

FEDERAL MINE SAFETY AND HEALTH REVIEW
COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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September 26, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 95-15
Petitioner : A. C. No. 12-01590-03542
v. :
 : Little Sandy Mine
LITTLE SANDY COAL COMPANY :
INCORPORATED, : Docket No. LAKE 95-16
Respondent : A. C. No. 12-02160-03502
 :
 : Brimar Mine

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor,
U.S. Department. of Labor, Chicago, Illinois,
for Petitioner;
Richard A. Wetherill, Esq.,
215 Main Street, Rockport, Indiana,
for Respondent.

Before: Judge Barbour

These cases, which arise under the Federal Mine Safety and Health Act of 1977 (the Act)(30 U.S.C. ' 801 et seq.), are before me upon petitions filed by the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA). The petitions seek the assessment of civil penalties for six alleged violations of mandatory safety standards for surface coal mines.

Pursuant to notice, the cases were consolidated and heard in Vincennes, Indiana. At the commencement of the hearing, counsel for the Secretary announced that the parties had settled three of the alleged violations. Counsel orally explained the settlements, and I tentatively approved them. I stated that I would confirm my approval in writing (Tr. 10-13).

The contested issues are whether Little Sandy Coal Co. (Little Sandy) violated the cited standards at its Little Sandy Mine and Brimar Mine; if so, the validity of the inspectors' findings that the violations were significant and substantial

(S&S) contributions to mine safety hazards; and the amount of the civil penalties to be assessed. The latter issue requires consideration of evidence pertaining to the statutory civil penalty criteria as set forth in section 110(i) of the Act (30 U.S.C. ' 820(i)).

Stipulations

At the hearing the parties stipulated in part as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
2. At all times relevant ... Little Sandy ... and its mines are subject to the provisions of the [Act].
3. At all times relevant ... [Little Sandy] owned and operated the Little Sandy Mine, a bituminous coal mine located in Daviess County, Indiana.
4. At all times relevant ... [Little Sandy] owned and operated the Brimar Mine, a bituminous coal mine located in Clay County, Indiana.
5. [Little Sandy's] operations affect interstate commerce.
6. The Little Sandy Mine produced 652,154 tons of bituminous coal from January 1, 1993 through December 31, 1993.
7. The Brimar Mine produced 0 tons of coal from January 1, 1993 to December 31, 1993.
8. [Little Sandy] produced 816,890 tons of bituminous coal at all of its mines from January 1, 1993 through December 31, 1993.
9. The subject citations/orders were properly served by a duly authorized

representative of the [Secretary] upon an agent of Little Sandy on the date[s] indicated thereon.

10. On August 1, 1994, [MSHA] Inspector James Boyd, an authorized representative of the [Secretary] issued [C]itation No. 4260064 at [Little Sandy's] Brimar Mine ...

11. On August 2, 1994, ... Boyd issued [O]rder No. 4260072 at the Brimar Mine ...

12. On August 1, 1994, ... Boyd issued [C]itation No. 42360065 at the Brimar Mine

13. On August 2, 1994, ... Boyd issued [O]rder No. 4260073 at the Brimar Mine ...

14. On July 12, 1994, ... Boyd issued [C]itation No. 4261891 at the Little Sandy Mine ...

* * * *

16. Oil, grease, hydraulic oil, and diesel fuel are combustible materials (Joint Exh. 1; see also Tr. 16-18).

The Contested Violations

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>
4261891	7/12/94	77.1104	\$267

Citation No. 4261891 states in part:

Accumulations of combustible material oil, grease and diesel fuel [were] allowed to accumulate on the #412 Light Plant around the drive engine and exhaust manifold and frame of [the] equipment measuring up to 1 inch in depth. This condition creates a fire hazard ... (Gov. Exh. 3).

The inspector found that the alleged violation was S&S.

The Secretary's Witness

James Boyd

Inspector James Boyd, who is employed in MSHA's Vincennes, Indiana office, has been an inspector for approximately two and one half years. In July 1994, he began conducting an inspection of the Little Sandy Mine. At that time, the mine employed between 25 and 35 miners (Tr. 30, 33).

In July, Boyd met with Bob Zoglman, who is both a bulldozer operator at the mine and the mine superintendent. Boyd explained the inspection process to Zoglman. In addition, Boyd checked the on-shift book for reported hazardous conditions and discussed with Zoglman the importance of having a competent person inspect equipment before putting it into use (Tr. 31).

The Little Sandy Mine consists of two pits. Bob Zoglman is in charge of one pit and his brother, Randy Zoglman, is in charge of the other. Each of the brothers traveled with Boyd, when he was at their respective pits (Tr. 32).

On July 12, 1994, Boyd inspected the light plant at Bob Zoglman's pit. The plant consists of a small trailer onto which a light is affixed and a three cylinder diesel engine on the trailer which powers a generator (Tr. 35). The generator produces the electricity for the light. The light illuminates the edge of the pit's embankment, so that equipment operators are aware of the edge (Tr. 36-37). Also, the light illuminates the pit in order to assist miners working below (Tr. 36). The light is used at the night almost exclusively (Id.; see also Tr. 59-60).

When Boyd inspected the plant during the day, the light was not on and the diesel engine was not running (Tr. 59). Boyd and Zoglman went to the light plant area because rock trucks were dumping spoil there and Boyd wanted to make certain the trucks were not getting too close to the embankment's edge (Tr. 39). The rock trucks were the only equipment that came near the plant on a regular basis. No other structures were near the plant (Tr. 65).

