

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 13, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-149
Petitioner	:	A.C. No. 46-08553-03569
v.	:	
ELK RUN COAL COMPANY, INC.,	:	
Respondent.	:	Black King I North Portal

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA; for the Secretary
David J. Hardy, Esq., Spilman, Thomas & Battle, Charleston, WV; for the Respondent

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor alleging that Elk Run Coal Co. ("Elk Run") violated 30 C.F. R. § 220(a)(1) regarding its roof control plan. Subsequent to notice, the case was heard in Charleston, West Virginia on March 16, 2004. Subsequent to the hearing, the parties filed proposed findings of fact and briefs. In addition, on July 9, 2004, each party filed a reply to the other party's proposed findings of fact and brief.

II. Introduction and Findings of Fact

Elk Run operates the Black King I North Portal mine, an underground coal mine. On July 23, 2002, Elk Run was performing pillar, or retreat mining in area 013-014 MMU. This area contained seven entries numbered, left to right, one through seven. There were seven rows of pillars (blocks) perpendicular to the entries, denominated A through F; row A was the most inby row. Each row contained six blocks, one through six, right to left.¹

Elk Run used two continuous miners each operating from right to left. The right side continuous miner usually mined entries four through seven, right to left. The left side continuous

¹Each block is identified by referring to its location by row and place in that row e.g. row B block 2p.

miner usually mined entries one through three, right to left. After mining right to left in a row, the miner then usually proceeded outby to the next row.

In July 2003, Elk Run ran two production shifts; the day shift from 6:30 a.m. to 3:30 p.m., and the evening shift from 4:00 p.m. to 1:00 a.m. The mid-night shift, which was a maintenance shift and did not produce coal, usually started between 11:00 p.m. to 12:00 p.m., and ended at approximately 8:00 a.m.

On July 23, 2002, MSHA Inspector Danny Meadows, inspected the subject facility. He arrived at the pillar line in question at approximately 9:45 a.m. According to Meadows, an employee was "... tinkering around ..." a continuous miner located between rows C and D in Entry No. 2. (Tr. 67, 145). Coal was not being mined.

Meadows and Phil Saunders, the section foreman on the day shift who accompanied him, observed that the block in row B between Entry Nos. three and four (block 3p), and the block between Entry Nos. Four and five (block 4p) had been mined through. However, the block in row B between Entry Nos. two and three (block 2p) had not been mined all the way through. Also, there were not any timbers set in Entry No. 2 outby row B.

The only blocks in row C that had been completely split were blocks 5p and 6p, between entries five and six, and six and seven, respectively. Block 6p, was the only block in row D between Entry Nos. 6 and 7 that had been mined all the way through.

At approximately 10:00 a.m. Meadows issued an order under Section 104(d) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging that the roof control plan was not being complied with "... in that pillars are not being extracted as the plan requires." The parties agreed that the pertinent language in the roof control plan, which was developed pursuant to 30 C.F.R. Section 75.220(a)(1) provides that during the pillaring mining sequence, "... no more than 2 rows of blocks shall be started until inby blocks are completed."² (Government Exhibit 5,p.11)

III. The violation of Section 25.220(a)(1) (the roof control plan)

The roof control plan, as pertinent, provides as follows: "No More than 2 Rows of Blocks Shall Be Started until Inby Blocks Are Completed." In essence, the evidence establishes that, when inspected by Meadows, rows C and D had been started but not completed. The parties appear to be in agreement that the main issue for resolution is whether block 2p in row B, which

²The order at issue alleges, first, that the roof control plan was not being complied with and that pillars were not being extracted as the plan required. It next alleges that "... [t]hree rows of blocks were started at the same time." The plan does not clearly prohibit the starting of three blocks at the same time. The parties have agreed that the issue in this case is whether page 11 of the roof control plan was violated, i.e., whether the block in row B between Entry Nos. 2 and 3 was completed before two outby blocks were started.

had been partially split, had been completed.

It is Elk Run's position that the Secretary has not established that Row B was not complete. Elk Run first asserts that, in essence, under the roof control plan it decides when a row is complete.³ In this regard Elk Run avers that at the time the inspector issued the order herein, it had decided that row B was complete. This assertion is based on the testimony of Saunders, that when he arrived on the section at the beginning of the day shift on July 23, he inspected the area in question. He testified that he did not go in by up to row B because "[y]ou're not supposed to. At that point in time, that's an abandoned row". (Tr. 331). He indicated that he did not intend to complete the cut in block 2p in row B.

