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SOL (MSHA) V. U.S.STEEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

U.S. STEEL MINING CO., INC.,
RESPONDENT

UNITED MINE WORKERS OF
AMERICA, LOCAL 2300,
INTERVENORS

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 83-70
A.C. No. 36-03425-03511

Docket No. PENN 83-78
A.C. No. 36-03425-03512

Maple Creek No. 2 Mine
Docket No. PENN 83-77

A.C. No. 36-04281-03505
Dilworth Mine

Docket No. PENN 83-94
A.C. No. 36-00970-03514

Maple Creek No. 1 Mine
Docket No. PENN 83-74

A.C. No. 36-05018-03508
Docket No. PENN 83-75

A.C. No. 36-05018-03509
Docket No. PENN 83-76

A.C. No. 36-05018-03510

Cumberland Mine

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., U.S. Steel Mining Co.,
Inc., for Respondent.

Before: Judge Kennedy

The notice of contest in each of the captioned penalty proceedings admitted the fact of violation but challenged the S & S findings. After a lengthy consolidated hearing in Morgantown, West Virginia, the matters are before me on the operator's exceptions to 17 of my 27 bench decisions.

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The parties' stipulations with respect to the operator's size, prior violations, ability to pay, and promptness in abatement are set forth in the record and were considered and incorporated by reference in the bench decisions. As indicated, the disputed issues focused on gravity, likelihood of contribution to another mine hazard, and negligence or culpability.

Decisions Accepted As Final

The operator filed no exceptions to the bench decisions assessing penalties for the following ten violations:

Docket No.	Citation	Amount
PENN 83-70	2013726	\$242
PENN 83-76	2013047	259
	2013052	178
	2013056	50
PENN 83-77	1144515	20
	2012080	25
PENN 83-78	2013734	200
	2013737	227
	9901321	178
PENN 83-94	2014016	30
		\$1,409

Decisions Rejecting the \$20 Minimal Penalty Limitation.

Eight of the bench decisions rejected the operator's challenge to the trial judge's jurisdiction and authority to assess penalties of more than \$20 for violations which he found were not significant and substantial.

In May 1982, MSHA inaugurated an alternate dispute resolution policy for contested violations. Under this program, the District Managers were authorized to act as substitutes for the neutral decisionmakers established under section 113 of the Act, 30 U.S.C. 823, and to conduct off-the-record, ex parte reviews of contested violations. Further, District Managers were authorized to vacate or reduce to \$20 the penalty for any violation promptly abated which they found "was not reasonably likely to result in a reasonably serious injury or illness." 30 C.F.R. 100.4.

The purpose of the new procedure was to insure the success of the administration's new non-adversary, cooperative enforcement policy. District Managers and their delegates do not, of course, enjoy the decisional independence and security of tenure of the Commission and its trial judges. Thus, when conscientious mine inspectors failed to follow the lax enforcement policy a mechanism was readily available to discipline the inspectorate through wholesale application of the

ex parte review procedure.

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An example of the policy in action was described in the Commission's decision in Bethlehem Mines, 6 FMSHRC 91, 96-101 (1964). (FOOTNOTE 1)

In an effort to expand the "cooperative enforcement" policy to the limits of its logic, U.S. Steel took the lead in the move to persuade the Commission to require its trial judges to defer to MSHA's no-fault penalty policy by denying them authority to make de novo determinations of the gravity, negligence and penalties warranted for non-S & S violations. An editorial in the Courier/Journal for July 11, 1984, copy attached, noted that big bucks are involved in the "current emphasis on leniency and cooperation." For example, in the first full year under the \$20 minimal penalty policy MSHA succeeded in reducing operators' penalties by \$9.7 million dollars. Such a drastic reduction in penalties signals that mine safety and health is no longer the first priority of business with MSHA.

Recognizing the potential for almost total emasculation of the Act's civil penalty provisions, the Commission's trial judges stoutly resisted the U.S. Steel's insistence that the Commission's mandate to act as an independent adjudicatory agency (Article I Court) be subordinated to the operator's interest in promoting the \$20 no-fault penalty policy. The first Commission ruling on the matter occurred on May 31, 1984, when, in a decision affirming an earlier ruling by Judge Broderick, the Commission held that as a matter of law its trial judges were not bound by MSHA's penalty proposals and as a matter of policy should not be.

As the Commission observed:

The Mine Act divides penalty assessment authority between the Secretary of Labor and the Commission. The Secretary proposes penalties. The Commission assesses penalties. The Secretary's penalty proposals are made before hearing. In the event of a challenge to the Secretary's proposal, the Commission affords the opportunity for a hearing. Thereafter, the Commission assesses penalties based on record information developed in the course of the adjudicative proceeding . . . In assessing a penalty the Commission and its judges are required to consider the six statutory penalty criteria set forth in section 110(i) of the Act (30 U.S.C. 820(i)). Thus, the Commission's penalty assessment is not based upon the penalty proposal made by the Secretary, but rather on an independent consideration of the six statutory penalty criteria and the evidence of record pertaining to those criteria

. . .
The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under 100.3, 100.4, or 100.5 of the Secretary's regulations. The distinctions that U.S. Steel attempts to draw in this proceeding between a 100.3 or 100.4 penalty proposal by the Secretary are without merit and are rejected. Secretary v. United States Steel Mining Co., Inc., 6 FMSHRC 1148, 1150 (1984).