When inspecting the plant, Boyd found oil, grease and diesel fuel around the diesel engine, on the engine's exhaust manifold and on the frame of the equipment. The accumulated material measured up to one inch deep on the frame (Tr. 41). Boyd speculated that some of the oil and grease was the result of "a little leakage" of the engine, and that some of the oil accumulated when a miner failed to clean up after changing the

engine's oil. In Boyd's opinion, the accumulated diesel fuel was the result of an overflow when the engine's fuel tank was filled (Tr. 41-42). Boyd did not think that the accumulations were the result of normal use.

Boyd stated that he knew that the accumulations included grease because of the accumulations' "colorization" and thickness (Tr. 50, see also Tr. 51). Boyd was asked if he would change his mind about the presence of grease if he were told the engine had no grease fittings? He stated that he would not, because facilities like light plants are used by miners to store grease (Tr. 50-51). He admitted, however, that he did not know for certain how the grease accumulated on the plant (Tr. 55). He also agreed that when the oil was changed, the oil drain was opened in order to cause any spilled oil to drain down the frame and onto the ground (Tr. 61).

Boyd believed that the accumulations created a fire hazard, and that if the accumulations caught on fire, a miner could have suffered burns or smoke inhalation trying to extinguish the flames. In addition, a fire could have spread to any nearby equipment (Tr. 42).

Boyd found that the condition was S&S because of the "reasonable likelihood of a fire" (Tr. 43). Possible ignition sources were the accumulated materials on the exhaust manifold and the electric wiring saturated with some of the accumulations (Tr. 43). The engine could overheat the exhaust manifold leading to a fire and/or a ground could fail and the wiring could heat. (Id.).

Boyd also found that Little Sandy was negligent in allowing the accumulations to exist. Someone had to start the engine on each evening shift in order to illuminate the light, someone had to put fuel into the engine, and someone had to check the oil. The person or persons who had to do these things should have observed and cleaned up the accumulations (Tr. 43-44). In addition, although the light plant did not have to be inspected daily, its electrical components had to be inspected monthly (Tr. 69-70). Any violation that was observed during the inspection should have been corrected (Tr. 70).

Little Sandy's Witness

Bob Zoglman

Zoglman has worked for Little Sandy since 1975 and has been superintendent at the Little Sandy Mine since 1982. He stated

that the light plant has been at the mine for at least twelve years. The plant does not require greasing and it has no grease fittings (Tr. 75). During his years at the mine, Zoglman never observed grease on the light plant (Id.)

In addition, Zoglman did not believe there was an accumulation of oil and diesel fuel on the manifold. Had one been there, it would have melted off. Nevertheless, he agreed that it is common to see oil or oil mixed with dirt around the manifold bolts (Tr. 81).

Zoglman acknowledged that there were accumulations of Asomething@ on the frame of the light plant. Although it was possible there was some oil or diesel fuel involved, Zoglman believed that the Asomething@ was "mostly dirt" (Tr. 80, see also Tr. 82).

There was a hole on the frame that allowed oil from the engine to run onto the ground (Tr. 76-77). Therefore, it was unthinkable that an inch thick accumulation of oil ever was present on the frame of the light plant. Zoglman never had seen an accumulation that thick (Tr. 77).

Zoglman did not think that the cited condition constituted a safety hazard because the pan that held most of the alleged combustible material was too far from the engine for an ignition to occur (Tr. 77). There was a distance of at least two feet between the engine and the pan. In all of his years with the company, he never had seen a light plant catch on fire (Tr. 78). Moreover, the closest structure to the light plant was 700 feet away and the light plant was 50 feet away from trucks that come to the area to dump spoil (Tr. 78).

Finally, Zoglman stated that when he was told by Boyd that the accumulations constituted a violation, he immediately tried to correct the condition. It is not a practice at the mine to contest an inspector's finding of a violation (Tr. 86).

The Violation

Section 77.1104 states in pertinent part that "[c]ombustible materials ... shall not be allowed to accumulate where they can create a fire hazard."

I accept Boyd's testimony to the extent of finding that, as he stated, there was an accumulation of oil and diesel fuel around the frame of the equipment and on the exhaust manifold of the engine (Tr. 41). His testimony was more specific than Zoglman's regarding the appearance of the accumulation and its

depth. Moreover, even Zoglman agreed that there was an accumulation of "something" (Tr. 80), and although Zoglman described that "something" as mostly dirt, he acknowledged that it was possible the dirt included oil and diesel fuel (Tr. 82).

Zoglman took issue with Boyd's assertion that the accumulation included grease, and I agree that the evidence does not support finding that grease was present. Zoglman's testimony established that the engine on the light plant did not have grease fittings, and Boyd's testimony regarding the presence of grease tended to be speculative (see Tr. 50-51).

However, the presence of grease is not essential to the Secretary's case. The oil and diesel fuel on the engine and frame constituted an accumulation of combustible materials within the meaning of the standard, and this is so even if the oil and fuel were mixed to some extent with dirt, as undoubtedly they were.

Further, I conclude the accumulated materials created a fire hazard. They were in the open, on the engine and in the vicinity of the engine. A malfunction of the engine could have ignited the nearby accumulations. Or, had the exhaust manifold heated sufficiently, the accumulations around the bolts of the manifold could have ignited. To establish the violation, the Secretary did not need to prove that an ignition would have happened but rather that it could have happened, and he met his burden of proof.

S&S and Gravity

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (30 C.F.R. ' 814(d)(1)). A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Cement Division, National Gypsum Co., 3 FMSHCR 822, 825 (April 1981)).

In Mathies Coal Co. 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth its well-known test for determining the S&S nature of a violation. The Commission also emphasized that the question of whether a violation is S&S must be based on the particular facts surrounding the violation, including the nature

of the mine involved (Texas Gulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Finally, a S&S determination must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 822, 825 (April 1981); Halfway Incorporated, 8 FMSHRC 8 (January 1986)).

