

OCTOBER 1992

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OCTOBER 1992

Review was granted in the following cases during the month of October:

Secretary of Labor, MSHA v. Energy West Mining Company, Docket No. WEST 91-251. (Judge Lasher, September 11, 1992)

Aluminum Company of America v. Secretary of Labor, MSHA, Docket No. CENT 92-362-RM. (Judge Maurer, October 16, 1992)

Review was denied in the following case during the month of October:

Secretary of Labor, MSHA on behalf of Joseph A. Smith v. Helen Mining Company, Docket Nos. PENN 92-57-D, PENN 92-58-D. (Judge Maurer, September 17, 1992)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1992

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

v.

CARDER, INC.

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: Docket No. WEST 92-350-M
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BEFORE: Holen, Chairman; Backley, Doyle, Nelson, Commissioners

ORDER

BY THE COMMISSION:

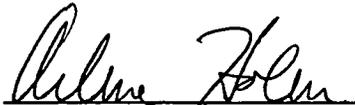
In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on September 29, 1992, finding respondent Carder, Inc. ("Carder") in default for failure to answer either the civil penalty petition filed by the Secretary of Labor or the judge's order to show cause. The judge assessed the civil penalty of \$691 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

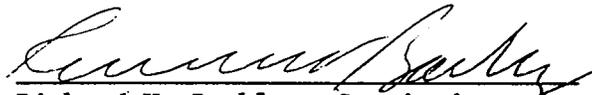
On October 6, 1992, the Commission received a letter dated October 2, 1992, in which Carder requests that Judge Merlin rescind his previously issued default order and approve a settlement agreement negotiated between the parties in this case. Carder explains that, at the time the default order was issued, Carder was in settlement negotiation with the Secretary. Carder believed that the Secretary would submit the settlement agreement to the judge and that consequently no further response was required.

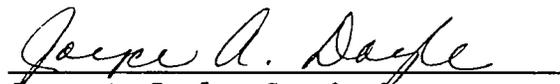
The judge's jurisdiction over this case terminated when his default order was issued on September 29, 1992. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Carder's letter to the Commission seeks relief from the judge's default order. We will treat the letter as a timely petition for discretionary review of the judge's default order. See, e.g., Middle States Resources, 10 FMSHRC 1130 (September 1988).

It appears from the record that Carder may have a plausible explanation for its failure to respond to the judge's show cause order. See e.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989). We are unable, however, to evaluate the merits of this explanation on the basis of the present record. We will afford Carder the opportunity to present its position to the judge, who shall determine whether final relief from default is warranted. See, e.g., Blue Circle, 11 FMSHRC at 2145. If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. § 820(k).

Accordingly, we grant Carder's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1992

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

v.

CARDER, INC.

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Docket No. WEST 92-351-M

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

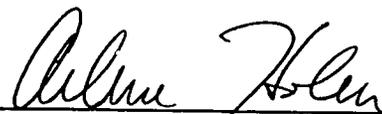
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On October 6, 1992, the Commission received a letter dated October 2, 1992, in which Carder requests that Judge Merlin rescind his previously issued default order and approve a settlement agreement negotiated between the parties in this case. Carder explains that, at the time the default order was issued, Carder was in settlement negotiation with the Secretary. Carder believed that the Secretary would submit the settlement agreement to the judge and that consequently no further response was required.

The judge's jurisdiction over this case terminated when his default order was issued on September 29, 1992. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Carder's letter to the Commission seeks relief from the judge's default order. We will treat the letter as a timely petition for discretionary review of the judge's default order. See, e.g., Middle States Resources, 10 FMSHRC 1130 (September 1988).

It appears from the record that Carder may have a plausible explanation for its failure to respond to the judge's show cause order. See e.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989). We are unable, however, to evaluate the merits of this explanation on the basis of the present record. We will afford Carder the opportunity to present its position to the judge, who shall determine whether final relief from default is warranted. See, e.g., Blue Circle, 11 FMSHRC at 2145. If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. § 820(k).

Accordingly, we grant Carder's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 13 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-246
Petitioner : A.C. No. 46-04702-03562
v. :
VIRGINIA CREWS COAL COMPANY, : Docket No. WEVA 92-247
Respondent : A.C. No. 46-04702-03563
: No. 14 Mine

DECISIONS

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston
West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Docket No. WEVA 92-246, concerns alleged violations of mandatory safety standards 30 C.F.R. § § 75.220(a)(1), and 75.208, and Docket No. WEVA 92-247, concerns an alleged violation of mandatory safety standard 30 C.F.R. § 75.400.