The Commission also rejected the suggestion that "as a matter of policy" it should require its judges to defer to MSHA's no-fault violation policy. Noting that such a "policy" would "unwisely restrict the wide discretion the Act affords the Commission in assessing civil penalties" the Commission held

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that it, and its judges, must exercise an independent discretion to insure that the penalties assessed "are effective" and "encourage operator compliance." (FOOTNOTE 2)

On June 11, 1984, the United States Court of Appeals for the Seventh Circuit confirmed that Part 100 is not binding on the determination of penalties by either the Commission or its trial judges. *Sellersburg Stone Co. v. Secretary*, --- F.2d ---- No. 83-1630, 7th Cir.1984.

As the court noted,

. . . we find no basis upon which to conclude that these MSHA regulations also govern the Commission. It cannot be disputed that the Commission and its

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ALJ's constitute an adjudicative body that is independent of MSHA. Sen.Rep. No. 461, 95th Cong., 1st Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary, 29 C.F.R. 2700.29(b) (1983)." Slip Op. 9-10.

For these reasons, I find the operator's challenge to my independent assessment of penalties for the following non-S & S violations is without merit. Accordingly, it is ordered that the bench decisions be, and hereby are, AFFIRMED, and the operator pay the penalties assessed.

Docket No.	Citation	Amount
PENN 83-74	2012781	\$100
	2012784	100
PENN 83-75	2011622	75
PENN 83-78	2013730	100
	2013731	75
PENN 83-94	2014005	50
	2014016	30
	2014013	50
Total		\$580

The Decisions Rejecting the Challenges to S & S Findings.

The Secretary takes exception to one decision that rejected MSHA's S & S finding and the operator challenges eight bench decisions that sustained such findings. Based on an independent evaluation and de novo review of the record evidence my findings and conclusions with respect to these nine violations is as follows: (FOOTNOTE 3)

I. Docket No. PENN 83-74 - Cumberland Mine

A. Citation 2013043

On October 19, 1982, the operator was charged with failing to provide a guard for a 7200 volt electrical

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cable in violation of 30 C.F.R. 75.807. The standard required that underground high voltage transmission cables "shall be placed so as to afford protection against damage, [and] guarded where men regularly pass under them unless they are 6 1/2 feet or more above the floor . . ."

The inspector observed an unguarded cable, 4 inches in diameter, that was suspended only 5 1/2 feet above the mine floor in an area where miners and mobile equipment carrying supplies regularly passed under it. The inspector believed this created an electrical shock hazard that was "reasonably likely" to result in a fatality or lost work days. This, he testified, could occur if the cable were sliced, smashed or damaged by a piece of mobile equipment or supplies so as to pierce its insulated cover or if an individual miner carrying a sharp tool such as a pick or slate bar were to accidentally thrust the tool through the cable and thus penetrate one of its energized leads. The inspector speculated that a sharp tool such as a pick or digging bar could pierce the cable bypassing the inner protective sheathing and contact an energized 7200 volt lead before the automatic circuit breaker was tripped or activated. He then contradicted himself by stating that the MSHA District in which he works does not understand the requirement for a "guard" to mean what the dictionary says it means, namely, a device to protect the cable from injury by preventing its penetration by a sharp tool but merely a high visibility plastic wrapping. Thus, the inspector said that the learning of his MSHA District is that the intent of the requirement for a "guard" is only a requirement for a "guard" that serves as a warning or danger sign such as a sign reading "Danger - High Voltage Cable."

Under this inexplicably narrow construction of the standard, the inspector terminated the citation after the operator installed a piece of yellow plastic PVC pipe of indeterminate mechanical strength cut longitudinally around the lower half of the cable. The totally unguarded condition, which apparently existed for some time, was obvious and should have been reported by the pre-shift examiner.

In rebuttal of the claimed seriousness of the hazard, the operator's senior maintenance training engineer stated that in his expert opinion the cable did not need to be guarded because the inherent protective devices built into the cable and the high voltage system of which it was a part made the need for a guard or even a warning device unnecessary. This expert's opinion was that the likelihood of any contact resulting in a shock hazard of any consequence was too remote to be realistic. Indeed, the record considered as a whole is persuasive of the fact that the millisecond reaction time of the protective devices of the SHD High Voltage

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Shielded Cable in question rendered unlikely the possibility or probability that any sharp instrument piercing the cable would become energized. As the operator's expert explained the ground system in the cable is of lower ohmic value than that of any piece of metal that might pierce the cable. Therefore, "the current would flow back to the ground conductors and make the vacuum breaker operate before it would travel into a piece of machinery and electrocute a man" (Tr. 664).

I conclude, as I did at the hearing, that a high visibility plastic warning device such as a piece of PVC plastic pipe added nothing to the electrical and mechanical protection already provided by the automatic deenergizing devices installed in the shielded cable. The absence of the alleged "guard" did not therefore significantly and substantially contribute to an electrical shock hazard.

In a series of recent decisions, the Commission has made clear that one of the essential elements of an S & S finding is that the underlying violation be of such a nature as to create a "discrete," i.e., a recognizable safety hazard that in the normal course of continued mining operations could contribute to an injury of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984); Consolidation Coal Company, 6 FMSHRC 34 (1984); Consolidation Coal Company, 6 FMSHRC 189 (1984); United States Steel Corporation, 6 FMSHRC 1423 (1984); United States Steel Mining Co., Inc., 6 FMSHRC ---- (July 11, 1984). I find it beyond dispute that the absence of the alleged "guard" in this instance did not create any condition that could reasonably be expected to cause death or serious physical harm before the condition could be abated. It did not therefore approach even the threshold of "significant and substantial."