The Secretary has established the first two elements of the Mathies test in that there was a violation of section 77.1104, and the violation presented a discreet safety hazard. In the latter regard, I note that if the accumulations had caught on fire, a miner or miners near the light plant could have been burned.

However, the Secretary has failed to establish the third element of the test. The evidence does not support finding there was a reasonable likelihood that the fire hazard would have resulted in an injury because it does not support finding there was a reasonable likelihood the accumulations would have caught on fire. The evidence presented by the Secretary was primarily limited to Boyd's conclusory statement that a fire was reasonably likely (Tr. 43). Boyd did not explain how an ignition was reasonably likely to occur. For example, he did not testify concerning the temperature necessary for the manifold accumulations to ignite and the likelihood of that temperature being reached. He did not testify regarding studies or tests that indicated the likelihood of an ignition. Nor did he testify that such an ignition ever occurred previously at the mine, or anywhere else, for that matter.

Further, there was no testimony that the engine suffered from any mechanical defects that could have served as an immediate ignition source or that it was prone to such defects as mining continued. Even if there had been such defects, I agree with Zoglman that the distance of two feet between the pan where most of the accumulations existed and the engine, significantly reduced the likelihood that an ignition source on the engine would have ignited the accumulations below (Tr. 77-78).

Finally, few miners worked or traveled in the immediate vicinity of the light plant. Dump trucks did not travel within 50 feet of the plant and the nearest structural facility was 700 feet away (Tr. 78). The only miner near the light plant while the engine was operating was the miner who started the engine on the evening shift, unless the person who inspected the light plant monthly did so at night, which seems unlikely (Tr. 43-44).

In sum, under the circumstances in existence at the light plant on July 12, 1994, I cannot find that there was a "confluence of factors" necessary to create a reasonable likelihood of an ignition (Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988)) or of an injury. Nor was such a confluence likely as mining continued. I conclude therefore that the violation was not S&S.

The gravity of a violation is gauged by the seriousness of possible injuries and the likelihood of the injuries occurring. Obviously, if a miner or miners had been burned, their injuries could have been serious. However, the likelihood of an ignition and of a miner or miners being injured by the ignition was so low, I find that the violation was not serious.

Negligence

Negligence is the failure to exercise the standard of care required by the circumstances. The light plant was used daily. There was a possibility that combustible fuel and/or lubricants could spill or leak and accumulate. Reasonable care required that the plant, including its engine, be checked periodically for accumulations and, when they existed, that they be cleaned up. The presence of the prohibited accumulations establishes that Little Sandy failed to meet this standard of care, and I conclude that the company was negligent.

Docket No. Lake 95-16

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>
4260064	8/1/94	77.1104	\$ 270

Citation No. 4260064 states in part:

Combustible material[,] hydraulic oil, was allowed to accumulate on the Hitachi Shovel Numerous oil leaks were observed on the hydraulic system located under the operator[=]s cab and across from it on the right side, puddles of oil, [were] located in these areas and on the frame of the equipment. This condition creates a fire hazard (Gov. Exh. 4).

The inspector found that the alleged violation was S&S.

The Secretary's Witness

James Boyd

Boyd testified that during June and July 1994, he inspected the Brimar Mine. During the inspections he was accompanied by the mine superintendent, Wayne Jeffers (Tr. 89-90). The Brimar mine is a surface coal mine. Between 10 and 15 persons were then employed at the mine (Tr. 90).

On August 1, 1994, Boyd inspected a Hitachi shovel that was used to load overburden into haulage trucks (rock trucks). The shovel is a large piece of equipment with a long boom. The shovel is powered by two diesel engines. The mechanical functions of the shovel are controlled by a hydraulic system (Tr. 96-97).

Upon inspecting the shovel, Boyd observed numerous leaks in the hydraulic system. He noted pools of oil under and around the operator's cab as well as oil on the frame of the equipment (Tr. 94-95, 97). The oil was leaking from the hydraulic valves and hoses in the area of the valve chest (Tr. 98). The main pool of oil was eight to ten feet long. The oil had saturated some of the dust surrounding it and Boyd estimated the oil had been accumulating for two or three days (Tr. 98-99).

Boyd testified that he was told the shovel operator had not inspected the shovel before it was put into service. Boyd also remembered being told by both Jeffers and the shovel operator that they believed an accumulation of combustible materials was not a violation until the accumulation was one quarter of an inch thick (Tr. 99-100) (Boyd recorded this conversation in his notes (Tr. 104; Gov. Exh. 6).)

Boyd believed that an injury was reasonably likely to have resulted from the violation because of the danger of fire. He stated, "within the last two or three years ... we've had about four of these particular machines ... burn in this area" (Tr. 100). If a fire occurred, Boyd expected the shovel operator to suffer burns, or smoke inhalation, or to be injured trying to leave the shovel. He stated, "[T]hese machines ... burn so ... fast they ... put a little axe in the operator's cab so [that] if [the] machine gets on fire ... [the operator] can burst [the] front window out ... and just leap out the window" (Id.).

In Boyd's opinion, potential ignition sources for the oil were provided by the shovel's electric wiring, and by the 24 volt battery that is used to start the shovel's diesel engines (Tr. 118). (However, Jeffers and the shovel operator did not believe the accumulations presented a fire hazard because the company never had experienced a fire on a Hitachi shovel (Tr. 104, Gov. Exh. 6). In addition, the shovel had an operational automatic fire suppressant system that was supposed to put out any fire (Tr. 113).)

Boyd decided to issue a citation for the accumulations (Citation No. 4260064) at around 10:50 a.m. (Gov. Exh. 4). Boyd then discussed with Jeffers the time required to clean up the accumulations. According to Boyd, Jeffers suggested 6:00 p.m. and Boyd set that as the time for abatement (Tr. 102; see Gov. Exh. 4).