In contrast, the Secretary refers to Meadows' testimony that on July 23, when he spoke to Saunders during his inspection later on in the shift, Saunders told him that his plan was to mine block 2p "... but he was going to wait until I got there." (Tr. 65). On the other hand, Saunders testified regarding his conversation with Meadows, that, in essence, he had initially planned that morning to finish the cut in Row B block 2p, i.e., that it had not been completed, but that when he arrived on the section and observed the condition of the various blocks he had to change his plans.

I find that the weight to be accorded to Meadows' version is diminished somewhat because the record does not contain any explanation as to why Saunders would have told Meadows he had intended to mine block 2p but was going to wait until Meadows arrived. On the other hand, I find Saunders' version more credible inasmuch as he explained, in essence, that he would have considered block 2p row B incomplete, and would have completed it on his shift on July 23, had he not observed, at the beginning of the shift, that block 6p row D had been cut.

Further, I note that Saunders' testimony is somewhat corroborated by Gary Neil, who was the Superintendent at the subject mine on the dates at issue. He testified that Saunders had explained to him that if he (Saunders) were to go back and continue cutting block 2p in row B "... we would mining three rows of blocks." (Tr. 169). Neil indicated that after this conversation it was his "contention" that block 2p had been completed. (Tr. 176 - 177)

Thus, at most, the record indicates that as of approximately 7:30 a.m. on July 23, Elk Run had determined that row B had been completed, and there was not any intent to go back and finish the cut in block 2p, row B. Elk Run argues that, when it was cited by Meadows later in the morning, there was not any violation since row B was complete, and there were only two rows, C and D, that were incomplete.

I do not find Elk Run's argument to be compelling. I agree with the Secretary that Elk Run did not comply with the plan if the record establishes that, at any time prior to the issuance

³This assertion, based on the testimony of Inspector Mathews on cross examination, is accepted inasmuch as there is not any evidence to the contrary.

of the citation, row B, and two outby rows had not been completed.

The record fails to indicate that any mining of rows B, C and D, occurred on July 23.⁴ Hence, the focus must be placed on Elk Run's intention, during the evening shift of July 22, regarding the partial cut of block 2p in row B. In this connection, I note, that in meeting its burden, the Secretary did not proffer the testimony of any miners who were present during the evening shift regarding the sequence in which cuts were actually taken from the various rows in question. Neither did it proffer the testimony of any supervisory personnel who were present during that shift relating to Elk Run's intention during or at the conclusion of the shift regarding the partial cut in block 2p, row B.

The Foreman's Production Report ("Production Report") for the July 22 evening shift (Government Exhibit 5), establishes the following: (1) that the last two full cuts⁵ were taken from blocks 5p and 6p, from 9:34 to 10:50, and from 11:24 to 12:10 respectively; (2) that, in normal mining, after mining right to left in a row, i.e., blocks 4p through 6p, the miner proceeded to cut blocks in the next outby row; (3) that on the morning shift on July 23, block 6p row D, block 5p row C, and block 6p row C, had all been cut ; (4) that as of the end of the evening shift, July 22, no other blocks had been cut in rows C and D; (5) that in the evening shift July 22, from 12:06 to 12:20, block 2p row B, had been cut only 10 feet, i.e., not all the way through (6) that the roof plan requires "(8) Breaker Post will be set at location (a) promptly after mining inby." (Government Exhibit 4 p. 18); and (7) that, at the commencement of the day shift on July 23, breaker posts had not been set in Entry No. 2 row C outby row B block 2P. Based on these facts,⁶ it might reasonably be inferred that, at the conclusion of the July 22 evening shift, row B

⁴Mining did take place only in rooms to the left and right of these rows.

⁵Although the production report indicates the time cutting commenced and ended and the depth of cut taken from a particular block, it does not indicate the row where that block was located. However, since it indicates that only a 10 foot cut was taken from block 2p that evening, and since, when inspected on July 23, the only block 2p that had been cut not all the way through was located in row B, it might reasonably be inferred that the partial cut in block 2p which commenced at 12:06 p.m. and ended at 12:20 p.m. was located in row B. Further, the production report indicates that prior to the time that the cut was taken from block 2p at 12:06, mining had commenced in block 6p at 7:50 and the depth of the cut was indicated as "GOB". Also, mining was started at a block 6p at 11:24, and the depth of cut extended 35 feet. Since the record establishes that, when inspected on July 23, blocks had been cut in rows C, (blocks 5p and 6p) and D (block 6p) it may reasonably be inferred that mining had been started in these rows at 12:06, prior to the starting of mining in block 2p in row B. Thus it might be inferred that rows C and D had been started before the final block in row B (2p), had been mined, i.e. before the most inby row (row B) had been completed.