But this is not to say that a violation even under the attenuated standard did not occur. Having disposed of MSHA's challenge to vacation of its S & S finding, therefore, I turn to the operator's claim that the penalty assessed for its knowing failure to provide a warning sign, \$200, was excessive. In my bench decision I found that while the failure to provide a warning sign did not contribute to the likelihood of a shock hazard it was nevertheless serious because of the "chance in a million" that the absence of the "guard" would fail to warn off a miner who due to some inexplicable combination of unforeseen circumstances might be killed or injured. Indeed, in its post-hearing brief the operator concedes that it is not arguing that it could not or should not comply with the attenuated standard:

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USSM would not file a petition for modification because that would be a useless act. Even if the plastic pipe is not more than a warning sign, the operator cannot establish that a wire (sic) without a warning sign is as safe as one with a sign.

But, the operator argues, since MSHA had interpreted the standard to require only a warning sign and not a protective guard, it was correct in assuming that MSHA did not believe noncompliance presented a serious shock hazard. Thus, it continues, the trial judge erred in finding there was a culpable disregard for compliance that required more than a minimal \$20 penalty. (FOOTNOTE 4)

It is true, of course, that while the risk of a serious shock hazard was remote, its occurrence was not beyond the realm of possibility and its consequences extremely grave - death or a disabling injury. I also felt, and my de novo review confirms that the record supports my finding that noncompliance stemmed from the operator's opinion that the requirement, even in its attenuated form, was arbitrary and, above all, unnecessary. I am sure this was the view of its expert witness. But if it was, as counsel concedes, the remedy was to seek a waiver or variance and not to unilaterally disregard the standard. For these reasons, I concluded the operator's decision to disregard the standard rather than seek a variance, waiver or modification demonstrated a lack of regard for compliance that should not be condoned by assessment of a token penalty. On reflection, however, I believe a lesser penalty than tentatively assessed will suffice.

Accordingly, I reject both parties' exceptions to the bench decision and assess a penalty of \$100 for the violation found.

B. Citation 212365

On October 6, 1982, a 104(a), S & S citation issued for a nonpermissible headlight on a Jeffrey Ramcar. The ramcar was parked in a crosscut awaiting repair of a broken trunion approximately 500 feet from the face. The headlight on the right, outby side had a damaged packing gland that permitted the power cable to be moved freely by hand in and out of the

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headlight indicating the seal around the power leads had been broken. While the ramcar was out of service due to the broken trunion, the operator was unaware of the existence of the permissibility violation.

The undisputed facts showed the power wires entered the headlights through a copper nipple or ferrule which had been broken off and a rubber conduit hose that had been stripped back so as to expose the power wires. As a result, the power leads were not clamped in place which caused a strain on the terminal connections inside the headlight. Because of the damage to the seal around the power leads the flame-path protection against ignitions or explosions within the headlight was inoperative. The operator challenges only my affirmance of the S & S finding.

The operator's expert testified that because the heat generated by a headlight does not exceed 350 degrees fahrenheit and the ignition point of methane is 1100 degrees the violation could not contribute to the cause and effect of a mine fire or explosion. I considered this to be irrelevant since the question was not whether the headlight could cause a fire or explosion but whether a spark or arc from damaged power leads could cause a fire or explosion. As to the latter there seemed to be no dispute. The operator also argued that because a light on the outby side of the ramcar would never get within 40 feet of the face it would be unlikely to encounter a 5 to 15% concentration of methane. It was also argued that since nothing in an unbroken headlight could cause an arc, something would have to fall on the headlight to create a spark of sufficient intensity to cause an ignition. Finally, the operator pointed out that the machine was not energized, was not operating inby the last open crosscut, and was out of service due to the broken trunion. I considered all of these contentions irrelevant. It was clear that since the ramcar was checked for permissibility only once a week and the operator was unaware of the permissibility violation it could have been returned to service without correction of the condition.

The Cumberland Mine is classified as a gassy mine that releases 3.5 million cubic feet of methane a day. This gas is emitted not only from the face and gobbed out areas but also from bleeders in and along the ribs. Consequently, even outby headlights were subject to operating in a gassy, dusty atmosphere in the presence of much loose coal and coal dust. It was not unusual for either inby or outby headlights to be smashed by loose and falling coal or rock or by striking the ribs. When and if this occurred it was likely that arcs and

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sparks could result in ignitions or explosions in the headlights. While damage to lights can cause arcs and sparks even when the packing gland has not previously been damaged, the failure to maintain the gland in a permissible condition increases the risk or likelihood that a light with a damaged flame-path will cause an ignition that may not be contained within the light in the presence of an explosive concentration of gas or float coal dust.

The inspector considered the violation "very serious." He believed it could contribute to an ignition that could in turn cause a fire or explosion with resulting fatalities. On the other hand he considered the negligence slight because the condition, he thought, had occurred since the last weekly inspection and in the interim was not readily observable to anyone not making a check for permissibility. But, he noted, this could also result in the ramcar being put back into service after the repairs to the trunion were accomplished without correction of the permissibility violation.

In my bench decision (Tr. 728), I found that if there was a malfunction or damage to the headlight that caused it to arc or spark the absence of flame-path protection in this headlight could significantly and substantially contribute to the cause and effect of a mine safety hazard and assessed a penalty of \$178.

Applying the Commission's analytical construct cited, supra, including the deference to be given the experienced opinion of the inspector who found it was "reasonably likely" that the broken seal on the headlight could provide a link in the chain of causation from an ignition in the leads to a mine fire or explosion, I conclude that the probability of such an event was not so remote as to be unexpected or unforeseeable in the normal course of mining operations. I find, therefore, that on the basis of the record considered as a whole the evidence shows the underlying permissibility violation could significantly and substantially add, both qualitatively and quantitatively, to a "discrete" safety hazard, namely a mine fire or explosion, that could result in death or serious physical injury.