Boyd returned to the mine around 9:00 a.m. on August 2 (Tr. 107). The shovel had been operating (Tr. 108, 115). Boyd found that the conditions on the shovel were almost the same as they had been at 10:50 a.m., the day before. Boyd stated that although there had been some effort to clean up around the valve chests and the two diesel engines, no effort had been made under and around the operator's cab (Tr. 111-112).

Boyd testified that he was told by the company's master mechanic that the company's clean up efforts included some steam cleaning and the replacement of some of the hydraulic system's O rings and hoses (Tr. 108, 110). Boyd saw one hose that was new, but he did not inspect the machine to determine if the mechanic was telling the truth about the O rings (Tr. 111). (He explained that given the location of the O rings, he could not have seen them, in any event, and thus could not have determined whether they had been replaced (Tr. 109-110).) In Boyd's view, whatever had been done to the O rings had not corrected the problem because the accumulations were still present (Tr. 102-103). Jeffers should have realized that more efforts were needed (Tr. 117).

Boyd described the accumulations that existed on August 2, as a mix of oil that was present on August 1, and oil that had accumulated since he issued the citation, ("[s]ome of it was old oil, some of it ... [was] new" (Tr. 103)). Boyd agreed that in general, as O rings wear, they leak, and that when O rings and hoses are replaced, there also is some leakage (Tr. 117).

Because the accumulations had not been abated within the time set, Boyd issued an order of withdrawal at 9:30 a.m. on August 2 (Gov. Exh. 5). Boyd explained:

Jeffers knew he had a given time to correct this ... violation ... I have no knowledge how many hours he worked on it, but [Jeffers] elected to put the equipment back into service and ceased working on it (Tr. 116).

* * * *

[W]hen I looked and [saw] the accumulation was still there to the same degree as when I'd issued the citation, then that's where my determination came from that an honest effort had not been made ... to correct the violation (Tr. 117).

Little Sandy's Witness

Wayne L. Jeffers, Sr.

Wayne Jeffers confirmed that oil was present on the shovel (Tr. 125). Jeffers had no recollection of telling Boyd that he did not think there was a violation until there was an accumulation of one fourth inch, but he recalled telling Boyd that he did not think the oil that was present was bad enough to be a fire hazard (Tr. 140).

Once the shovel was cited, Jeffers stated that he directed that it be taken out of service (Tr. 125-126). In order to clean up the accumulations, Jeffers had the master mechanic repair "some leaks and bad hoses" and do "some ...steam cleaning" (Tr. 126). Jeffers also stated that a lot of the accumulations were scraped off the shovel (Tr. 128). The mechanic was assisted by the shovel operator and a truck driver (Tr. 127-128). Jeffers estimated that they worked on the shovel from the time it was cited until possibly 6:00 p.m. (Tr. 127).

Jeffers left the mine around 6:00 p.m. At that time, the shovel needed more cleaning, and Jeffers assigned two of the night shift truck drivers to the task (Tr. 129-130). He estimated that before the order was issued, a total of 20 man hours was spent cleaning the accumulations (Tr. 133).

Jeffers returned to the mine on August 2, around 4:30 a.m. He stated that he believed that the shovel was "real clean" at that time (Tr. 130). Therefore, he ordered that the shovel be

put back into service. He explained, "Once you make the repairs and do cleaning, you have to run the machine a certain amount to see if ... your repairs are complete"(Id., see also Tr. 131). Before he could determine if the repairs had been successful in stopping the oil leaks, Boyd arrived (Tr. 131).

Jeffers did not recall what he said when Boyd told him he was going to issue a withdrawal order (Tr. 138-139). However, he was sure he told Boyd that the shovel had been cleaned and that some of the leaks had been fixed. He added that Boyd should have been able to see what had been done (Tr. 139).

After the order was written, Little Sandy personnel put in more O rings and new hoses. Jeffers maintained the shovel was not steam cleaned again and that it looked worse when the order was terminated than it did when it was issued (Tr. 132, 137).

Raymond C. Weber

Raymond C. Weber has worked for Little Sandy for almost ten years. He is the head mechanic at the Brimar Mine. On August 1, after the citation was written, Weber was assigned to correct the cited conditions. Weber testified that Boyd told him the areas about which he was concerned were the "swing pump areas and another valve area" (Tr. 149, 151). Boyd also wanted the accumulated grease removed from around the automatic greaser pins (Tr. 153).

Weber stated working on the shovel around 11:00 a.m. He stopped work around 3:30 p.m. because the shovel was going to be steam cleaned by the shovel operator and another miner (Tr. 142). In the meantime, the shovel operator helped Weber change hoses and install O rings. In addition, the shovel operator scraped accumulated grease from the machine (Tr. 142-143).

Weber stated that between 11:00 a.m. and 3:30 p.m., on August 1, he replaced at least four O rings, a supply line, and some hoses (Tr. 143). Weber claimed that his efforts stopped the main leaks. He added that although there were more "seeps," they were inevitable on a hydraulic shovel and that such seeps had to be worked on continuously (Tr. 143; see also Tr. 146). He did not have time to fix all of the leaks because the machine had to be steam cleaned (Tr. 144).

After Weber left the mine on August 1, he did not work on the machine again until the order of withdrawal was issued (Tr. 144). The shovel was steam cleaned prior to the order being issued. Weber believed that the night crew finished cleaning the shovel around 3:00 a.m. on August 2 (Tr. 150). According to

Weber, the house area of the shovel was "pretty clean," although a little bit of the accumulation might have remained on the boom (Tr. 146).