⁶Additionally, the production report indicates that (1) the left continuous miner cut block 2p between 12:06 and 12:20; (2) the men on the shift departed the section 12:25; and (3) there is not any indication explaining why the cut in block 2p was not a full cut. Based on these facts, it might be inferred that the cut was not completed on that shift just because the crew left at the end of the shift, and there was not any intention to abandon the cut at that time and to consider 2p and row B as complete.

had not been completed, as it had not been completely cut, posts had not been set, and rows C and D had been started, but not completed.

Elk Run failed to produce probative evidence to rebut these inferences. Elk Run did not proffer the testimony of any persons who were present on the evening shift of July 22 to explain the precise sequence in which cuts had been taken, the reason why only a partial cut had been taken from block 2p row B, and whether at the end of the evening shift Elk Run's agents determined that mining had been completed in block 2p row B, and the basis for this determination. Nor did Elk Run adduce evidence of any physical conditions in the mine in the area of block 2p row B that would have made it prudent for Elk Run to have determined that after cutting only ten feet mining had been completed. Nor did it proffer the testimony of any miner present on the evening shift of July 22 to indicate why pillars had not been set at location "A" outby block 2p row B. (See, Government Exhibit 2).

Thus, taking into account all the above, I find that the preponderance of the evidence, and reasonable inferences drawn therefrom establishes that by the end of the evening shift on July 22 row B had not been completed, and outby rows C and D had been started but not completed. Accordingly, I find that Elk Run was in violation of its roof control plan, and, by extension, Section 75.220(a), *supra*.

IV. Unwarrantable Failure

Unwarrantable failure has been determined by the Commission to be aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.* 9 FMSHRC 1997, 2001 (Dec. 1987). In *VA Slate Co.*, 23 FMSHRC 482, 486, (May 2001) the Commission set forth the various facts and circumstances to be considered in determining whether conduct is aggravated within the context of unwarrantable failure. The Commission held as follows:

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to

determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Elk Run asserts that the extent of the violative condition, and danger presented were both non-significant. Elk Run argues, in support of these assertions, that on July 23, mining was not taking place in rows B and C, and no employees went into these areas. Also, that a continuous miner blocking entry No. 2 would block the entry of miners to the cited areas as effectively as breaker posts. Elk Run also refers to the presence of solid coal on every corner of rows D and C as mitigating any danger of a roof fall. Further, Elk Run argues that there was not any evidence presented that it had been put on notice that greater efforts were necessary for compliance with the roof control plan. Additionally, Elk Run asserts that the violative condition was not obvious, inasmuch as Saunders believed that row B had been abandoned, and Gary Neil, who was the superintendent at the mine and testified he did not have any reason to believe that any violation existed when he arrived on the day shift. Accordingly, it is argued by Elk Run that there was a lack of evidence presented that it knew the roof control plan had been violated.

In evaluating whether Elk Run's conduct herein was aggravated, I note that Meadows found the violative condition of cuts from blocks in three rows to have been obvious. Significantly, Saunders also readily observed the condition when he first arrived at the first section earlier that morning.

It is clear that cuts were taken from blocks during the evening shift on July 22. The next shift was a non-production shift, and there is no evidence that any cuts were taken on the morning shift July 23, prior to the time Saunders arrived at the area in question. Accordingly, I find that the violative condition of cuts in three rows existed at least since the end of the evening shift on July 22.

As explained by Meadows, the hazard of a roof fall is inherent in pillar mining. The record does not indicate that any action was taken during the midnight shift to protect miners from the hazards attendant upon the uncompleted condition of row B. There is not any evidence that breaker posts (timbers) were installed to impede travel inby that point, and to warn miners not to travel inby.

On the other hand, I take cognizance of the fact that the length of time the violative condition existed unabated was during the non-production midnight shift. I observed Saunders' demeanor and found his testimony trustworthy, that, in essence, when he arrived on the section in the morning on June 22 and observed three rows of blocks had been mined, he sent Larry Helmick, a scoop operator, to obtain supporting/warning timbers.