For these reasons, the operator's exceptions to the bench decision are denied and the penalty assessment of \$178 affirmed.

II. Docket No. PENN 83-75 - Cumberland Mine

A. Citation 2012377

This citation charged the operator with failure to provide guards for the tail and drive rollers on the Mains

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South Conveyor Belt. The absence of the guards was not challenged. The operator contends only that the violation was not significant and substantial.

The undisputed facts showed that at 12 different locations and at various heights ranging from 2 inches above the mine floor to about 5 feet drive rollers up to 2 feet in diameter were unguarded for distances of up to 20 feet along the wide and tight side of the beltline. This exposed miners using the parallel 5 foot wide travelway on the wide side to accidental contact with the rollers as the miners performed rock dusting or fireboss duties or carried supplies from one point to another using the travelway. On the tight side exposure resulted when rock dust was spread while the belt was in motion.

The absence of the expanded metal guards presented multiple pinchpoint hazards which could result in hands, arm or legs getting accidentally caught between the moving rollers and the beltline. The unguarded condition could result in severed or dismembered limbs, traumatic amputations, or a fatality.

The guards removed from the supporting vertical posts were found in a crosscut about 50 feet away. The fact that they were covered with mud, rock dust and coal dust indicated they had been there for some time. Even so, there were not enough expanded metal guards to provide protection for the entire length of the unguarded rollers on the wide and tight sides.

There was conflicting evidence over whether the walkway was damp and slippery or dry. Since the tail roller was under the walkway a miner would have to fall or slip from the walkway to become entangled. While these circumstances may or may not have attenuated the risk with respect to this roller, they obviously did not eliminate it. The evidence also showed the support posts for the missing guards were 4 to 5 feet apart and 18 inches from the edge of the walkway and drive rollers. These dimensions did not provide a protection by location.

The operator claimed the absence of the guards could not significantly and substantially contribute to the pinchpoint hazard because the evidence does not support a finding that an accident involving the pinchpoints "would be reasonably likely to occur" before the condition was voluntarily abated. The operator claims that to assume the condition would "never be corrected significantly alters the test to be applied." The Commission's test, namely, "reasonable likelihood that the hazard contributed will result in a serious injury" requires, the operator contends, a time continuum. I agree.

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The appropriate time continuum in my judgment is whether there is a reasonable likelihood that normal mining operations can be expected to continue before the hazardous condition is abated. Eastern Associated Coal Corp., 491 F.2d 277 (4th Cir.1974); U.S. Steel Mining Co., Inc., 6 FMSHRC ---- (July 11, 1984). Here the evidence amply supports the conclusion that the condition had existed for some time prior to issuance of the citation and that absent issuance of the citation the pinchpoint hazard would have continued to exist for a time sufficient for an accident to occur before the condition would have been "voluntarily" abated.

For these reasons, the operator's exceptions to the bench decision are denied and the penalty assessed, \$120, is affirmed.

B. Citations 2012379, 2012380, 2011625.

These three citations involved the absence of water sprays at dumping points. Citation 2012379 was occasioned by the inspector's reading of the operator's preshift examination reports. They showed that on three consecutive working days, Friday, November 5, Monday, November 8, and Tuesday, November 9, 1982, the preshift examiner (fireboss) had reported a hazardous condition on the Main Face South Conveyor Belt. This consisted of an excessive accumulation of float coal dust at numerous locations around the No. 2 conveyor drive for a distance of approximately 100 feet. The dust had collected on the belt structure, the electrical drive motors and the power cables. The electrical power sources while protected with short circuit devices were not permissible.

When the inspector arrived on the scene, he observed that the belt was energized and running and that the atmosphere was visibly dusty with large amounts of float coal dust deposited on the ribs and roof. As a result of his observations, the inspector issued a 75.316, 104(a), S & S, citation. (FOOTNOTE 5)

It alleged a violation of the operator's Methane and Dust Control Plan in that water sprays were not provided at the belt transfer point. The operator admitted the violation but contested the S & S finding.

Water sprays are required at belt transfer points to precipitate float coal dust from the atmosphere thereby reducing the concentration of respirable and explosive coal dust. In this case, the presence of a visible concentration of dry float coal dust created both a health (respirable dust)

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and safety hazard. Miners working on the beltline and elsewhere were subjected to the hazard of a fire or explosion if an ignition source were to ignite the float coal dust or a methane bleeder. The inspector testified these hazardous conditions existed in the presence of nonpermissible electric motors and where hot rollers or friction from a misaligned belt could occur at any time. As the preshift reports established, the condition was one about which the operator knew or should have known.

The operator's assistant mine foreman claimed the accumulation of float coal dust could have occurred even if the sprays had been installed and made operative because much float coal dust comes from the bottom belts for which no sprays are required or from other sources such as the ventilation system. From this counsel for the operator argued that it could not be assumed that the absence of the water sprays at the transfer point significantly and substantially contributed to the hazardous accumulation of float coal dust.

On rebuttal, the inspector testified that the accumulation of float coal dust observed could not be attributed solely to dust from the bottom belt. He admitted the sprays did not completely suppress or control the suspended float coal dust but was certain that the absence of the required sprays permitted much of the excessive accumulation that he observed. He was also of the opinion that if an electrical malfunction occurred it was "highly probable" that an ignition would cause the float coal dust to ignite.

Citation 2012380 was issued for the absence of water sprays at a belt transfer point inby the point cited in Citation 2012379, supra. Twenty-four hours after this citation issued, the inspector issued a 75.400, 104(a), S & S citation on the same area, the 128 West Conveyor Drive. Counsel for the operator argued that because sprays were installed by the end of the shift on November 9, 1982, and the 75.400 citation did not issue until the next day is proof that the sprays were ineffective and inconsequential in preventing the accumulation of float coal dust.

