

CCASE:
WESTMORELAND COAL V. SOL (MSHA)
DDATE:
19840711
TTEXT:

~1717

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WESTMORELAND COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

WESTMORELAND COAL COMPANY,
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 83-260-R
Order No. 2147582; 8/10/83

Hampton No. 3 Mine

CIVIL PENALTY PROCEEDING

Docket No. WEVA 84-75
A.C. No. 46-01283-03530

Hampton No. 3 Mine

DECISION

Appearances: Kevin McCormick, Esq., U.S. Department of
Labor, Office of the Solicitor, Arlington,
Virginia, for Petitioner/Respondent;
F. Thomas Rubenstein, Esq., Westmoreland
Coal Company, Big Stone Gap, Virginia, for
Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for
assessment of a civil penalty filed by MSHA against Westmoreland
Coal Company pursuant to section 110(a) of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil
penalty assessment for an alleged violation of mandatory safety
standard 30 CFR 75.523. The alleged violation was stated in a
section 104(d)(2) Order served on Westmoreland by MSHA Inspector
Vaughan Garten on August 10, 1983.

~1718

Westmoreland Coal Company contested the civil penalty proposal, and also filed a separate notice of contest pursuant to section 105(d) of the Act challenging the validity of the order. The cases were consolidated for trial in Madison, West Virginia. The parties were afforded an opportunity to file post hearing arguments, and they have been considered by me in the course of these decisions. (FOOTNOTE a1)

Issues

The issues presented in these proceedings include the validity of the order, whether the alleged violation resulted from an unwarrantable failure by Westmoreland Coal Company to comply with the cited mandatory standard, and whether or not the violation was significant and substantial.

Assuming the alleged fact of violation is established by a preponderance of the evidence, the question next presented is an appropriate civil penalty to be assessed for the violation taking into account the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.
2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.
3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated to the following:

1. Westmoreland Coal Company is subject to the jurisdiction of the Commission and the Act, and the presiding judge has jurisdiction to hear and decide these cases.
2. MSHA Inspector Vaughan Garten is a duly authorized representative of the Secretary of Labor, MSHA, and acted in this capacity when he served the contested order on a representative of the contestant/respondent.
3. The subject contested order was properly served, and a copy may be admitted as a part of the record in these proceedings.

4. Westmoreland Coal Company is a large mine operator. It's overall coal production for the year 1982 was approximately 12,642,000 tons. The 1982 coal production for Westmoreland's Hampton No. 3 Mine was approximately 490,000 tons.

5. The proposed civil penalty for the contested violation will not adversely affect Westmoreland's ability to continue in business.

6. The conditions cited as a violation were timely abated in good faith by the respondent/contestant.

7. The history of prior violations for the Hampton No. 3 Mine is reflected in a computer print-out, exhibit G-2, and it may be admitted as part of the record in these proceedings.

Counsel for Westmoreland stated that he does not now challenge the fact that the required precedent underlying section 104(d) citations or orders to support the order issued in these proceedings were issued by MSHA inspectors. Accordingly, counsel stipulated that the contested order was procedurally valid. However, he indicated that he was not waiving or otherwise admitting his contention that the violation did not constitute an unwarrantable failure and a significant and substantial violation.

Discussion

Section 104(d)(2) Order No. 2147582, 10:20 a.m., August 10, 1983, citing a violation of 30 CFR 75.523, states the following condition or practice:

The panic bar provided for the No. 19 Joy Standard drive shuttle car operating in the 018-1 7 Left Section was not being maintained in an operative condition in that when tested said device would not deenergize said shuttle car in the event of an emergency.

The inspector found that the violation was "significant and substantial," and ordered the withdrawal of the shuttle car from service.

~1720

The inspector cited a previous order, No. 2140708, issued on February 18, 1983, as the "initial action," underlying the order which he issued on August 19, 1983.

Order No. 2147582 was abated at 11:25 a.m., August 10, 1983, and the abatement action states:

Panic bar was repaired and now will deenergize said equipment.

MSHA's Testimony and Evidence

MSHA Inspector Vaughan Garten testified as to his duties, experience, and training, and he confirmed that he has worked as a mine foreman and holds mine foreman's and fire boss certificates issued by the West Virginia Department of Mines. He confirmed that he is familiar with the subject mine, that he was assigned to inspect it for approximately a year beginning in October 1982, and he described the mine as a slope and deep mine. Coal is mined with continuous miners and a beltline, and the mine has five active sections. The roof averages six-feet high, and spot inspections for methane are conducted at the mine (Tr. 9-13).

