot and strike Sexton as he stood in the red zone at the location of the shear, as indicated on Exhibit 1 A.

Respondent contends that the Secretary did not establish unwarrantable failure. By its view, the evidence does not establish aggravated conduct, nor that it meets “any of the Commission’s definitions of what constitutes unwarrantable failure.” R’s Br. at 7. Accordingly, it contends that there was no showing of “not justifiable and inexcusable” conduct, nor was it shown that the conduct was “more than inadvertence, thoughtlessness or inattention.” *Id.*

Instead, from Respondent’s perspective, foreman Sexton “did not realize his location in relation to the tail boom,” and “did not deliberately violate the roof control plan.” Contrary to those very assertions, Respondent then immediately asserts that, while Sexton did not realize his location and did not deliberately violate the plan, he “did not consider himself to be in violation of the plan since he did not think there was any safer place he could have stood to have operated the miner from its position.” *Id.* at 7-8. Respondent continues that Sexton “reasonably believed that his actions were safer than any alternative” and, that being his state of mind, it asserts there was no unwarrantable failure. *Id.* at 8, (emphasis in brief). Apart from the facts, as found by the Court herein, Respondent’s argument contradicts itself. Respondent cannot simultaneously assert that Sexton’s actions were without realization of his location in relation to the tail boom and not deliberate, while also claiming that Sexton viewed his actions as not in violation of the roof control plan as he deemed his position to be the safest location for him. The latter claims bespeak conscious activity on Sexton’s part and therefore flatly contradict any claim that his actions were not deliberate. Beyond the conflicting arguments of counsel, Sexton’s own testimony shows that he knew exactly what he was doing.

Respondent’s Counsel also repeats the theme in its brief, twice, that Sexton was standing in the “only place a miner operator could be positioned to operate the miner by remote.” It then adds “***It is an undisputed fact that if Sexton had stood in the entry, he would not have been able to see to have operated the miner.***” *Id.* at 8 (all emphases in brief). The problem with this contention is that it tells only half the story. Sexton had another, safe, position he could have located himself, but the overriding concern was to resume mining coal. This was unwise. Had the section foreman slowed things down, as he certainly could have, and moved to the position which he admitted was safe, resumption of coal mining would have been only very briefly delayed. The consequence of focusing solely on the resumption of coal mining was that a significant, rather than a momentary, delay in mining came about from the accident which ensued.

Respondent also contends that “the roof control plan [did] not specifically address the factual situation presented in this case [,namely]. . . where a miner operator should position himself to operate a continuous miner in a second cut.”¹² *Id.* at 9. Last, in its weakest contention, Respondent seems to suggest that while Sexton is a shift foreman, he became a mere miner as he “was acting as a continuous miner operator when the accident occurred.” *Id.* Thus, while admitting that a foreman is

¹²Respondent also points to the “Red Zones are No Zones” chart because it also does not advise where one should be located for a second cut. R’s Br. at 9 and R’s Ex. 1. Again, this is a misdirected argument. Sexton was on his way to the face, and not in the process of actually continuing with the second cut. Besides, even Sexton admitted he was in the red zone when the accident happened.

to set a good example, Respondent seems to suggest that the responsibility vanishes where a foreman takes over a miner's task, such as here, where the crew member is on a lunch break. No authority is cited for this novel argument that one's status as a foreman ebbs and flows depending on the foreman's particular activity of the moment.

Apart from its contentions regarding unwarrantability, Respondent believes that the proposed \$60,000.00 civil penalty is excessive. It seems to acknowledge that, though a higher penalty can have the effect of persuading the operator to encourage its management to comply, there is no evidence here that the Respondent does not already do that. *Id.* at 9. That may be the case, or it may not be, as the record does not speak to that, but the contention misses the point that a significant penalty can help focus the mind on those efforts and whether, in view of the section foreman's decisions here, management's encouragement of compliance with the safety regulations needs to be revisited, as stimulated through an attention-getting civil penalty.

In its post-hearing Reply Brief, the Secretary notes, as the Court did earlier in this decision, that in *Wilmont*, the Commission observed that supervisors have an obligation to set a good example for non-supervisory miners working under their direction, which is the situation which existed in this instance. The Secretary also points out that Sexton was a foreman, regardless of the particular task he may engage in at any given moment. Sec. Reply at 2. The Court, as stated, agrees. In fact, the Secretary maintains that there is an especial duty when a foreman takes over a subordinate's normal task to set the proper example. Here, as the Secretary correctly notes, this example was even more important because Sexton was not only a foreman, he had also been a long experienced continuous miner operator during his mining career. The record, as previously discussed, shows that Sexton's poor practice impacted Gilliam's perspective adversely.

To the contention that Sexton did not deliberately violate the roof control plan, and that he had no choice but to stand in the red zone, the Secretary reminds that Sexton acknowledged that he knew he was in the red zone. Sec. Rely at 3-4, citing Tr. 93-94. Clearly the record supports the Secretary on this point and the Court explicitly finds it as a fact.

Last, the Secretary asserts that the violation was of an aggravated nature and thus unwarrantable. It contends that the record reflects that the Respondent, at least through its section foreman's actions, placed production over safety. The Court agrees with that characterization as well, and this too is a finding of fact, based on the record as a whole. It is clear, from Sexton's own testimony that his focus was on resuming coal production, not safety. Accordingly, the Court agrees with the Secretary that a "production over safety mentality [] caused the accident." *Id.* at 5. As the Secretary aptly described it, "[i]f Sexton would have stopped production and instructed the shuttle car operator to stay put, Sexton could have trammed the miner into the heading while standing outby the tail." *Id.* As the shuttle car operator admitted, if they had simply slowed things down, Sexton could have placed himself in a safe position and that choice was an available option, albeit with a momentary lull in the production of coal. Tr. 118-120.

Accordingly, for all the reasons discussed *supra*, the Court finds the violation was an unwarrantable failure.

Civil Penalty Assessment

The Court agrees with the Secretary's analysis of the appropriate civil penalty to be imposed in this instance, and it incorporates by reference, those pages reflecting the Secretary's review of the penalty criteria. Sec. Br. at 8-9. Thus the Court, upon taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i), subscribes and adopts that analysis¹³ in its determination that the appropriate civil penalty is \$60,000.00 (Sixty thousand dollars), as initially proposed.

ORDER

Within 40 days of the date of this decision, Stillhouse Mining **IS ORDERED** to pay a civil penalty of \$60,000.00 for the violation of section 75.220(a)(1), as set forth in Citation No. 7502252. Upon payment of the penalty, this proceeding **IS DISMISSED**.

William B. Moran
Administrative Law Judge

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¹³Accordingly by virtue of the incorporation by reference, the Secretary's analysis of the history of previous violations, size of the operator, ability to continue in business, gravity, including the finding that the violation was significant and substantial, which finding was not challenged in any event, and the good faith abatement are all adopted by the Court. The negligence, rising to unwarrantable failure, has already been discussed in the body of this decision.

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