The accumulation cited, and not contested, was that float coal dust on previously rock dusted surfaces was permitted to accumulate on the mine floor from rib to rib in the belt entry and crosscuts for a distance of 200 feet. In addition, loose dry coal and coal dust had been permitted to accumulate under the drive and rollers on the drive motor in amounts up to 19 inches deep in an area 3 by 4 feet.

The inspector testified he did not issue the 75.400 citation on November 9 because he did not see the accumulation

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he cited on the 10th. He conceded it was possible that he did not see it because it was not there on the 9th. I find that in view of the large accumulation found under the drive and rollers it was more probable than not that the accumulation existed at the time the 75.316 citation issued on November 9 but that the inspector overlooked it.

The parties stipulated that the same two witnesses who testified in support of and in opposition to Citation 2012379 would give similar testimony with respect to the gravity, negligence, and significant and substantial nature of the violation.

Citation 2011625 was issued on November 12, 1982, for failure to provide water sprays on the feeder located at the 52 Main East Section in violation of the same Methane and Dust Control Plan that applied to Citations 2012379 and 2012380. The belt, which was energized but not running when observed, had three water sprays mounted on a bar approximately 300 to 400 feet out by the face at the point where the shuttle cars dumped on the feeder to the main conveyor belt. The sprays were inoperative because no hose was attached to them to supply water.

Coincident with his observation of the inoperative water sprays the inspector saw a shuttle car dump a load of coal on the feeder. When this failed to activate the water sprays the inspector noted the absence of the water hose. Looking further, the inspector observed and wrote a 104(a), S & S citation for a 75.400 violation that disclosed an accumulation of loose, dry, coal dust to a depth of 21 inches in an area around the sequence roller that measured 6 feet wide by 6 feet long. He also noted an accumulation under the tail roller that was 4 feet by 4 feet that was wet. The sequence roller, however, was turning in loose, dry coal and coal dust. This citation was not contested.

As in the case of the other two citations, the inspector testified that it was reasonably foreseeable that the absence of the water sprays could contribute to the hazard of a fire or explosion of to a respirable dust health hazard.

An aggravating circumstance alluded to was the fact that the evidence showed the violation occurred on an intake air split in by the return for the belt air which meant that the respirable dust generated by the absence of the sprays was being carried over the eight miners working at the face.

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Since the inspector observed only one load of coal being dumped on the feeder and the belt was not running the operator contended coal was not being produced and therefore no immediate hazard either serious or nonserious was presented. The operator also showed that, as the inspector admitted, the accumulation of coal under the tail roller was wet but offered no evidence to rebutt the inspector's showing that under the sequence roller the loose coal and coal dust was dry.

In summing up counsel for the operator argued that because each of the violations occurred in an area that was well ventilated and rock dusted the absence of the water sprays was insignificant and not likely to result in or contribute to a hazard that would result in a reasonably serious injury. The operator asserts that any contribution that the absent sprays might make to a buildup in the dust concentration in each of these areas was so minimal as to make the violations trivial and certainly not of such a nature as to increase the risk of any recognizable health or safety hazard.

I do not agree. I admit that quantifying the degree of contribution each of these violations made either singly or in the aggregate to a respirable dust, fire or explosion hazard is impossible. Nevertheless the existence of the spray requirement in the operator's own dust control plan is a plain recognition of the fact that water sprays play a significant role in the suppression of respirable and float coal dust. Further, their absence particularly under the circumstances that appear here, namely, the presence of excessive accumulations of loose, dry coal and float coal dust in working areas rife with potential sources of ignition is persuasive of the fact that the underlying violations were of such a nature as to constitute a significant and substantial link in a chain of causation that could result in death or serious physical injury if normal mining operations continued with these conditions unabated.

Accordingly, I find the absence of the sprays could and did contribute to a significant and substantial increase in the amount of loose, dry float coal dust and respirable dust in suspension and to an increase in the accumulation of loose, dry coal dust on previously rock dust surfaces; that such accumulations did, in fact, occur; and that the presence of such dust could contribute to the cause and effect of at least three discrete hazards, namely a health (respirable dust) hazard and a fire and/or explosion hazard. Applying the Commission's analytical construct cited supra, and giving deference to the testimony of the inspector and weight to the uncontested 75.400 violations, I conclude the conditions cited were significant and substantial violations.

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Upon review of the record considered as a whole, therefore, I am constrained to affirm the bench decisions and the amounts of the penalties assessed for each of the first two violations, \$136 and \$98 respectively. As to Citation 2011625, I find the aggravating circumstance warrants an increase in the amount assessed from \$100 to \$200.

III. Docket No. PENN 83-76 - Cumberland Mine.

A. Citation 2013051

On November 15, 1982, a 104(a), S & S citation issued for a violation on an energized torkar shuttle car parked without wheel chocks on a slight down grade in an underground section of the Cumberland Mine. At the time the citation issued miners were observed walking or standing in front of the car on the downhill side. The citation charged the condition was a violation of a notice to provide safeguard issued September 8, 1981. The existence of the condition was undisputed. The operator contested only the S & S finding.

The testimony of the inspector and the walkaround showed that even where the mechanical parking brake on a shuttle car is set the wear and tear on the teeth of the ratchet mechanism may permit the 20 ton vehicle to drift down a hill with sufficient force to crush a miner against a rib.