Richard Edwards

Richard Edwards is the shovel operator. Edwards understood the citation required him to replace the O rings, change a few hoses and clean the shovel. The machine was shut down while this work was on-going (Tr. 155). According to Edwards, work on cleaning the accumulations started around 11:00 a.m. Edwards helped with the cleaning (Tr. 155). He also helped Weber replace the O rings and hoses (Id.). He worked until around 5:00 p.m., when the night shift began (Tr. 156).

When Edwards left at 5:00 pm., there was between a half gallon and a quart of oil remaining on the machine. It was located in front of the engines. Edwards did not believe the accumulations would catch on fire (Tr. 156-157). He acknowledged that there was a battery located about three or four feet from the accumulations, but it was higher than the oil and the oil would have to have been blown on the battery for the oil to ignite. This would only happen if an O ring malfunctioned, but if that occurred, he would shut off the power on the shovel and eliminate the ignition source (Tr. 157).

Because the shovel was not steam cleaned before the order of withdrawal was terminated, Edwards stated that the condition of the shovel probably was worse when the order was Alifted@ than when it was imposed (Tr. 158).

Charles Stephens

Stephens was a truck driver at the Little Sandy mine when the citation and order were issued. He worked from 5:00 p.m., August 1, until 5:00 a.m., August 2. (Tr. 165-166).

Stephens was told to steam clean the shovel. He testified that he and another miner did so from 5:00 p.m. to 9:00 p.m. (Tr. 167). Stephens did not feel the shovel needed to be cleaned. He believed the day shift had cleaned it adequately (Tr. 168). He stated: "I thought it was really ridiculous, but I was told to do it" (Id.).

Stephens also stated that grease from the boom pins had fallen toward the bottom of the operator's house. The grease was described by Stephens as "nasty" and he agreed that it was not steam cleaned (Tr. 169). Everything else was steam cleaned and

the miners used two 500-gallon tanks of water to do the cleaning (Id.).

Joseph L. Hensley

Joseph L. Hensley presently is a safety consultant for twelve private companies. He is a former MSHA inspector and former master mechanic for Amax Coal Corporation. He is familiar with hydraulic shovels (Tr. 172-173).

He testified that all such shovels develop leaks (Tr. 182-183). He stated also that he was familiar with four instances in which hydraulic shovels had caught on fire. The causes ranged from a broken hydraulic line that sprayed oil onto the shovel's extremely hot turbo charger, to men working on the shovel with an acetylene torch (Tr. 173).

Hensley did not agree with Boyd's testimony that the oil leaks on the cited shovel would have ignited. He believed the chances were "very, very small" (Tr. 174).

According to Hensley, the same day the order was issued, he went to the Little Sandy Mine and viewed the shovel. Around 3:00 p.m. on August 2, he took pictures of the shovel. (Since the order was issued at 9:30 a.m., the pictures were taken approximately five and one half hours after the order was imposed (Tr. 177, Gov. Exh. 5). Hensley identified the pictures (Tr. 175; Resp. Exh. 2).) He described the shovel depicted in the pictures as a "very, very nice looking machine" (Tr. 179). He stated that he did not think it possible to get the shovel any cleaner (Tr. 179). If he had found a shovel in that condition when he was an inspector, he would not have written a withdrawal order (Tr. 180).

The Violation

The company agreed that the violation of section 77.1104 existed as charged (Tr. 92).

S&S and Gravity

The first element of the National Gypsum test has been met. There was a violation of the cited standard. I conclude the second element has been established also. I accept the testimony of Boyd that accumulations of combustible oil and grease existed in the vicinity of potential ignition sources (e.g., the 24 volt battery and electrical wiring (Tr. 118)). Obviously, had the oil and grease caught on fire, the shovel operator would have been

endangered. Boyd's testimony that once a fire started it burned rapidly was not disputed (Tr. 100). The presence of the prohibited accumulations therefore, subjected the shovel operator to the hazard of burns and smoke inhalation, or worse.

I also conclude that there was a reasonable likelihood of an ignition of the accumulated oil and grease. The accumulations were extensive. Boyd testified without dispute that the main pool of oil was 8 feet to 10 feet long (Tr. 98). There also were extensive accumulations of grease. Boyd believed a fire was reasonably likely because four machines had caught fire within the last two or three years (Tr. 100). Although, on its own, this testimony is insufficient to establish the reasonable likelihood of an ignition on the cited shovel, there is other testimony from which that likelihood can be inferred.

All of the witnesses agreed that a major source of the accumulation was the malfunctioning of the hydraulic system's O rings, and that problems with the rings were recurring and frequent. Edwards, the shovel operator, stated that the shovel's 24 volt battery could serve as an ignition source if an O ring malfunctioned (i.e., if "you blow an O ring" (Tr. 157)) and oil was sprayed on the battery (Id.). Edwards did not believe this would happen because the loss of the O ring would cause a drop in oil pressure which, in turn, would cause him to shut down the machine (Tr. 157). However, Edwards could have been away from the controls when the pressure dropped. Or, he could have been at the controls and been slow in responding. Or, given the rapidity with which the combustible materials can ignite, Edwards could have been at the controls and simply not have shut down the shovel rapidly enough to avert an ignition. With the number of recurrent O ring problems the hydraulic system was experiencing, I conclude it was reasonably likely an O ring would have "blown" and sprayed the battery with oil. I further conclude it was reasonably likely that an ignition would have resulted.

Finally, had an ignition occurred, resulting injuries from burns or smoke inhalation certainly could have been of a reasonably serious nature. Therefore, I find that the violation was S&S.

The violation also was serious. The likelihood of an ignition combined with the extent of injuries that reasonably could have been anticipated establishes the violation's grave nature.