Mr. Garten confirmed that he conducted an inspection at the mine on August 10, 1983, and the inspection was a continuation of a general inspection which began on August 1, 1983. After arriving at the mine on August 10, he met with the mine superintendent, mine foreman, and chairman of the union safety committee, checked the pre-shift, on-shift, and weekly equipment books for the 7 left section, and he then proceeded to that area. Upon arrival, the section foreman asked him if he was going to inspect any equipment, and when Mr. Garten answered in the affirmative, the foreman requested him to check the Nos. 17 and 19 shuttle cars which were on the section (Tr. 13-15).

Mr. Garten stated that upon inspection of the No. 19 shuttle car he found that the panic bar was inoperative in that it could not be pressed down to deenergize the machine. The panic bar was located alongside the operator's shoulder or lower part of his arm, and Mr. Garten explained that the bar should be able to deenergize the machine by the operator leaning over against it or hitting it with his hand. Fifteen pounds of pressure are required to deenergize the machine, and the bar should only travel about two inches for this to occur. He found that the bar was "fouled" by a piece of metal at one end, and this would not allow the bar to go in the downward motion when it was hit. In order to activate the bar one had to reach and pull the bar forward, then "mash it down" (Tr. 15-17).

Mr. Garten stated that the section foreman and the union safety committeeman were with him when he tested the panic bar,

~1721

and when they both tried it and observed that it would not work and could not operate it the way it was designed to operate, Mr. Garten then issued the order, and served it on Ted Forbes (Tr. 17-18).

Mr. Garten stated that the No. 19 shuttle car was energized and in by the section dumping point at the time the violation was issued, and that the section was not active and coal was not being mined (Tr. 18, 23). However, he stated that the section was preparing to mine coal, and that from speaking to other miners, he determined that coal was mined on the previous shift. He also confirmed that the section was an active pillar section, and although the prior shift was not a production shift, and he could not state why coal would have been mined on this prior shift, Mr. Garten stated that "due to it being a pillar section, you cannot let a pillar section set idle for a period of time" (Tr. 20-21).

Mr. Garten stated that the shuttle car is a self-propelled electric car which is in the active workings of the mine, and that it is not equipped with a substantially constructed cab. He also indicated that the respondent has not applied to MSHA for approval of a device in lieu of the panic bar to deenergize the shuttle car. In his opinion, the car which he cited did not have a panic bar which allowed for a quick deenergization of the machine (Tr. 21).

Mr. Garten stated that the problem was corrected by cutting the metal from the area which fouled the panic bar, and after this was done it performed the way it was designed to (Tr. 22).

Mr. Garten confirmed that the shuttle car was used on a regular basis in a heavily worked or frequently traveled area, and he believed that the condition should have been discovered by the required weekly electric hazards examination. He also believed that the electrician or section foreman should have been aware of the condition because the electrician should have checked all of the working components of the car. However, Mr. Garten confirmed that he found no notation of the condition in the electrical examination book (Tr. 23).

Mr. Garten believed that the violation was unwarrantable because the condition should have been known to mine management. He confirmed that the machine operator should have checked the car and reported the condition to management (Tr. 23).

Mr. Garten noted that the respondent's negligence was "moderate" because "management should have been aware of this condition, but there could be mitigating circumstances behind it" (Tr. 24). He believed that it was reasonably likely that the cited condition would lead to an accident, and that any

~1722

resulting injuries "could be permanently disabling or maybe fatal" (Tr. 24). He confirmed that the purpose of the panic bar is to stop the shuttle car in the event of an emergency, and he believed that the operator or a miner working in the section would be affected if an accident were to occur. The operator could be crushed against a rib, and miners could be run over if the machine "got away" and could not be stopped (Tr. 26).

On cross-examination, Mr. Garten stated that on prior inspections he would have examined the shuttle car in question, but that the panic bar was operating properly. The only difference he found on August 10, 1983, was the piece of metal which had been welded on and which prevented the bar from working (Tr. 27). He did not observe the metal piece during prior inspections, and he believed that it had been added since the time he last inspected the car.

Mr. Garten confirmed that he tested for methane on August 10, 1983, and found none present. He stated that he did not test the panic bar, but asked the machine operator to test it while he observed him and he confirmed that the operator did deenergize the machine at that time, and he clarified his previous direct testimony as follows (Tr. 29-30):

Q Did you not earlier testify that the panic bar was totally inoperative, the piece of metal would prevent it from actuating?