The respondent filed timely notices of contests and answers, and hearings were held in Charleston, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these cases.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to

be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

Stipulations

The parties stipulated to the following (Tr. 7-8):

1. The No. 14 Mine is owned and operated by the respondent.
2. The respondent and the mine are subject to the Act.
3. The presiding judge has jurisdiction to hear and decide these matters.
4. MSHA Inspector Gerald L. Cook was acting in his official capacity when he issued the contested citation and orders.
5. True copies of the citation and orders were properly served on the respondent or its agent.
6. The imposition of appropriate civil penalty assessments for the alleged violations in question will not adversely affect the respondent's ability to continue in business.
7. The respondent is an average sized mine operator, and has a low history of prior violations as shown in an MSHA computer print-out (Exhibit P-1).
8. The cited conditions and practices were abated by the respondent in good faith within the times fixed by the inspector.

Discussion

Docket No. WEVA 92-246

This case concerns a section 104(d)(1) significant and substantial (S&S) Citation No. 3740213, issued by MSHA Inspector Gerald L. Cook at 7:15 a.m., April 16, 1991. The inspector cited a violation of mandatory safety standard 30 C.F.R. § 75.220(a)(1) and the condition or practice cited is described as follows:

The approved Roof Control Plan (permit No. 4-RC-5-76-11069-10 dated 2-20-91) was not being complied with on the 1st Left (003-0) section in No. 6 working place in that the face had been advanced about 15(sic) inby last row of bolts and not supported and evidence indicated that crosscut right had been advanced about 20 feet and not bolted traveling past openings that create intersection that was not supported.

Following the issuance of the citation, Inspector Cook issued section 104(d)(1) "S&S" Order No. 3740214, at 7:18 a.m., April 16, 1991, citing a violation of 30 C.F.R. § 75.208, and he included a reference to the previous citation in support of the order. The cited condition or practice is described as follows:

The No. 6 working place had the face advanced about 15 feet inby last row of permanent roof support and crosscut turned left advanced about 20 feet inby last row permanent roof support and areas not posted with readily visible warning. This condition observed prior to mining started on section. This condition observed on 1st left (003-0) section.

Docket No. WEVA 92-247

This case concerns a section 104(d)(1) Order No. 3739989, issued by Inspector Cook on April 29, 1991, citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.400. Inspector Cook relied on the previously issued April 16, 1991, section 104(d)(1) Citation No. 3740213, in support of the Order, and the cited condition or practice is described as follows:

Loose coal and coal dust was allowed to accumulate from 3 to 24 inches deep and 16 to 18 feet wide and 6 to 10 feet in length in about 6 locations in the left return off the left mains section (003-0). This accumulation had been pushed up and placed in these areas. Accumulations from 2 to 12 inches was present along roadways and ribs also in this area and had not been cleaned on cycle starting at about 70 feet inby the return overcast and extending inby for about 1,000 feet. Some rock had been mixed in some of the accumulations and this entry is ranging from damp to wet conditions with some areas dry. (This company is not following their clean up program).

Petitioner's Testimony and Evidence

Section 104(d)(1) Citation No. 3740213 30 C.F.R. § 75.220(a)

MSHA Inspector Gerald L. Cook, Sr., confirmed that he visited the mine on April 16, 1991, to continue an inspection which began the previous day, and he rode in with the day shift section foreman and crew. He identified a copy of the section 104(d)(1) citation which he issued (Exhibit P-1). Mr. Cook stated that he inspected the working faces, travelling from the No. 1 through No. 6 working places, and when he arrived at the No. 5 or No. 6 entry he met union representative Richard Patton who was performing a preshift examination. Mr. Cook stated that he observed that the No. 6 working face had been advanced approximately 15 feet in by the roof bolts, and that the crosscut right, turned back toward the No. 7 entry, had been advanced about 20 feet, and that neither roof area was supported. He concluded that these conditions constituted a violation of the roof control plan because openings that create an intersection must be supported before mining or miners can advance past the openings. He identified a copy of the plan (Exhibit P-3), and stated that paragraph 3 of page 4 of the plan was violated (Tr. 19-25).

Mr. Cook confirmed that the cited areas were not permanently supported, and he saw no evidence of any temporary support. The No. 6 entry had been advanced in by the last row of bolts, and the crosscut to the right, off No. 6, had also been advanced. This indicated to him that someone had to pass by one of the two openings to mine the other opening without any roof support, and that this was a violation of the roof control plan. He confirmed that the intersection itself was supported, but that the crosscut right and the No. 6 heading were not. He stated that the respondent could have mined the right crosscut, or the heading, as long as a row of posts was installed across the mouth of the intersection before mining either opening. Mr. Cook observed that some coal that appeared to have been cleaned from the roadway was shoved into the crosscut between the No. 6 and No. 7 entries in an area which had been mined and not supported and he concluded that work had been performed in that area without any roof support. He confirmed that this was an active area of the mine (Tr. 26-27).