Negligence

I further conclude that Little Sandy was negligent in allowing the accumulations to exist. Boyd believed the accumulations had collected over a period of two to three days (Tr. 98-99). Given the extensive nature of the oil and grease, I find that this was in fact the case. The accumulations were visually obvious and reasonable care required that they be cleaned up prior to the shovel being put into service. Little Sandy failed in this regard, and in so doing, negligently allowed the violation to exist.

Good Faith Abatement

During the course of the hearing it became evident that Little Sandy wished to raise the issue of the validity of the section 104(b) order of withdrawal. I explained to counsels that I did not believe I could rule on the validity of the order because Little Sandy had not filed a contest of the order within 30 days of its receipt. However, I noted that the evidence the company intended to present regarding the circumstances surrounding its efforts to abate the violation and the reasonableness of the inspector's decision not to further extend the time for abatement of the citation was relevant with respect to the civil penalty aspects of the case (Tr. 92-93).

Since the hearing, nothing has been brought to my attention that causes me to change my view that the reasonableness of the time for abatement of a citation may not be contested in a civil penalty proceeding unless the operator has contested the order pursuant to section 105(d) of the Act (30 U.S.C. ' 815(d)) and the contest proceeding has been consolidated with the civil penalty proceeding.

Nonetheless, and as I stated at the hearing, the issue of Little Sandy's good faith in attempting to achieve rapid abatement of the violation is before me with respect to the civil penalty aspects of the case (30 U.S.C. ' 820(i)). Good faith requires an operator to assign sufficient manpower and resources to accomplish abatement and for the miners assigned to work diligently within the time given to achieve abatement. After considering all of the testimony, I conclude that Little Sandy did not exert good faith efforts to comply.

I accept Boyd's explanation that after consulting with Jeffers, he set 6:00 p.m. as the time to have the accumulations cleaned up (Tr. 102). I also accept Jeffers testimony that the shovel was not cleaned of accumulations when he left the mine around 6:00 p.m., and that he assigned men to work on it that

night (Tr. 129-130). I do not credit the essence of Little Sandy's good faith argument -- i.e., that through the diligent efforts of the men assigned, the shovel was cleaned of accumulations by 4:30 a.m., August 2, and was put back into service (Tr. 130).

Boyd testified without dispute that when he viewed the shovel on the morning of August 2, he could see that some effort had been made to clean up around the valve chests and the diesel drive engines, but that no effort had been made around the front of the shovel and that ~~Even~~ ... Jeffers ... stated that ... area had not been cleaned@ (Tr. 111-112). Jeffers did not deny he made this statement.

It was incumbent upon Jeffers, as the representative of Little Sandy, to explain the company's abatement efforts to the inspector -- who was not present when they allegedly took place -- and to point out why the front of the shovel had not been cleaned. Jeffers did not satisfactorily fulfill this obligation, and I infer from his failure to do so that uncleaned areas observed by Boyd on the morning of August 2, were the result of the company's lack of good faith efforts and not, as the company would have it, new accumulations that had come into being since 4:30 a.m. that morning.

To put it another way, while I believe that Weber, Edwards and Stephens all worked on cleaning the machine, I conclude their efforts were inadequate. (In this regard, I note Stephens testimony that the grease from the boom pins was not cleaned at all (Tr. 169).) The testimony presented by Little Sandy did not overcome the inference established by the Secretary that the company had not made good faith efforts to remove the cited accumulations from the shovel.

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>
4260065	8/1/95	77.1607(i)	\$292

Citation No. 4260065 states:

Dust control measures were not taken on the haulage road from the No. 1 pit area to the refuse dump area. Dust conditions created from passing haulage trucks and equipment, significantly reduced the visibility of the drivers and the equipment operators (Gov. Exh. 7).

The inspector found that the alleged violation was S&S.
The Secretary's Witness

James Boyd

Boyd stated that on August 1, 1995, he and Jeffers were in a vehicle following rock trucks on the haul road that leads from the No. 1 pit area of the Brimar Mine to the refuse dump. The dirt-surfaced road is approximately two and one half to three miles long. During the trip, Boyd observed the dust raised by the rock trucks (Tr. 185). In addition to the rock trucks, he believed he recalled seeing a bulldozer on the roadway. The dust kicked up by the trucks he was following and by the trucks passing him obscured Boyd's vision. He believed that the vision of the truck drivers and the equipment operator was obscured as well (Tr. 186).

Boyd stated that he discussed the dust condition with Jeffers, and told Jeffers he was going to issue a citation for a violation of section 77.1607(i). (The citation was issued at 10:30 a.m. (Gov. Exh. 7).) Boyd asked Jeffers how much time it would take to correct the condition, and Jeffers stated that it could be taken care of by 5:00 p.m. (Tr. 186).

Because of the reduced visibility, Boyd believed that an injury was reasonably likely. Moreover, if the trucks collided with one another or with other equipment, the injury could be permanently disabling (Tr. 187). Boyd agreed, however, that he did not know of any previous accidents on any of the haulage roads maintained by Little Sandy (Tr. 198). He found the condition to be S&S because of the reasonable likelihood and the visibility of the people ... [that are] operating ... [the] large equipment on the haul[age] roads@ (Tr. 188). In Boyd's opinion, Little Sandy could have avoided the problem by using water to wet the road or by using a grader to scrape off the dust (Tr. 188).

On the morning of August 2, Boyd again followed the rock trucks from the pit to the dump. There was no indication that the company had tried to control the dust. Therefore, at 9:40 a.m., Boyd issued a section 104(b) withdrawal order for failure to abate the cited condition (Tr. 189; Gov. Exh. 8).

On cross-examination, Boyd agreed that Jeffers told him the road had been watered for the entire day after the citation was issued on August 1 (Tr. 192). Boyd admitted that he did not know what the company had done with regard to the condition between the time he cited it and 5:00 p.m., the time he set for abatement (Tr. 193). However, he stated that if the road had been watered

as Jeffers maintained, he should have seen dark areas along the side of the road, or in the middle of the road on August 2. When Boyd failed to see any Adiscolorization@ he Aknew [the company] ... had not put enough water down to control the dust@ (Tr. 201).