A The piece of metal did prevent it from working properly. The way he designed it, or would test it-he'd pull the bar forward, then mash it down. I talked to that man and told him that wasn't the way it was designed to work.

Q Your testimony is the panic bar would somehow slide?

A Yes.

Q How did the piece of metal cause it to not work if the bar was sliding? Was there only one particular spot it would get in and not work?

A The piece of metal, the way it was situated, it would prevent the bar from going in a downward motion. Now, you could slide the panic bar forward and it would free itself from the piece of metal. Then you could mash it down.

Q What would cause the bar to slide back and forth? Aren't those things fairly rigid?

~1723

A The majority of them, right.

Q What position would the bar normally be in?

A What are you referring to?

Q Would it not oftentimes be operative if it was slid away from where the piece of metal would catch?

A There would be circumstantial factors that plays in that, because a lot of times a panic bar designed on a piece of equipment will slide forward and slide back, but they have a piece of metal welded on so when it comes down, it comes in contact with the switch-

Q How big is that switch? How big's the piece of metal in width that we're talking about?

A I'd say two to three inches.

Q So we're talking about a two to three inch area? In that particular area, the panic bar would work? The piece of metal would not prevent it from operating. It would have to be within the range of that two to three inch area?

A Right.

Mr. Garten stated that the piece of metal behind the bar was approximately 2 to 3 inches and that the bar would have to be in this area for it not to operate properly (Tr. 30). He stated that maintenance foreman Harold Vanhorn came to the machine after it was cited, and the panic bar would not operate. Mr. Garten stated that he advised Mr. Vanhorn that the bar would have to be repaired so that it deenergized the machine by someone's body simply coming into contact with it and without the necessity of someone making any other kind of motion to activate the bar. Although Mr. Garten did not point out the piece of metal to Mr. Vanhorn, Mr. Garten stated that Mr. Vanhorn observed the problem and that he cut the metal off with a torch (Tr. 31).

Mr. Garten stated that the piece of metal which impeded the bar served no other purpose than to prevent the bar from working. He has never observed a Joy standard drive shuttle car which could also be deenergized by means of a rear lever which could activate the emergency car braking system (Tr. 32).

~1724

Mr. Garten indicated that if the car operator knew of the condition of the panic bar this would constitute mitigating circumstances, but that he had no reason to believe that this was the case (Tr. 32). He also indicated that the shuttle car's movement is limited to an area within its 500 foot cable (Tr. 32).

In response to further questions, Mr. Garten stated that he also inspected the No. 17 car but found no piece of metal impeding the panic bar, and that it worked properly (Tr. 33).

And, at (Tr. 36-37):

Q Did you actually climb into the equipment yourself to test the panic bar?

A Right. I showed him—the operator himself—I showed him how the panic bar was supposed to work by just leaning into it.

Q So once it became disengaged or pulled away from the metal piece that was there, then you could lean into it and it would go down and do what it was supposed to do?

A That is if you held it up, slid it forward, Your Honor.

Q I'm saying once it was away from the metal, once someone pulled it away from there, then you could lean into it and it would deenergize it?

A No. You had to keep holding it forward. Once you let go of it, it would slide back.

Q Did you ever determine what that was all about? I mean, did someone deliberately weld a piece of metal on there to allow someone to manipulate the panic bar in the way you described it?

A I hope not. I don't think.

Q Well, how did the metal mysteriously appear on that particular machine when it wasn't on the other one?

A I don't know, Your Honor.

Q You don't know what it did, what its function was?

A No, sir.

~1725

Q Did anyone from management offer any explanation as to what that piece of metal was doing there?

A One of them-I think it was Harold Vanhorn stated maybe they used that as some kind of a stop. Now, so far as what he was referring to, I could not-

Q Is that panic bar-I mean it's right in the cab, right, right next to the operator?

A Yes, sir.

Respondent/Contestant's Testimony

William Roberts testified that he is employed at the mine as a union electrician, and that his duties include performing electrical and mechanical maintenance on mine equipment. He confirmed that he was familiar with the No. 19 Joy standard drive shuttle car which is the subject of these proceedings, including the panic bar. He stated that he personally checked the panic bar in question the day before the violation was issued, and when he checked it with the car energized, the panic bar worked (Tr. 51).