The operator's senior maintenance engineer testified that, while he had no personal knowledge of the condition of the car in question, he believed all the torkars purchased by the operator had a dual braking system. The first system was that described by the inspector and walkaround and is similar to the parking brake mechanism found on an automobile. The brake is engaged by pressing the brake pedal down and then pulling back on a lever that locks the foot pedal down and the car in place.

The second braking system on the torkar is called the "failsafe" brake. This braking system is activated when the car is unattended or shut off by hitting the panic bar. The walkaround testified, and the operator's expert did not deny, that the "failsafe" brake did not automatically prevent a car from drifting.

The maintenance engineer said the "failsafe" brake is a hydraulically activated spring brake that works as follows: "If the torkar is in movement, and you activate the panic bar, the panic bar deenergized the pump motor, and, at the same time, the failsafe brake will lock to the rotor on the braking mechanism" and bring the vehicle to a stop (Tr. 845). He further testified that the failsafe brake requires considerable maintenance as its use in stopping a 20 ton vehicle in

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10 feet tears up the rotor. Instead of taking such a vehicle out of service, chocks will be used until the "failsafe" brake is repaired. The maintenance engineer did not know of his own knowledge whether the "failsafe" brake on the torkar in question was operative on the day the citation issued. The walkaround testified that on the basis of his personal experience with the vehicle the "failsafe" brake was not operative.

The operator's expert testified that "failsafe" is a misnomer because no brake is "failsafe" if it is not properly maintained. These particular "failsafe" brakes need a lot of maintenance and repair because, he said, the "momentum of a twenty ton piece of equipment traveling ten miles an hour coming to a screeching halt within, maybe, ten feet . . . tears up the rotor that the brakes grab on to" (Tr. 848). After this occurs, the "failsafe" brake is no longer operative.

Counsel for the operator contended that MSHA had the burden of showing the claimed "failsafe" braking system was not on the vehicle in question, was not operative, and would not have prevented the car from drifting. A miner who actually operated the torkar in question, testified that he was never told the vehicle had a failsafe brake or how to operate it (Tr. 855-856). He further testified that the torkar drifted after shutting the power off and before setting the mechanical brake which led him to believe it had no failsafe brake or at least not one that engaged automatically. I conclude, therefore, that MSHA carried its burden of showing that the violation charged did, in fact, occur and that it was reasonably foreseeable that the underlying violation, i.e., the absence of the chocks would significantly and substantially increase the risk of death or serious physical harm.

Once MSHA established the fact of the underlying violation, the operator had the burden of going forward with evidence to show that the violation was trivial because the shuttle car had a fully operative "failsafe" backup braking system that would prevent the car from drifting after the mechanical brake was set. Not only did the operator fail to carry its burden but, as we have seen, MSHA affirmatively proved that in all probability the vehicle in question did not have an operative "failsafe" braking system.

Applying the Commission's approved analysis we have, therefore, (1) an underlying violation; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed

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to by the violation; (FOOTNOTE 6) (3) a reasonable likelihood that the hazard contributed will result in injury; (FOOTNOTE 7) and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (FOOTNOTE 8)

For these reasons, the exceptions to the bench decisions are denied and the \$200 penalty affirmed.

IV. Docket No. PENN 83-77 - Dilworth Mine

A. Citation 2011736

The roof control plan for the Dilworth Mine in effect at the time this citation issued required that when the sum of the diagonal measurements of an intersection exceeded 60 feet, "posts or jacks shall be installed to reduce the longest span to 28' or less." On November 8, 1982, a 104(a), S & S citation issued when measurements taken at the intersection of the number 14 (intake escapeway) entry and the number 5 crosscut showed that each of the diagonals measured 32 feet and no posts or jacks had been installed. The existence of the condition cited was admitted. The challenge was to the S & S finding.

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At the time the citation issued, the operator was engaged in retreat mining. Three intersections inby the crosscut in question, at the number 8 crosscut between the 15th and 16th entries and the 26th and 32d pillars approximately 2 feet of the roof shale had oxidized and peeled or flaked away across the entire 16 foot entry leaving the roof bolts exposed.

The inspector believed this condition, which was approximately 400 feet from the overwide intersection, had resulted from override pressure on the roof due to the failure of the operator to effect total caving of the roof in the gobbed or pillared out areas. This explanation for the S & S finding is lacking in evidentiary support and at odds with the inspector's statement that he found no basis for concluding the operator was, or had, engaged in improper pillar recovery methods. The operator's general assistant mine foreman, who accompanied the inspector and personally abated the violative condition by setting three posts in the intersection, testified convincingly that the roof condition in the number 8 crosscut between the 26th and 32d pillars was not the result of a roof fall.

Both witnesses agreed that the roof bolts in the area in question were still firmly anchored in the sandstone rock and that the black shale had fallen or peeled away from between the bolts to a depth of about two feet. The inspector speculated that if all this had fallen at once he would consider it a dangerous unintentional roof fall that might have crushed a miner. The mine foreman, who testified from personal observation of the condition, said the condition did not result from a roof fall but one that occurred over time "when the air hits it and so forth, it just peels off around the pins. The pins are still anchored, hanging about a foot and a half. They are anchored, but nothing massive falling down, just the black shale falling down" (Tr. 360-361).

My de novo review of the record leads me to conclude the inspector erred in finding the condition in the number 8 crosscut was due to override pressure. His own diagram of the area characterized the condition not as a roof fall but as "Broken roof here, will need [to be] rebolted" (GX-6). Indeed, the inspector's initial testimony was that "The roof had pulled away from the bolts. The bolts were hanging down. Everything was broken" (Tr. 329). The inspector also said that because he saw what he thought was a roof fall inby the area in question, "You might as well say there was a roof fall there [in the number 8 crosscut] too, but it wasn't above the anchorage line, maybe a foot or two high, stuff had spalled out and came down which means it had to be rebolted before" further retreat mining could be accomplished (Tr. 329).