On August 2, Boyd spoke with Jeffers about the condition of the road and Jeffers told him that the water truck was broken on the evening shift and that there was nothing else to use to wet down the road (Tr. 189-190, 193). Boyd read from the notes he made on August 8, regarding the condition:

Wayne Jeffers stated to me that a fitting on the fuel tank on the water truck was broken . . . [a]nd they did not have a mechanic on the 2nd shift to repair the water truck, so they could not have watered the roadway, unless he took someone off a piece of equipment to perform the repair work on the water truck (Gov. Exh. 9).

Boyd explained that he did not believe an Ahonest effort@ had been made to abate the violation because the company could have made some arrangement to have the water truck repaired and then would have used it to control the dust (Tr. 191). Boyd could not recall whether Jeffers also told him that he had gone to the Farm Bureau Co-operative to purchase the needed fitting for the water truck (Tr. 193).

Little Sandy's Witness

Wayne L. Jeffers, Sr.

Jeffers described the road in question as being 80 to 100 feet wide. Two eighty-five-ton rock trucks used the road. The trucks traveled one half mile from where they were loaded to where they dumped (Tr. 202). Jeffers believed it was Aalmost impossible@ for the trucks to collide because of the dust (Tr. 203). Nor did Jeffers understand how dust would have restricted the drivers= vision when the trucks followed one another, or when they met (Id.)

Jeffers testified that around the time the citation was issued on August 1, the company had not yet watered the road and that the dust was rising. Jeffers said nothing to Boyd about the citation (Tr. 203).

On August 1, the rock trucks used the road from approximately 6:00 a.m. to 5:00 p.m. (Tr. 216). The trucks also

used the road from the beginning of the day shift on August 2, (6:00 a.m.), until the order was issued (9:40 a.m.) (Tr. 218-219).

After Boyd told Jeffers he was going to issue a citation, Jeffers testified he made arrangements to water the road. Jeffers stayed at the mine until around 6:00 p.m or 7:00 p.m., on August 1.

The road was watered throughout the day shift and until the end of the shift by Rick Scarbrough (Tr. 206, 211). Jeffers could not recall whether it was also watered that night (Tr. 212).

However, when Jeffers returned to the mine the following day (August 2), the water truck was not functioning and Jeffers assigned Weber to repair it. Weber told Jeffers that a part was needed. Jeffers then left the mine to pick up the part at the Farm Bureau Co-operative (Id.). Boyd stated that he arrived at the Co-operative around 7:00 a.m. (Tr. 207). Jeffers identified a copy of a receipt from the Co-operative. The receipt is dated August 2 (Tr. 207; Def. Exh. 3).

When Boyd returned on the morning of August 2, Jeffers and Boyd had a discussion about why the truck was not functioning. Jeffers stated that he told Boyd he did not have a mechanic on the night shift. Boyd said that if Jeffers was making a Atrue effort to get the water truck fixed, he would have called in a mechanic (Tr. 213).

Raymond Weber

Master mechanic Weber testified that shortly after he arrived for work on the August 2 day shift, he was advised that the water truck had broken down. Weber made what repairs he could and then waited to complete the repairs until the needed parts from the Co-operative arrived (Tr. 221). He stated that he finished around 8:00 a.m., and that the truck was then ready to be put back into service (Tr. 222).

Rick Scarbrough

Rick Scarbrough was a scraper operator in August 1994. He testified that on August 1, he was taken off of his normal job and was asked by Jeffers to run the water truck (Tr. 225). He started operating the truck around 10:00 a.m. He believed that

he watered the road until his shift ended around 5:00 p.m. (Tr. 226). As best he could recall, he refilled the truck about six times during the shift (Id.). He experienced no problems with the truck (Tr. 227).

He described the condition of the road when he started to water it as not that bad (Tr. 227). Dust was present on the road but it did not impede his visibility. The dust was normal for August (Tr. 228).

Robert Hay

Robert Hay, a truck driver, drove a haulage truck over the road. He did not think the road was dusty on August 1, (Tr. 234). He stated that there were only two trucks hauling on the road and that you could see a truck coming a mile away (Tr. 234-235). He estimated that the two trucks made about 80 trips along the road during a shift. The trucks traveled the road about once every ten minutes (Tr. 238). Besides the trucks, there are instances when someone worked along the road or when the foreman's truck traveled the road (Tr. 235).

The Violation

Section 77.1607(i) requires that dust control measures shall be taken where dust significantly reduces visibility of equipment operators. I conclude the testimony supports finding that the violation occurred.

Boyd's concern about reduced visibility for truck drivers was based upon his personal observation. On August 1, he traveled the road behind a truck. He observed the dust as it was kicked up by the truck ahead of him, as well as the dust that was created by a passing truck. In both instances, the dust obscured his vision (Tr. 186). It was reasonable for him to infer that a truck driver who was following a truck or who encountered a passing truck would have had his or her vision similarly reduced.

Boyd's observation of the extent of the dust was buttressed by Jeffers testimony, that at the time the citation was issued, the company had not watered the road and that the dust was increasing (Tr. 203). Although Jeffers stated he did not understand how dust would restrict a driver's visibility if

trucks were meeting on the road (Id.), Boyd's concern was not for the moment of meeting but for the moments after the trucks had passed one another, when drivers had to travel through the dust each truck raised or when one truck followed another. At these times, I believe the drivers' vision was significantly reduced.