Mr. Roberts explained the operation of the panic bar, and he confirmed that the car also contained a valve in the car deck which automatically locked when the machine lost power. The valve was activated by a metal flap welded on the panic bar itself, and it was always on the cars used at the mine. Mr. Roberts confirms that he never received any complaints from car operators concerning inoperative panic bars (Tr. 53).

On cross-examination, Mr. Roberts confirmed that he checked the panic bar in question while seated in the cab, and after starting the pump motor he pushed down on the bar and it operated. He stated that he checked the car during the day shift. He could not recall testing the bar by simply leaning into it, and he remembered simply pushing the bar down by simply hitting it down (Tr. 55). He did not check the No. 17 car because he is assigned only to the No. 19 car. However, he stated that he has observed the No. 17 car and that it has a metal lip on the bar (Tr. 56). The purpose of this piece of metal or "lip" is to serve as an alternative method of activating the emergency braking system, and that this was also the reason why it was on the No. 19 car (Tr. 56).

Mr. Roberts stated that he has observed car operators activate panic bars by leaning against them with their arms and he has never seen anyone pulling it in any direction and then depressing it (Tr. 57).

~1726

Mr. Roberts identified Exhibit C-1 as pages from the electrical equipment examination book of August 5, 1983, but he could not confirm his signature, nor could he recall whether he reported anything that day (Tr. 59). He also identified his signature on the report for August 12, 1983, and he again confirmed that he inspected the No. 19 car on that day (Tr. 60).

In response to further questions, Mr. Roberts stated as follows (Tr. 65-69):

BY JUDGE KOUTRAS:

Q Mr. Roberts, let me ask you a hypothetical question now. Okay? You climb into a particular shuttle car to examine it one day, you're sitting there and you decide to check the panic bar. Okay?

A Yes, sir.

Q You reach over and slide it and lift it and then hold it down and it deenergizes the equipment, okay?

A Got it.

Q In your mind, is that panic bar functioning properly?

A No, sir.

Q Why?

A Because you've got to go straight down position with it before it will deenergize the switch and the braking system.

Q What does that mean to you now, straight down?

A It means it's working.

Q Didn't it go straight down in my hypothetical?

A No, not if you have to pull on it and push to get it in position.

Q All right. Were you there when the inspector in this case issued this particular order on August 10?

A I was on the section, not at the buggy.

~1727

Q Do you have any idea why he issued this order?

A No, sir.

Q Has anyone ever told you why he issued this order?

A That it wouldn't work.

Q Did they tell you why it wouldn't work?

A I don't think so.

Q But you're the man that's responsible for checking it?

A Yes, sir.

Q On this, the same shift he issued the citation on?

A Yes, sir.

Q And your curiosity wasn't aroused?

A No, sir.

* * *

Q Were you involved in the abatement of this particular citation?

A No, sir, I don't think so.

* * *

Q The lip wouldn't keep the bar from going down to touch the actual deactivation device?

A Well, it's a possibility it could have got-something happened to it in twenty-four hours; but like I say, the day before, the panic bar was checked because I personally checked it.

Q You leaned into it and there was no problem?

A I don't remember if I leaned into it or how I shut it off, but anyhow, I just shoved it or leaned into it, or whatever, and it went off.

~1728

Q But you don't remember specifically how you did it?

A No, sir, but I remember that it worked like it's required to work.

Q What is your idea about how it's required to work?

A Just push down on it and it deenergizes the motor.

Harold Vanhorn, assistant maintenance foreman at the subject mine, testified that he was responsible for the supervision of maintenance on the 7 Left Section on August 10, 1983, and he confirmed that he was summoned to come to the area after the violation was issued. He stated that he got into the shuttle car after energizing it, and that the panic bar operated properly and deenergized the car when he used it (Tr. 72). He indicated that Mr. Garten got into the car and tried the panic bar, but because of his height when he leaned against it, it did not work. Mr. Vanhorn then adjusted the spring so that the panic bar "would be down a little bit for him." When the bar hit the piece of metal, which was a lever for a park brake, Mr. Vanhorn removed it (Tr. 72-73).