Mr. Cook stated that he based his "significant and substantial" finding on the following (Tr. 28-29):

A. Because it's been proved -- they want to go back to the history of fatalities. We do have several fatalities that have resulted from a situation as this one where they are mining in past an opening that is not supported.

We've had miners killed and we've had miners badly injured and it's due to the fact that we have a lot of unsupported top, and swinging, that could fall. If it fell, it could ride back past your -- even back past your permanent supports, which it had done before.

Mr. Cook believed that the violation would reasonably likely cause a fatality "because of the fact that we have had fatalities on this" and "where you're exposing miners to unsupported top, you're giving them a little bit extra where they can have a chance of having a roof fall and getting a person killed". He further stated that "if you go under unsupported top, you're asking for a fatality" and that "the company exposed the miners to unsupported top unnecessarily" (Tr. 29). Mr. Cook further explained that anytime miners are exposed to unsupported top "it is S&S in our criteria" (Tr. 30). He confirmed that the roof did not fall and that he observed no one in the area of unsupported roof while he was there. However, he saw evidence that someone had taken a scoop through the area pushing coal up into the breakthrough, and he saw no evidence that any temporary support had been installed when this was done (Tr. 32). Mr. Cook confirmed that this was his first visit to the underground mine area and he did not observe any broken or loose top in the cited unsupported areas (Tr. 32).

Mr. Cook stated that he based his "unwarrantable failure" finding on the following (Tr. 32-33):

A. Because the operator has a roof control plan which is their plan. It's supposed to be known by everybody who is working on that section that has to deal with roof control. And whenever they have an approved plan, that is their plan they mine by. And when they violate that plan, there is no way they can tell me they didn't know the plan had that stipulation in it, because they're supposed to review the whole plan and this plan is supposed to be known by everybody.

And once they violate it, the negligence come out that -- if you have a roof control plan that is approved, it's supposed to be known by everybody on that section, what the parts stipulate and what the parts mean. And there is no excuse for them to create a situation, as they did, and there is no way they can tell me they didn't know it existed, because they're supposed to know what the plan states. It is their plan and they're supposed to review it.

Mr. Cook stated that after issuing the citation and order he spoke with section foreman Clyde Bailey who confirmed that he was located in the No. 6 entry. Mr. Bailey assembled the crew and Mr. Cook informed the crew that he had issued the citation and order because they had mined the cited area without any roof

support and no one spoke up to tell him that this was not the case (Tr. 35-36). Since no one spoke up, Mr. Cook assumed that what he had observed "was the way it was done" (Tr. 36). He confirmed that the crew acknowledged that they knew about the roof control plan and that they were not supposed to mine past an opening they had created without supporting it first, and no one suggested that a violation had not occurred (Tr. 37). Mr. Cook confirmed that temporary supports were installed after he issued the citation, and that when he next returned to abate the violation, both entries had been permanently supported (Tr. 37).

On cross-examination, Mr. Cook confirmed that he saw no evidence of the roof dripping or any indications that it was about to fall, and he saw no evidence of any roof danger in the cited areas (Tr. 38). Mr. Cook also confirmed that he did not know which crew had cut the intersection in question, but he believed that any crew that knows that the area is not supported should attend to the matter (Tr. 38). He stated that Mr. Bailey's morning crew had just arrived on the section, and Mr. Cook did not know when the area had been mined or who mined it (Tr. 40). He confirmed that the violation was an unwarrantable failure because "the plan is supposed to be known by the coal crews and the company. It's an approved plan and they're supposed to know what it requires them to do, to mine according to the roof control plan" (Tr. 40).

Mr. Cook stated that he was confident that he was in the No. 6 to No. 7 break and at the No. 6 heading when he made his observations and roof measurements. He initially assumed that he was in the No. 1 entry, but it was not as advanced as the other entries. Mr. Bailey and Mr. Patton both told him he was in the No. 6 entry before he issued the violation, and he asked both of them for his location because he wanted to make sure of the entry location before issuing the violation (Tr. 42). Mr. Cook stated that he made his measurements from the last row of roof bolts, but he could not recall which side of the entry he measured from or whether the entry or face was squared up or at an angle (Tr. 43-44). Mr. Cook stated that under the roof control plan he is allowed to be in four feet from the last row of roof bolts, and he explained the measurements he made with his tape and the procedures he followed (Tr. 45-47).