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The inspector then went on to claim he decided on the S & S finding because the operator was not getting "clean falls" of the roof during his pillar recovery. This turned out to be incorrect because on close examination the inspector admitted "No, there was no improper practice on mining the pillar line" (Tr. 334-335).

On the basis of the record considered as whole, I conclude there was no factual basis or credible expert opinion to support a finding that the broken roof condition observed in the number 8 crosscut contributed to the risk of a roof fall in the number 5 crosscut. Both witnesses agreed the roof in the number 5 intersection was good with no signs of stress. The mine foreman readily admitted that someone had improperly removed the three support posts that had been set in the intersection and that this was a serious violation of safe mining practice. The inspector found the negligence involved was "moderate."

For these reasons, I hereby vacate the finding in my bench decision and find the condition in the number 5 crosscut, while serious, did not significantly and substantially contribute to a different or discrete hazard that could result in death or serious physical harm. I conclude; (1) the violation was serious; (2) affirm my ruling rejecting the operator's offer to prove that the sum of the diagonals requirement was obsolete and contributed nothing to safety; and (3) reduce the penalty from the \$500 initially assessed to \$150.

V. Docket No. PENN 83-94 - Maple Creek No. 1 Mine

A. Citation 2014066

On November 16, 1982, a 104(a), S & S citation issued in the 8 Flat, 56 Room of the Maple Creek No. 1 Mine when the inspector found the ground wire from the frame of a Ricks Water Gathering Pump twisted together with the return ground of the power conductor for the pump. Power was being drawn by a fused nip cable from the 550 volt trolley wire. The two grounds were in turn grounded to the mine track by a ground clamp attached to the rail as shown in GX-12.

The violation, which was admitted, consisted in the fact that the two ground wires were not attached to the mine track or other grounded conductor by separate clamps. 30 C.F.R. 75.701-5. The operator challenged the S & S finding contending the hazard contributed to - shock or electrocution - was too remote and speculative to create a reasonable likelihood of the event occurring.

The undisputed facts showed that if the ground clamp were dislodged from the mine track through vibration, derailment or

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other accident and the twisted ground wires thereby lost their ground to the track, they would continue to conduct the 550 volt current from the overhead trolley wire through the ground frame wire to the frame of the water pump. With the circuit thus completed the pump would continue to operate normally, but with the frame energized with a voltage sufficient to cause a lethal electrical shock.

A miner required to do maintenance on the pump or a miner travelling the track entry on the tight side who had occasion to contact the pump frame while standing in the water that surrounded the pump could ground himself and receive the full force of the 550 volts of power coming from the trolley wire.

The evidence showed the water pump was checked on each shift to see if it was functioning properly and weekly for electrical compliance. The record of the weekly check was too vague to permit the inspector to determine whether this particular pump had been inspected that week or, if it was, whether the inspection included the ground clamp. Both MSHA and the operator had recognized that "robbing" ground clamps was a problem. A solution was found with respect to permanent pumps by welding a roof bolt to the track to serve as a permanent ground clamp.

State law required such clamps to be at least six inches apart. Federal law merely required two clamps. But since both laws had to be read together the requirement was for two clamps at least six inches apart. The operator's maintenance foreman said no permanent solution was possible for pumps that were installed temporarily because they had to be detachable to be moved.

A fair appraisal of the testimony of the operator's maintenance foreman shows management was aware that miners "infrequently" engaged in the practice of "robbing" ground clamps and using one clamp to ground electrical equipment where the law required two. In fact, the parties' stipulated the operator had a history of nine prior violations of this standard in the 24 months preceding issuance of this citation. While the foreman was reluctant to admit personal knowledge of the practice, he did state that "once in a while," "not frequently," but "once in a while," he had seen wires clamped in a single ground clamp. He didn't take this lightly but said it was difficult to pin point responsibility.

Even if the practice was "infrequent," as counsel for the operator would have it, it was frequent enough, as witness the nine recent prior violations, to require management's attention.

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The foreman's ready admission of the same problem on the permanent pumps when contrasted with his inability to recall how frequent it was on the temporary pumps cautions against ready acceptance of the view that the problem was hardly worthy of management's attention.

I conclude that even if the practice was "infrequent" management's awareness of the problem and its failure to take effective steps to insure compliance made out a case of aggravated negligence on its part. While control of the problem may have presented difficulties with respect to the temporary pumps, it was no excuse for tolerating the condition or turning a purblind eye to it. The circumstances of this violation are precisely those in which a civil penalty can be most effective in encouraging voluntary compliance.

The inspector initially found the operator's negligence was "moderate" because he felt it was a problem that was difficult to control. But he did recognize, as did the other witnesses, that the substitution of one clamp for two took a knowing and deliberate act. This in turn reflects a deficiency in the operator's safety training and enforcement program.

The evidence also showed that the violation could result in anything from a lost workday or restricted duty accident to a fatality due to electrocution. The maintenance foreman felt a fatality or other injury was unlikely because his experience was that derailment would cut both wires and thus break the circuit. He was not asked to address the problem of a dislodgment due to vibration. The operator's ventilation foreman, who accompanied the inspector, thought the wires were not twisted together and that if the clamp was dislodged the wires would physically separate and thus break the circuit. The inspector and the walkaround were sure the wires were twisted together.

The citation merely recites that the two ground wires "was (sic) attached to the same clamp." The operator's foreman candidly admitted that whether the wires were twisted together was "immaterial" because the wires were "squeezed" together in the clamp and unless the manner in which the clamp broke released the "squeeze" the circuit would not break. On rebuttal, the inspector demonstrated (see GX-12) how one wire was twisted around the other before the washers squeezed them together. I conclude that whether the wires were "twisted" or "squeezed" the hazard created was the same.