Mr. Vanhorn testified that the lever in question was an alternate method of setting the parking brake, and that it was always attached to the panic bar (Tr. 74). He confirmed that the No. 17 car had a similar lever, and that both cars came equipped that way (Tr. 75). Mr. Vanhorn stated that after he adjusted the spring on the bar to lower it to suit Mr. Garten's height, and he indicated that individual car operators always wanted to adjust the bars to suit their own height and that this was a "big controversy" (Tr. 75). However, as long as the bar was not altered so that it could not deenergize the car, operators were allowed to adjust them to suit their individual height (Tr. 76).

Mr. Vanhorn was not aware of any previous problems with the panic bars on shuttle cars, and he indicated that the piece of metal has to remain in alignment so that when it is depressed it will activate the hydraulic valve (Tr. 78).

On cross-examination, Mr. Vanhorn described what he did to check the shuttle car after the violation was issued. He confirmed that when Inspector Garten tried it, it did not operate but that when Mr. Vanhorn lengthened the spring, it did. However, Mr. Vanhorn indicated that the panic bar would deenergize the car when one reached out or up and hit it (Tr. 79). He indicated that the car operators are instructed to test their equipment before operating it, and that the operators are more or less the same height (Tr. 80).

~1729

In response to further questions, Mr. Vanhorn stated as follows (Tr. 83-89):

Q And did you speak with the inspector?

A Yes, sir. I asked him, I said, "Just what is wrong with the machine?"

Q And what did he tell you?

A And he showed me, he got in it and showed me what was wrong with it.

Q What did he show you? Do you remember?

A When he got in it, he pushed against it, and it went up.

Q What do you mean it went up?

A It pivots down on, say, a forty-five degree angle over a set of switches; and the boy had a spring up here and it raised it up a little more than center. You know what I mean? And when he come against it, you know what I mean, it went up. It fouled again. It went up.

* * *

Q It went up?

A It come up, instead of going down. But the motion of it is to go down.

Q How did he finally get it to work, the inspector?

A I lengthened the spring on it to lower it more.

Q And then he got it working?

A As far as I know, it worked for him. It suited him, and they run the buggy.

* * *

Q I'm told that lip is what caused the problem in that it would cause the panic bar to hang up somehow and the operator would have to get in, slide the panic bar, then push it down before it would deactivate.

~1730

A I did not have no indication of that with it.

Q Now, this panic bar is designed so that anyone, by depressing it, could deactivate the machine, right?

A Yes, sir.

Q Is that panic bar supposed to be at one particular position?

A No, sir.

Q And it can be raised or lowered, depending upon what, the size of the operator?

A Well, it's a matter of figures, you know. They might come up with a certain travel space on the panic bar, or weightwise, or something; but do energize it. Do you follow me?

Q Right. But I'm talking about accessibility.

A As long as you're supposed to be inside the cab of it, you're supposed to be able to hit it.

Q The next question is how are you supposed to hit it? What would you do to hit it?

A I approximately would use my shoulder or my hand. It would depend if I was in a hurry. In a quick reflex, you don't know what you'd do.

Q In a shuttlecar, you're steering the machine with your left hand, are you not?

A Yes, sir.

Q And the panic bar is on that side, isn't it?

A Yes, sir.

Q So if you use your hand to do it, you wouldn't let go. You'd reach over with your right hand?

A Well, you could.

Q If you were going to use your hand?

A It would be a matter of quickness. I'd probably do it with my shoulder.

~1731

Q With your left shoulder?

A Yes. I'd just go against it. Left or right, whichever way you'd be traveling. There's a left and right machine.

* * *

Q Did that piece of metal in any way impede or keep the panic bar from doing its job?

A When I tried it, no.

Q How about if somebody else tried it?

A Well, now-

Q If the inspector tried it, did it?

A It might have, but it did not when I tried it.

Inspector Garten was called in rebuttal, and he could not explain the presence of the metal lip on the panic bar, nor could he dispute the testimony of the respondent's witnesses regarding that device (Tr. 101). In response to further questions, Mr. Garten testified that when he tested the panic bar he had to push it approximately one-half inch forward and then down, and he explained his citation further as follows (Tr. 107-108):

Q If there's an operator sitting there and he pushes it a half an inch and down, is it altogether possible that he believed it was operating all right?

A He could have.

Q And yet when you did it, you didn't think it was, because-

A The panic bar is designed two-inch play downward pressure, not sideways. It was designed for two-inch play when you hit it for it to come down into contact.

Q So it's altogether possible then the reason you issued this citation is that you were strictly applying Subparagraph (c), which says, Any part of the body leaning into it has to de-energize it?

A Yes, sir.