Referring to a mine map (Exhibit R-3), Mr. Cook identified the two unsupported roof locations which he observed, and he explained how he made his measurements while standing under the last row of roof bolts (Tr. 50-54). Mr. Cook confirmed that there were two distinct areas which were not supported, namely, the No. 6 heading, and the No. 6 to No. 7 break. He also confirmed that if the mouth of the No. 6 heading were supported with two rows of roof bolts into the crosscut, it would not have been illegal to mine the No. 6 to No. 7 break, and vice versa (Tr. 55). He stated that the coal accumulations in the break

were roughly 20 to 24 inches deep, but he did not consider them as a barrier preventing entry into the break because the accumulations stopped before the last row of bolts. He did not know how the accumulations got there (Tr. 56).

Mr. Cook clarified his previous "S&S" testimony by stating that miners are exposed to the unsupported roof areas when they pass by the two openings that are unsupported, and he concluded that they had to pass by the unsupported roof area in the No. 6 heading when the loose coal was pushed into the break (Tr. 57). He stated that the "evidence" that someone had been in the area previously consisted of the "ridge of coal" across the mouth of the intersection and rubber tired scoop or tractor tracks going down the No. 6 entry (Tr. 59).

In response to further questions concerning his "S&S" finding, Mr. Cook stated as follows at (Tr. 62-64):

Q. What you're saying, Mr. Cook, is whether you had evidence of miners in this area or not, you were going to write this as an S&S violation. Is that what you're saying?

A. Yes. It's an S&S violation due to the fact that --

Mr. Hardy: That is all. Thank you.

Judge Koutras: Well, you can finish your answer. Go Ahead.

Mr. Hardy: Yes. Please.

The Witness: It's an S&S violation regardless of whether there is miners active in that area or not. The fact is it's already done. You had exposed the miners to it. And what we're saying is the more times you expose miners to this type of areas leads them up to having more chances or them getting roof on them.

Mr. Cook stated that in the normal course of business the crew would have started producing coal, but he did not know the mining sequence and did not know where mining would have started. He confirmed that the two cited unsupported roof areas had already been mined, and the next step would have been for miners to go to those areas to support the roof before cleaning up the coal accumulations. If the areas were to be abandoned they would still have to be timbered to abate the violation (Tr. 66). He confirmed that the intersection itself, as shown by an "X" mark on the mine map (Exhibit R-3), was permanently supported. In the instant case, the break to the right and the heading straight ahead in the No. 6 entry were not supported. The heading needed to be supported to keep miners from going into the break under unsupported roof (Tr. 68).

Section 104(d)(1) Order No. 3740214, 30 C.F.R. § 75.208.

Inspector Cook confirmed that he issued the order after observing that neither of the previously cited unsupported roof areas contained any visible warnings devices. He stated that section 75.208, requires barriers to prevent persons from going under unsupported roof, or visible warning devices such as reflectors or surveyor's ribbons to warn miners not to pass under unsupported roof. In the case at hand, barriers or reflectors should have been located at the last row of bolts at both the No. 6 heading and at the No. 6 to No. 7 crosscut (Tr. 69-70). Mr. Cook confirmed that these unsupported areas were a part of the active working section, and he could find no visible warnings or physical barriers to alert miners about the unsupported areas (Tr. 71).

Mr. Cook explained the basis for his "S&S finding as follows at (Tr. 71-72):

A. By them not having any kind of means provided to show that this area wasn't supported, a person could go into that area and be out from under supported top before he realized he was out from under supported top. There was no means showing it wasn't supported. That is why we place -- that is why this law is in, so they can make miners aware that this area is unsupported. So you don't need to go past this area.

Q. Why did you determine that this was reasonably likely to cause a fatality?

A. Because there is no means provided and anybody could have been in that area. As it shows here, the way it looks, the evening shift might have mined that area. So the day shift could have thought that since there was no flag there or no visible means, that the area was supported. They might venture up into the face before they would realize they was out from under supported top, exposing themselves to the unsupported top.

Q. What was the likelihood of a roof fall?

A. There was no evidence right there. I'm not a specialist on roof. There was no evidence to show that this area was extremely bad and would be imminent to fall. If it was an extremely bad top and imminent danger, I would have issued an imminent danger, but the top condition in this area wasn't enough to show that there was a fall going to occur.

Q. Under normal mining operations, what was the likelihood of a fatality occurring?

A. Again, we've had people killed by roof and this is -- again, you're taking a chance, exposing the miners to the roof, unsupported. You're just boosting -- You're just increasing your chances on getting someone killed. I can't say that it might have led to a fatality or not, but you have the case of having people exposed to it.

And this is what we're trying to prevent, people being exposed to this unsupported top. And there was no means provided to keep them out of that area, to let them know that the area wasn't supported.

Mr. Cook stated that he based his "unwarrantable failure" finding on the following (Tr. 73):

A. This is a statutory provision of the law which was up until the new roof control plan, new roof control law came into effect, this was part of the plan. And they took this part of the plan out and made it law. Everybody is aware of what needs to be done while they mine a place. It's a statutory provision of the law and it's required to be known on mining.