I note that according to Meadows, when he arrived on the section at the pillar line shortly after 9:30 a.m. on July 23, no timbers were in place, and he did not observe any timbers on the section. Meadows was asked on direct examination whether Saunders said anything to him about his plans to place timbers in the area just in the entry just outby pillar 2p row B, and he indicated

that "... we never did discuss any timbers there." (Tr. 67). He was asked next whether Saunders mentioned anything about a plan to timber that area. He answered as follows: "No. I don't recall timbers even being mentioned." (Tr. 67). However, on cross-examination he was asked "Isn't it true that [Saunders] told you that he had sent an employee outby to get timber to set them in location A." Meadows gave the following answer: "I don't remember him saying that. I'm not disputing it, but I don't remember him telling me that." (Tr. 125). Thus, I find Meadows' testimony is not of sufficient probative value to dilute the weight to be accorded Saunders' testimony that he ordered timbers. I observed Saunders' demeanor while testifying on this point and find him credible. I thus place more weight on his testimony that he had in fact ordered timbers to be brought to the section "... because we probably would have to basically block that entry off." (Tr. 280).⁷

Within the framework of the above evidence, I place considerable weight on the following: (1) Saunders' efforts in abating the violative condition by ordering timbers to be brought to the section at the start of the shift on July 22; (2) the relatively short time the violation had existed, i.e., from the end of the night shift July 22 continuing only through the non-production mid-night shift up until cited by the inspector the morning of July 23; (3) the fact that the operator had not been placed on notice that greater efforts were necessary for compliance; (4) the fact that the degree of danger posed by the violative condition is mitigated by the fact that it existed mainly during a non-production shift, and there is not any evidence that during that shift men regularly entered the violative area, and (5) the fact that there was not any production in the area or men exposed to working in the area during the morning shift on July 23, until the time the conditions were cited.

Taking into account all the above, I find that it has not been established by a preponderance of evidence that the operator's conduct herein was aggravated. Thus I find that it has not been established that the violation was as a result of the operator's unwarrantable failure.

IV. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the

⁷I note that on direct examination Saunders was asked when the timbers that he had sent for were set he indicated that "... it would have been probably around 9:00 a.m. . . . We took care of setting those timbers while Danny was on the section." (Tr. 275). I find this testimony not credible in light of Meadows testimony that there were not any timbers outby block 2p row B in the No. 2 Entry when he was on the section on July 23, 2002. Also, importantly, the parties agreed that there were not any timbers at that location. However, although Saunders testimony was not credible on this point, I decline to apply the principle of *falsus in uno, falsus in omnibus*. I find Saunders' testimony credible, for the reasons set forth above, that shortly after arriving on the section he had ordered timbers brought to the section.

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, Nat'l Gypsum Co.*, 3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In *United States Steel Mining Co.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Co.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above, I found that there was a violation herein of Section 75.220(a) supra, and the roof control plan. According to Mathews, whose testimony I find credible at this point, pillar mining itself weakens roof support and places stress on the section. Further, according to Meadows, leaving three rows of blocks that have not been completed exacerbates the hazard. Also, the fact that breaker posts had not be installed to prevent any roof fall continuing outby further contributes to the hazard. I thus find that the first and second elements of Mathies, supra have been established.

In regard to the third element set forth in Mathies, supra , the Secretary must establish, by a preponderance of evidence, a reasonable likelihood of an injury producing event, i.e., a roof fall. In this connection Meadows testified that "... numerous people have been killed as a result of retreat mining." (Tr. 102). Also, that the presence of three incomplete rows without appropriate supporting timbers increases the risk of exposing miners to roof fall. However, in analyzing the likelihood of an injury producing event, ie., a roof fall, I note, as argued by Elk Run, that there was not any evidence adduced that the roof was undergoing any specific type of

stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine. I thus find that the Secretary has not established by a preponderance of evidence that there was a reasonable likelihood of a roof fall. I thus find that it had not been established that the violation was significant and substantial.

V. Penalty

Essentially, for the reasons set forth above, (*III, infra*) I find that the violation herein contributed to the hazard of a roof fall which could have caused serious injury to miners. Hence I find that the gravity of the violation was relatively high. I note that in the two year period preceding the date of the order at issue the operator was cited for one hundred and sixteen significant and substantial violations of which eight were violations of Section 75.220(a)(1), *supra*, and by reference, the roof control plan. I note that it has been stipulated that the proposed penalty would not have an effect on the operator's ability to continue in business.

On the other hand I note, for the reasons set forth above, (*III, infra*), that the level of Elk Run's negligence was only moderate. Additionally, the Secretary conceded that Elk Run acted in good faith abating the violation and in making efforts at abatement. I adopt these conclusions as they are supported by the record. Considering all the above factors, I find that a penalty of \$1,000.00 is appropriate.

Order

It is ordered that: (1) Order No. 4623160 be **Amended** to a Section 104(a) citation that is not significant and substantial, and (2) within 30 days of this Decision, Elk Run pay a civil penalty of **\$1,000.00** for the violation found herein.

Avram Weisberger
Administrative Law Judge

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