~1732

Q Whereas, the operator you saw was having a little difficulty because he had to move it a half an inch and then put a little more pressure down. And in your view, that wasn't in compliance with the standard?

A No, sir, because the standard calls for the fifteen pound pressure on your body in a downward direction.

And, at Tr. 109:

JUDGE KOUTRAS: Half an inch, gentlemen-how big is this panic bar?

MR. RUBENSTEIN: Three-and-a-half feet long?

THE WITNESS: Three-and-a-half or four feet. It depends on the length of the deck.

JUDGE KOUTRAS: So the question of whether the fellow leans into it or moves it half an inch, really-

MR. McCORMICK: I take issue with that, Judge. It's not that. He said when you leaned into it, it didn't work. So half an inch might be a small amount of distance, but you have to move it half an inch and then it would work; but if you leaned into it without moving it forward with your hand, it wouldn't work. So the half inch, I think, is significant. Not so much the distance. It's the fact you had to do something before the panic bar would automatically work the way it's supposed to.

Findings and Conclusions

In this case the respondent is charged with a violation of the provisions of mandatory safety standard section 30 CFR 75.523, which provides as follows:
[Statutory Provision]

An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency.

The citation issued by Inspector Garten asserts that the panic bar on the cited shuttle car was not maintained in an operative condition in that when it was tested it would not deenergize the machine in the event of an emergency.

~1733

Regulatory standard section 75.523-1 requires that electric face equipment must be provided with a device that will quickly deenergize the equipment in the event of an emergency. The parties stipulated that the exception found in subsection (b) of this standard, which does not require such a device when a machine is equipped with a substantially constructed cab, does not apply in this case.

Regulatory standard section 75.523-2 states the performance requirements for the deenergization device in question, and subsection (b) and (c) state as follows:

(b) The existing emergency stopswitch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

The inspector here did not include a reference to sections 75.523-1 and 75.523-2 as part of his citation. While it would have made the citation more specific and detailed as to precisely what was being charged, I do not believe that his failure to include these sections renders the citation procedurally defective. I conclude that all of these sections must be read together in order to make any sense as to what is required under section 75.523. Subsections (b) and (c) of section 75.523-2 state the performance requirements necessary to maintain compliance with section 75.523, to insure that the deenergization device "will permit the equipment to be deenergized quickly in the event of an emergency".

In its post-hearing brief, MSHA takes the position that the uncontradicted testimony of Inspector Garten clearly establishes that the panic bar in question did not operate in conformity with the requirements of the applicable standards noted above. MSHA asserts that when Mr. Garten examined the shuttle car, the operator had difficulty activating the panic bar, and that before the bar would deenergize the machine, the operator had to slide the bar up and then press it down. Given these circumstances, MSHA concludes that the car operator was unable to activate the panic

~1734

bar by using any portion of his body, and that it was only after he went through a special maneuver was he able to work the bar properly.

In further support of the violation, MSHA points out that when Inspector Garten attempted to activate the panic bar himself he was unable to deenergize the shuttle car because the bar could not be smoothly pressed down. MSHA concludes that Mr. Garten correctly determined that this additional step of pulling the panic bar before it could be pressed down to deenergize the car did not satisfy the requirements of the standard for a quick deenergization in the event of an emergency because a metal lip on the panic bar prevented the bar from moving smoothly in a downward direction. Finally, MSHA points to the fact that neither the mine foreman (Forbes) nor the Chairman of the Safety Committee (Gunoe), both of whom were present with the inspector when the machine was examined, were able to deenergize the car by simply pressing down on the bar, and that the testimony by Mr. Garten in this regard was not refuted.

In defense of the citation, the contestant/respondent presented the testimony of electrician William Roberts and assistant maintenance foreman Harold Vanhorn. Although Mr. Roberts indicated that he had checked the panic bar the day before the inspection and that it worked properly, he confirmed that he was not present at the shuttle car when the inspector issued his citation on August 10, 1983. He also stated that he had no idea why the order was issued, and that no one told him why the panic bar would not work.

Mr. Roberts was not involved in the abatement of the citation, and when asked how he had tested the bar the day before the citation issued, he stated that he had "hit it" or "pushed down" on it, but he could not recall whether he activated the bar by simply leaning into it. In response to a hypothetical question as to whether a panic bar which had to be activated by someone sliding it, lifting it, and then pushing it down would be functioning properly, Mr. Roberts answered that it would not.