If you're mining a section, you're supposed to know what parts of the roof control plan you have to abide by and what parts of the law pertain to roof control.

Mr. Cook stated that the violation was abated after foreman Bailey obtained reflectors or ribbons and placed them at the crosscut and the heading to show that these roof areas were unsupported (Tr. 74). Mr. Cook confirmed that the regulatory requirement for reflectors is not included as part of the respondent's roof control plan (Tr. 75).

On cross-examination, Mr. Cook confirmed that although he was aware of the fact that the preshift examiner's book for April 16, 1991, indicated that there was a reflector present in the intersection in question between 4:30 and 5:30 a.m., he still considered the violation to be an unwarrantable failure (Tr. 76).

Mr. Cook acknowledged that in his pretrial deposition he stated that in his judgment one ribbon posted in the intersection would suffice, but he now believed that two ribbons, or reflectors, would be required (Tr. 76).

In response to further questions Mr. Cook stated that one reflector would probably have been sufficient if it were placed in the middle of the intersection to let people know that the cited areas were unsupported. He then stated that he would still have considered this to be a violation because each of the

unsupported entries would not have been posted with a warning. However, he would not consider it to be an unwarrantable failure because "they at least tried to post it off" (Tr. 81). In the instant case, however, he found no warnings posted at any locations. If the accumulations which were present, were pushed all the way out to the last row of roof bolts, this would have constituted a sufficient physical barrier. However, the accumulations were two or three feet short of the last row of bolts and he would not consider this to be a sufficient barrier (Tr. 81).

Mr. Cook confirmed that he checked the preshift book for April 16, 1991, (Exhibit R-2) and after reviewing the entry for that day, he assumed that someone had placed reflectors in the areas shown, but he did not observe any at the time of his inspection (Tr. 86). He stated that ribbons or tape may be used, rather than reflectors, provided they are visible (Tr. 86). He confirmed that he did not check the mine production records to determine when anyone was last present in the area. However, based on the mine map (Exhibit R-2), it would appear that mining last took place in the area three days prior to his inspection (Tr. 87). He had no knowledge that anyone was travelling through the entry to reach any face area where mining was taking place, but someone informed him that a water pump car was brought through the area sometime prior to the day shift and that the car travelled down the No. 6 entry and over to the No. 7 crosscut. However, Mr. Cook did not know when this occurred, and he had no evidence that anyone travelled through the cited unsupported areas (Tr. 89). However, travelling through the supported intersection would be a violation of the roof control plan because the openings must be supported before any other work or travel in the intersection (Tr. 90).

Section 104(d)(1) Order No. 3739989, 30 C.F.R. § 75.400.

Inspector Cook confirmed that he issued the order in the course of an inspection on April 29, 1991 (Tr. 91-92; Exhibit P-5). He stated that he was accompanied by company representative Ronald Kennedy, and that he issued the order after observing accumulations of loose coal and coal dust in several areas along the ribs and roadways in the return airways starting at the overcast at the mouth of the first left section and extending inby for about one thousand feet. Referring to the mine map, (Exhibit R-3), Mr. Cook marked the mine areas where he found the accumulations. He stated that a lot of the accumulations were along the rib line and some had been left in the roadway. Coal had been scooped up and placed in piles at six locations, and the "piles" were 16 to 18 feet wide, 6 to 10 feet long, and 3 to 24 inches deep. The remaining accumulations were "here and there, numerous places along the ribs and along the roadway." He measured the accumulations with a rule, and

although they varied in size, the widths and lengths were basically "about the same" (Tr. 91-95).

Mr. Cook stated that the area in question is one of the returns off the first left section and it is required to be traveled on a weekly basis by the fire boss (Richard Patton), who is responsible for inspecting the area. If he is not present, a foreman or other certified person is required to conduct a weekly examination of the area. Some of the area was rock dusted, and some of the accumulations were rock dusted (Tr. 96).

Mr. Cook stated that he based his unwarrantable failure finding on the following (Tr. 97-98):

A. Due to the fact that a lot of the accumulations were ranging up to one thousand foot outby the working section indicates that the accumulations had been there for a long time and were left, and in some cases were placed and left.

75.400 requires that no accumulation shall be permitted -- no loose coal or coal dust or combustible material shall be allowed to accumulate in the coal mines. And they allowed this to accumulate for at least a month, month and a half from the time I found it. It had been placed there and left.