With respect to the S & S question, I find a derailment or vibration that could result in dislodging the ground clamp from the mine track could result in energizing the pump frame and that this was a foreseeable intervening cause that could

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contribute to a discrete hazard, namely that of a shock or electrocution. I further find that the likelihood of dislodgment was probable and certainly not so remote as to be inconsequential if normal mining operations continued.

Remoteness in time or space are undoubtedly important in determining whether an underlying violation could significantly and substantially contribute to a discrete and foreseeable hazard. But where, as here, the chain of causation (vibration or derailment) is direct and predictable and a hidden hazard could exist for an indeterminate time before abatement or injury there is no merit in the contention that uncertainty as to the exact time of occurrence bars a finding of significant and substantial contribution.

The same reasoning applies to the claim that a dislodgment by derailment would almost surely sever the wires and break the lethal connection. In the inspector's contrary opinion, to which I give deference, it was "very likely" that the wires would remain twisted or squeezed and the circuit complete. Viewed from the standpoint most favorable to safety, I find that it was at least as probable as not that the circuit would not be broken and therefore the hazard was real. Because of its hidden nature it was certainly a hazard likely to occur before the operator would discover and voluntarily abate it. This condition like the well known booby trap is most likely to lurk until some unwary individual trips it.

As Prosser notes: "The defendant who set a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences." Prosser on Torts, *supra*, p. 253. Here, of course, we are trying to forecast the likelihood of an adverse consequence and are denied the insight that comes from hindsight after an actual injury has occurred. Nevertheless common sense and unhappy experience show that either view reinforces the picture of a stage set for disaster for some unwary individual.

In my judgment, when an underlying violation sets the stage and provides a contributing cause of a major hazard its remoteness in time or space is irrelevant and immaterial. Compare, Consolidation Coal Company, *supra*, 6 FMSHRC 194 (Causative chain of a danger in a mine may have many links). The purpose of the law is to nip nascent hazards in the bud and not to find excuses for condoning them by trivializing the penalty.

A significant and substantial cause need not be the only cause, nor the last nor nearest cause. It is sufficient if it

conditions. Ironically, the effect has been just the opposite because operators have learned that the cost of noncompliance, \$20, is cheaper than the cost of voluntary compliance. Thus, instead of encouraging voluntary compliance the new policy has provided a negative incentive for voluntary abatement of identified hazards. Compare 47 F.R. 22291 (May 1982) with MSHA Documents quoted in Courier/Journal Article, supra. See, also CNN Documentary "Mine Safety, Death, and The Bureaucracy" alleging lax and corrupt enforcement of the Mine Safety Law.

~FOOTNOTE_TWO

2 A month later, however, the Commission reneged on its holding that penalties must be assessed on the basis of the record evidence by substituting for "reasons unknown or at least unexplained" MSHA's proposed penalties for the carefully crafted, neutrally oriented findings of its trial judge. Secretary v. United States Steel Mining Co., Inc., 6 FMSHRC 1423 (1984), (dissenting opinion). As the dissenting Commissioner noted, when the Commission "embarks on the uncharted waters of independent penalty assessment" the results are highly inconsistent and "furnish no guidance" for either the parties or its trial judges. Compare Sellersberg Stone Co., 5 FMSHRC 287 (1983) (Commission unanimously upheld judge's \$2,000 penalty for interference with MSHA's ability to investigate), with United States Steel Mining, supra (majority arbitrarily reduced penalty for interfering with inspector's ability to investigate from \$1,500 to \$400).

The propensity of the Commission's operator oriented majority to disregard adjudicated penalty findings and to defer, without rational explanation, to the Labor Department's extra-record penalty proposals for serious violations tends to undermine confidence in the neutrality and fairness of the Commission's decisions and to thwart the public interest in effective enforcement of the Mine Safety Law. Compare Southern Ohio Coal Co., 4 FMSHRC 1459 (dissenting opinion); United States Steel Mining, supra (dissenting opinion). A penalty assessment policy that substitutes whim and caprice for principled decisionmaking or that places the welfare of miners below that of stockholders or mine management violates not only the spirit but the letter of the Mine Safety Law.

~FOOTNOTE_THREE

3 The phrase "de novo determination" has an accepted meaning in the law. It means an independent resolution of a controversy that accords no deference to any prior resolution of the same controversy. United States v. First City National Bank of Houston, 386 U.S. 361, 368 (1967).

~FOOTNOTE_FOUR

4 The operator also claimed that in the absence of a valid S & S finding, my jurisdiction was limited to assessing a penalty that did not exceed \$20. For reasons already expressed, I declined to accept this contention.

~FOOTNOTE_FIVE

5 He also issued a 104(a), S & S 75.400 citation which was not contested.

~FOOTNOTE_SIX

6 Quantifying the increase in risk is, as I have noted, incapable of proof by mathematical certainty, since no one can say whether the absence of the chocks would necessarily result in a disabling injury or fatality. As Prosser states:

Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequence to follow certain antecedents merely because we had observed these consequences on previous occasions." (Citations omitted). "If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists." Prosser on Torts, p. 243 (4th ed. 1971).

~FOOTNOTE_SEVEN

7 It is self evident that no man is a match for a 20 ton shuttle car.

~FOOTNOTE_EIGHT

8 Experience as well as common sense teaches that the likelihood of a serious or disabling injury, dismemberment or death as the result of a collision between a shuttle car and a miner was reasonable.