Mr. Vanhorn was summoned to the shuttle car area after the citation issued, and he stated that when he tested the panic bar it operated properly and deenergized the car. However, he conceded that when the inspector tested it in his presence by simply leaning into it, the device would not operate properly and did not deenergize the machine. Mr. Vanhorn also conceded that the device is designed to function by someone simply depressing it, and in order to quickly deenergize the machine, he would probably use his shoulder.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that MSHA has established the fact of violation. I find the inspector's

~1735

testimony in support of the violation to be credible, and the contestant/respondent's testimony, while possibly mitigating the offense, has not rebutted the credible testimony presented by MSHA in support of the violation. Accordingly, the violation IS AFFIRMED.

Unwarrantable Failure

The violation in this case was set out in a section 104(d)(2) "unwarrantable failure" order issued by Inspector Garten. Although I have affirmed a finding of a violation of the cited safety standard in question, there still remains the issue as to whether or not the violation constitutes an "unwarrantable failure" by the contestant/respondent to comply with the requirements of section 75.523. Contestant/respondent has stipulated that it does not challenge the procedural underpinning for the order, and it concedes that the precedent underlying section 104(d) citation and order "chain" was validly issued (Tr. 48). However, contestant/respondent preserved its challenge to the "unwarrantable failure" finding by the inspector.

As correctly stated by MSHA in its brief, the test for "unwarrantable failure" is whether "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence", Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

MSHA did not produce copies of the underlying section 104(d) citation and order, and I have no way of knowing why they were issued. In support of its argument that the violation here was an unwarrantable failure, MSHA relies on the testimony of Inspector Garten. He believed that the violation was unwarrantable because he "felt this condition should have been known by mine management" (Tr. 23). In support of this conclusion, Mr. Garten was of the opinion that since the machine is on the section all of the time, and since there is a qualified electrician present who is required to inspect the equipment during his weekly examination, the condition should have been discovered. Further, Mr. Garten was of the view that the machine operator is required to check the machine daily before he operates it, and if he finds any condition that is out of compliance, he is required to report it (Tr. 22-23).

Neither party called the shuttle car operator as a witness, nor did they take his deposition. As a matter of fact, no testimony was elicited from the inspector as to whether he even interviewed the machine operator or obtained any statement from him as to whether or not he had examined the car in question prior to operating it, or whether he believed the condition "was obvious or easily discernible", as claimed by the inspector. Further,

~1736

when asked his opinion as to the negligence of the operator, Inspector Garten was of the view that it was "moderate". In reply to a question as to whether or not mine management should have been aware of the condition, Mr. Garten replied "there could be mitigating circumstances behind it" (Tr. 24).

Inspector Garten asserted that he had no reason to believe that the shuttle car operator was aware of the condition of the panic bar (Tr. 32). This leads me to conclude that prior to the inspector's arrival on the scene, the car operator either did not check it out or thought nothing of it. As a matter of fact, when called in rebuttal, Mr. Garten admitted that when he tested the panic bar he had to push it approximately one-half inch forward and then down before the machine would deenergize. When asked whether the car operator, given these same circumstances, could have concluded that the device was operating properly, Mr. Garten replied "he could have" (Tr. 108).

As for Mr. Garten's testimony that he examined the very same car "a month, maybe longer" prior to August 10, 1983, and found that the panic bar operated properly, and that he observed no metal lip impediment, contestant/respondent's post-hearing information suggests that it may have been added in May 1979 when the car was rebuilt. Thus, any inference that the metal lip may have been added after Mr. Garten's prior inspection is simply not supportable. As a matter of fact, Mr. Garten appeared to be totally ignorant as to the function of the impediment described as a "metal lip". Further, there is no evidence of any past complaints by machine operators concerning any problems with the panic bar, and Mr. Vanhorn's testimony that no prior complaints were ever brought to his attention remains unrebutted. Although the computer print-out of prior violations for the mine shows that four prior citations for violations of section 75.523 were issued in 1982, and in March and June of 1983, MSHA presented no evidence or testimony as to what those were about.

After careful scrutiny of the record in this case, I cannot conclude that MSHA has established that this violation was caused by an unwarrantable failure by the contestant/respondent to comply with the requirements of section 75.523. MSHA has produced no credible evidence to support any conclusion that the weekly examination had not been conducted, and I take official notice of the fact that August 10, 1983, the day the citation issued, was a Wednesday. Further, respondent's electrician Roberts' testimony that he examined the panic bar the day before the citation issued and found it operating properly has not been rebutted by MSHA.