Mr. Cook stated that he concluded that the accumulations were allowed to accumulate for at least a month or a month and half before he found them because the mine map (Exhibit R-3), shows that "the earliest they could have started in this area was 3/14/91". He explained that this was the date that the engineers surveyed the area and they were "approximately at that location" at the mouth of the section (Tr. 98). Mr. Cook stated that some of the cited areas had been cleaned, but the accumulations were placed in piles and left, and some of the areas had never been cleaned. The violation was abated after the entire return was cleaned "from just around the overcast up to the section" (Tr. 99).

On cross-examination, Mr. Cook agreed that if the previous citation No. 3740213, which he cited in support of the order, is found not to be an unwarrantable failure violation, the order would not be unwarrantable and there would be no "S&S" finding because it has been modified to a non-"S&S" order (Tr. 100).

Mr. Cook could not recall whether he was told that mining in the area had started at the beginning of the quarter or at the end of the last quarter which is shown as March, 1991, on the mine map. The inspector who last inspected the mine before he did was no longer employed by MSHA when he conducted his inspection, and Mr. Cook's supervisor told him that "they were

just getting ready to start up this first left at the end of the last quarter, which would have been the end of March" (Tr. 101).

Mr. Cook confirmed that the coal accumulations were damp, but were still combustible. However, there were no ignition sources such as power cables or electrical installations in the return (Tr. 101-102). Responding to questions concerning his prehearing deposition of July 8, 1992, Mr. Cook confirmed that he previously stated that the coal dust accumulations which he observed were not combustible (Tr. 103). Responding further, Mr. Cook explained that any loose coal, wet or dry, is considered to be combustible material, but that it needs an ignition source to make it burn (Tr. 103). He confirmed that he did not make any combustibility tests because the coal was damp and wet and there was no way to determine the content of the incombustible material at that time (Tr. 105).

Mr. Cook stated that Company representative Kennedy did not travel the return airway with him until after he found the accumulations and issued the order. He then went back to the cited locations with Mr. Kennedy to show him the conditions, and Mr. Kennedy offered no explanation, but stated that "he could see what the problem was" (Tr. 106). Mr. Cook stated that he checked the prior weekly examination records and he believed that he found an entry which stated "None Observed" (Tr. 106). He confirmed that the accumulations did not extend continuously for one thousand feet, but they were "here and there" within that distance (Tr. 107).

Respondent's Testimony and Evidence

Ronald L. Kennedy, mine chief electrician, stated that he performed a preshift examination in the mine between 4:30 and 5:30 a.m., on April 16, 1991, and recorded the results in his examiner's report (Tr. 109; Exhibit R-2). He stated that he found a reflector at the No. 2 to No. 3 break, and that the No. 6 to No. 7 break, and the No. 7 to No. 8 break were not bolted, but were reflected (Tr. 110). His report shows that he reported the results of his preshift examination to foreman Clyde Bailey (Tr. 111). Mr. Kennedy explained that his examination notations "needs bolted, reflector" for the No. 6 to No. 7 entry means that a crosscut was not bolted and that there was a reflector there. He further explained that a "reflector" is a piece of red tape which is hung on the last roof bolt, and he confirmed that a reflector was in the area when he conducted his examination, and if it were not present he would have installed one as a warning to miners not to proceed beyond the last roof bolt. He stated that he would not have knowingly signed the examination book if the reflector had not been in the No. 6 to the No. 7 area (Tr. 111-112).

On cross-examination, Mr. Kennedy stated that his report does not reflect any observations that he may have made in the No. 6 heading, but he was sure that he inspected that location and knew of no violations. He stated that the reflectors which he observed and recorded were standard markers used in the mine and they were hanging down four to five inches from the roof (Tr. 113). He confirmed that the No. 7 break needed bolting and was not temporarily supported, and he observed no debris or coal in the break (Tr. 114).

Referring to a mine map (Exhibit R-3), Mr. Kennedy identified the No. 6 to No. 7 break area as the circled blue area on the map (Tr. 114-115). Mr. Kennedy stated that he could not recall seeing anything in the No. 6 entry and he did not see any reflector there (Tr. 115). He stated that his crew were maintenance people and were not in the face area, but that he had to travel through the intersection area to conduct his examination. He could not remember whether a pump car was in the area during the shift, but stated that "there might have been one in there" (Tr. 116).

In response to further questions, Mr. Kennedy stated that he saw no need for a reflector in the No. 6 entry and that is why he did not note the lack of a reflector in his report. He confirmed that all of the reflectors noted in his report were in place, and that he did not put them up. He explained that reflectors are supposed to be hung on the last bolt after a place is mined, and if it is torn down, he will replace it (Tr. 117-118). Based on his experience as a mine examiner, he believed that there were adequate reflectors in the intersection. He could not recall whether the No. 6 entry had been mined, but he did see the reflector in the No. 6 to No. 7 break at the time of his examination (Tr. 119).