Scarborough, who watered the road after the citation was issued, stated that he did not think the dust was ~~A~~that bad,[@] but there is no testimony that he passed or followed any other vehicles while he was working on the road (Tr. 228). Similarly, Hay, who drove a truck on the road, testified that truck drivers could see one another coming, but, like Scarborough, Hay did not address what happened immediately after the trucks passed one another or when one vehicle followed another.

S&S and Gravity

The Secretary has established the first two elements of the Mathies test, and his proof also meets the third. There was a violation of section 77.1607(i). There was a discrete safety hazard in that the significantly reduced visibility of the drivers could have caused an accident involving the trucks and/or other equipment or persons on or along the road. In addition, I conclude there was a reasonable likelihood of an accident.

While only a few vehicles used the road and only a few miners occasionally worked along it (Tr. 185, 203, 234-235), it takes but seconds of lost visibility for a driver to lose sight of a vehicle, or to lose sight of the person he or she is approaching, or for a driver to fail to see a vehicle that has stopped suddenly. The trucks made frequent trips over the road - approximately 80 in all. They traveled the road every ten minutes (Tr. 235, 238). Given the frequency with which the trucks used the road and the occasional presence of other vehicles and miners along and on the road, I conclude that in the context of continuing operations at the mine, a dust-induced accident was reasonably likely. If such an accident occurred, the resulting injury or injuries could have been permanently disabling or even fatal.

Because, as stated, if an accident occurred due to the reduced visibility, it could have resulted in a serious injury or worse and because the likelihood of an accident was more than remote, this was a serious violation.

Negligence

The violation was visually obvious. Jeffers stated that the dust was rising (Tr. 203). It was August, and trucks had been using the road. Given these factors, mine management did not exercise the care required by the circumstances when it failed to

have dust control measures implemented. Little Sandy was negligent in allowing the violation to exist.

Good Faith Abatement

The citation resulted in the issuance of a section 104(b) order of withdrawal at 9:40 a.m. on August 2, when Boyd determined that the violation had not been abated within the time given, and that the time should not be extended (Tr. 189; Gov. Exh. 8). As stated previously, I do not believe I have the authority to rule on the validity of the order of withdrawal in this civil penalty proceeding. However, much of the evidence presented by Little Sandy is relevant to the issue of the company's good faith in attempting to achieve rapid compliance, and on the basis of the evidence, I conclude that the company exhibited good faith.

After a discussion with Jeffers, Boyd set 5:00 p.m., August 1, as the time within which the violation should be abated (Tr. 186; Gov. Exh. 7). However, Boyd did not return at 5:00 p.m. or at any other time that day. He came back to the mine on the morning of September 2. Boyd stated that at that time he did not see any dark areas along the road which would have indicated that the road had been watered. Therefore, he ~~knows~~ that no efforts had been made to abate the violation (Tr. 201).

Little Sandy's witnesses were adamant that the road had been watered and that the condition had been rectified by 5:00 p.m., or shortly thereafter, as required. Jeffers stated that the road was watered by Scarbrough from right after it was cited until the end of the day shift (Tr. 206, 211) and Scarbrough persuasively testified that he watered the road from around 10:00 a.m. to 5:00 p.m. on August 1, by making approximately six trips over the road (Tr. 227).

I have no reason to disbelieve these witnesses. Certainly, their testimony was not a recent version of events. Boyd stated on cross-examination that Jeffers told him on the morning of August 2, that the road had been watered the entire day after the citation was issued (Tr. 192). Moreover, Boyd admitted that he did not know what the company had done between the time he cited the violation and 5:00 p.m. (Tr. 193).

The fact that Boyd detected no dark areas along the road on August 2, does not necessarily mean that the road had not been watered on the day shift on August 1, especially since the water truck broke down during the night shift of August 1-2, and water that had been applied up until 5:00 p.m., could have evaporated by the time Boyd checked.

For these reasons I find that Little Sandy established that it exhibited good faith in attempting rapidly to abate the violation of 77.1607(i).

Other Civil Penalty Criteria

Size

Boyd testified that the Little Sandy Mine employed between 25 and 35 miners, and that 10 and 15 miners were employed at the Brimar Mine (Tr. 33, 90). In addition, the parties stipulated that Little Sandy produced 652, 154 tons of coal in 1993 (Stip. 6). I conclude from this that Little Sandy is a medium size operator.

History of Previous Violations

Between August 1, 1992 and July 31, 1994, the company had a total of 64 assessed violations (Gov. Exh. 2). This is a moderate history of previous violations.

Penalty Amounts

Considering the statutory penalty criteria, I assess the following civil penalties:

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>	<u>Penalty</u>
4261891	7/12/94	77.1104	\$267	\$ 50

Docket No. Lake 95-16

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>	<u>Penalty</u>
4260064	8/1/94	77.1104	\$270	\$270
4260065	8/1/95	77.1607(i)	\$292	\$200

Settlements

I have reconsidered the settlements in light of the explanations offered by counsel, and I continue to find they are appropriate (see Tr. 10-13). Therefore, the settlements are approved.

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4261886*	7/11/94	77.1605(d)	\$50	\$50
4261890**	7/12/94	77.1605(d)	\$50	\$ 0
4261894**	7/12/94	77.1605(d)	\$50	\$ 0

*Little Sandy agreed to pay the penalty proposed (Tr. 10).

**The Secretary moved to vacate the citation due to difficulties with his proof (Tr. 10-12).

Order and Dismissal

Little Sandy is **ORDERED** to pay the penalties assessed within 30 days of the date of this decision. The Secretary is **ORDERED** to modify Citation No. 4261891 by deleting the S&S finding and to vacate Citation No. 4261890 and Citation No. 4261894 within the same 30 days.

Upon payment of the penalties and modification and vacation of the citations, these proceedings are **DISMISSED**.

David F. Barbour
Administrative Law Judge

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