Maintenance foreman Vanhorn's testimony concerning the adjustments that are required to be made in the panic bar to take into account the height of the car operator has merit, and leads

~1737

me to conclude that it is altogether reasonable that what may appear to one individual as an "obvious or easily discernible" condition could very well depend on the subjective judgments and observations of someone else. As a matter of fact, Mr. Garten conceded during his rebuttal testimony that he strictly applied the standard requirement that the panic bar be capable of deenergizing the machine by the operator simply leaning his body against it (Tr. 107-108).

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish by a preponderance of any credible evidence or testimony that the violation constituted an unwarrantable failure by the contestant/respondent to comply with the requirements of the cited safety standard. Accordingly, Inspector Garten's finding in this regard IS VACATED, and the section 104(dd)(2) order IS MODIFIED to a section 104(a) citation.

Significant and Substantial

In support of its contention that the violation is "significant and substantial" (S & S), MSHA asserts that the unrefuted testimony of Inspector Garten established not only that there was a reasonable likelihood that the failure of the panic bar to deenergize the shuttle car would lead to an accident, but that if an accident did occur, it would reasonably be expected to result in at least one and possibly two employees being permanently disabled or fatally injured (Tr. 25). This was true, argues MSHA, because a shuttle car like No. 19, which could freely roam in the mine for up to 500 feet, could easily crash against a rib in the mine seriously injuring the operator or crush anyone in its path if the panic bar was inoperative (Tr. 25-26, 33). MSHA points to the fact that neither Mr. Roberts nor Mr. Vanhorn questioned Inspector Garten's statements as to the potential harm that can be caused by an inoperative or malfunctioning panic bar.

Although Inspector Garten confirmed that coal was not being produced at the time the violation was cited, and while he did not specifically know when the car was last used, he did confirm that the section was an active pillar section which does not remain idle for very long, and that the shuttle car was used during a coal production cycle. He also confirmed that the car would be used on a regular basis in the pillar section in areas which are heavily worked or frequently traveled (Tr. 21-22). While the testimony of the shuttle car operator himself would have been the best and most direct evidence of any hazard concerned with the cited panic bar, I still find the inspector's testimony to be credible, and Westmoreland has not rebutted it.

I believe it is reasonable to conclude that given the violation in this case, in the event of a collision caused by the inability of the shuttle car operator to quickly deenergize the

~1738

machine by simply leaning his shoulder into the panic bar, personal injuries or equipment damage would likely result. Accordingly, I conclude and find that the violation is significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Size of Business and the Effect of the Civil Penalty on the Respondent's Ability to Continue in Business.

The parties stipulated that Westmoreland Coal Company is a large mine operator and the civil penalty assessed in this case will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Abatement

The parties stipulated that the cited conditions were timely corrected and abated in good faith, and I adopt these as my conclusion on this issue.

Negligence

The inspector here believed that the violation resulted from a moderate degree of negligence. I conclude and find that the violation resulted from Westmoreland's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

I conclude and find that the violation here was serious. Failure of the car operator to be able to quickly deenergize the shuttle car by leaning against the panic bar during an emergency, unexpected traffic, or other obstacles in its path while the machine is in operation presents a real potential for accidents and injuries.

History of Prior Violations

Westmoreland's history of prior violations for the mine in question is contained in a computer print-out submitted by MSHA (exhibit G-2). For the period August 10, 1981, through August 9, 1983, the mine was assessed for a total of 290 violations, four of which were previous citations of section 75.523. The information also reflects that since October 20, 1978, the mine has received 126 "S & S" violations, and I assume that these are among those listed in the print-out.

Although Westmoreland is a large mine operator with a 1982 annual production of over 12 million tons of coal, for that same year the Hampton No. 3 Mine produced 490,000 tons. Assuming that

~1739

same production for 1983, the number of violations at the mine, in comparison to its production, appears to be high. However, absent any further analysis or supportive arguments from MSHA, I cannot conclude that the prior history warrants any additional civil penalty increase, and I am persuaded by the fact that the mine has had only four prior citations for violations of section 75.523.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$175 is appropriate for the violation in question.

ORDER

Respondent Westmoreland Coal Company IS ORDERED to pay a civil penalty assessment of \$175 within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄ

~FOOTNOTE_ONE

a1. MSHA filed a brief, but Westmoreland opted not to.