Richard Patton, union employee and belt fire boss, confirmed that he accompanied Inspector Cook during his inspection on April 16, 1991. He stated that Mr. Cook "duckwalked" and "crawled a little ways" into the No. 6 to No. 7 crosscut, and although he was not sure, he believed that Mr. Cook was "a little bit past the rib" when he told him to go and get foreman Bailey and that "that place was down and the one on the left was down, too" (Tr. 122). Mr. Patton stated that he observed some tracks in the area but did not know the direction of travel (Tr. 122). Mr. Patton stated that Mr. Cook may have been four to five feet into the crosscut when he measured the area, but he could not remember. He marked the mine map (Exhibit R-3), with a red "x" mark to show where he and Mr. Cook were located (Tr. 123).

On cross-examination, Mr. Patton confirmed that he looked for a reflector with Mr. Cook and although a reflector (streamer) was laying on the ground, he could not recall the particular location (Tr. 124). Mr. Patton confirmed that he

remembered the citation that was issued for unsupported roof, but did not remember the one concerning the reflectors (Tr. 126). He acknowledged that he was mistaken when he marked the mine map location where he and Mr. Cook were at and stated that "I must have been one back, because that hadn't been drove up yet, I guess" (Tr. 127).

In response to questions concerning the two cited roof locations in the No. 6 entry and the No. 6 to No. 7 break, which are marked in orange and blue on the mine map (Exhibit R-3), Mr. Patton recalled that a five or ten foot cut had been made in the No. 6 entry and it was not supported. With regard to the break, he stated that "it seemed like it might have been a row or something in it there. I can't remember". (Tr. 129).

Guvenc Argon, respondent's president, testified that he holds a master's degree in mining engineering from Achen, West Germany Technical University, and that he has worked in the mining industry for 34 years. He stated that he was familiar with the three contested violations in question, and that he has read the orders and citation issued by Inspector Cook. He stated that he prepared the mine map (Exhibit R-3), as part of his "investigation" to determine the locations of the violations and that he used the surveyors notes and foreman's daily reports from April 11, 1991 through April 15, 1991, to prepare the mine legend and to determine where mining had taken place on those days, including the number of cuts taken and the mining footage. He explained what he believed had been done up to the morning of Tuesday, April 16, 1991, and confirmed that the map reflects the status of mining at 7:00 a.m., that day (Tr. 130-141).

Mr. Argon speculated that Mr. Cook may have been in the No. 7 to No. 8 intersection rather than in the No. 6 to No. 7 break and if he were in fact in the No. 6 and No. 7, Mr. Argon did not believe that Mr. Cook could have measured 20 feet, and that the maximum measurement would have been 14 feet (Tr. 143-144). Relying on the records, Mr. Argon concluded that Mr. Steve Bailey made the last cut in the break from the No. 6 to the No. 7 entry late in the evening on Saturday, April 13, 1991 (Tr. 141-145).

On cross-examination, and in response to questions as to how far past the last row of roof bolts may have been mined into the No. 6 heading, Mr. Argon stated that "I was not there. I did not see it" (Tr. 153). Based on the map measurements, he concluded that mining may have advanced one or two feet beyond the corner (Tr. 153). Mr. Argon also explained some of the information contained in the examination reports that he used to prepare his mine map (Tr. 155-157).

Findings and Conclusions

Docket No. WEVA 92-246

Fact of Violation, Citation No. 3740213, 30 C.F.R. § 75.220(a)(1)

Inspector Cook issued the citation after concluding that the respondent had violated its approved roof control plan by failing to provide roof support at two openings of an intersection where mining had advanced. The inspector cited the respondent with a violation of 30 C.F.R. § 75.220(a)(1), which provides as follows:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The applicable roof control plan relied on by the inspector in support of Citation No. 3740213, is dated February 20, 1991 (Exhibit P-3). The inspector confirmed that the specific plan provision which was not followed is found at pg. 4, paragraph 3 of the plan, and it states as follows:

3. Openings that create an intersection shall be permanently supported or a minimum of one row of temporary supports shall be installed on not more than 4-foot centers across the opening before any other work or travel in the intersection.

In the course of the hearing, respondent's counsel introduced Exhibit R-1, which purports to be a copy of page 4 of the respondent's roof control plan (Tr. 90-91). Paragraph 3 of the document contains the same language found in the roof control plan relied on by the inspector except for the addition of a last sentence which reads as follows: "This does not preclude preshift and on-shift inspections". After further consideration, I reject the respondent's unsubstantiated version of page 4 of its plan, and I accept the approved plan as submitted by the petitioner and received in evidence in this case as the more credible and applicable plan provision (Exhibit P-3).

In the course of the hearing, respondent's counsel suggested that on April 16, 1991, Inspector Cook was confused and thought he was observing conditions in the No. 6 heading and the No. 6 to No. 7 break, when in fact he was looking at conditions at the No. 7 to No. 8 break and that he was confused as to exactly where he was and what he observed. Counsel asserted that there was no violation of the roof control plan because the No. 7 to No. 8 area was properly bolted before the No. 7 heading was mined

(Tr. 17-18). Counsel took issue with Inspector Cook's findings that both locations off the intersection in question were unsupported, and counsel maintained that "if you're bolted in one place or the other, you're legal. You can go to one or you can go to the other" (Tr. 48).

According to the respondent's approved roof control plan, the company official responsible for the plan was Safety Director Doug Pauley (Exhibit P-3). Although respondent's counsel indicated during the hearing that Mr. Pauley would be a witness, Mr. Pauley was not called to testify (Tr. 90). However, in response to certain bench comments, respondent's counsel stated that "Doug Pauley was able to get underground about four or five hours after all this happened. We had already had bolts put up, temporary supports put up. There had been numerous abatement measures taken already" (Tr. 148). Inspector Cook testified that temporary supports were installed after he issued the citation, and that when he next returned to abate the violation, both cited locations were permanently supported (Tr. 37).

In support of the suggestion that Inspector Cook may have been confused as to where he was in the mine at the time of his inspection on April 16, 1991, and that he was observing conditions at a location different from the one described in his citation, the respondent presented the testimony of union fire boss Richard Patton, who was with Mr. Cook during the inspection, and company president Guvenc Argon, who was not with Mr. Cook and did not view the cited conditions, and who reconstructed the conditions after reviewing the citation and certain mine records and reports.

Although Mr. Patton initially testified that he and Mr. Cook were at an intersection in the No. 6 entry different from the intersection identified by Mr. Cook on the mine map (Exhibit R-3), Mr. Patton acknowledged on cross-examination that he was mistaken, and he "guessed" that the location that he had initially placed on the mine map had not as yet been driven (Tr. 127). Further, Mr. Patton specifically recalled the roof plan citation and he confirmed that a five or ten foot cut had been made in the No. 6 entry and that it was not supported (Tr. 128). With respect to the second location cited by Inspector Cook, Mr. Patton stated that "it seemed like it might have been a row or something in it there. I can't remember" (Tr. 129).

Insofar as Mr. Argon's testimony is concerned, I am not persuaded or convinced that it provides a credible basis for establishing that Inspector Cook was at some location other than the one he cited and testified about. During a bench colloquy concerning Mr. Argon's testimony, respondent's counsel characterized the testimony "as speculation that perhaps he (Cook) was in the wrong entry" (Tr. 148). Further, although

respondent's counsel indicated that Mr. Argon's testimony was presented to address foreman Steve Bailey's belief that mining only progressed to a certain point on April 13, 1991, and that Mr. Bailey might be called to testify, Mr. Bailey was not called (Tr. 158).

Although Mr. Cook acknowledged that his inspection of April 16, 1991, was his first visit underground at the mine, and that he initially believed that he was in the No. 1 entry, he testified credibly that in order to make sure of his location before issuing the citation, he asked both Mr. Patton and Mr. Clyde Bailey about it and they told him that he was in the No. 6 entry (Tr. 42). Mr. Cook also testified credibly that after issuing the citation and subsequent order, Clyde Bailey assembled the crew so that he (Cook) could speak with them about the violation, and that no one spoke up to dispute his findings (Tr. 36).

After careful consideration of all of the testimony and evidence in this case, I reject the respondent's suggestion that Inspector Cook may have been at a location different than the one described in his citation at the time he viewed the unsupported roof areas in question. I conclude and find that Inspector Cook was at the location described in the citation which he issued.

The respondent's applicable roof control plan provision required all openings creating an intersection to be permanently supported or temporarily supported with a minimum of one row of supports on not more than 4-foot centers across the openings before any work or travel in the intersection. Although Inspector Cook confirmed that if one of the cited roof locations had been supported in compliance with the roof control plan, the failure to support the other location would not have been a violation, I find no credible evidence establishing that any of roof locations cited by Inspector Cook were supported. Inspector Cook's credible testimony that the cited roof location in the No. 6 entry was unsupported was corroborated by fire boss Patton. With regard to the second location, the No. 6 to No. 7 crosscut break, the inspector's testimony that it too was unsupported is corroborated by the preshift examination report of examiner Ronald Kennedy (Exhibit R-2), and Mr. Kennedy's testimony confirming that the break was not bolted or temporarily supported. Under the circumstances, I conclude and find that both of the cited roof locations off of the intersection in the No. 6 entry, and in the No. 6 to No. 7 crosscut break, were unsupported and the inspector's findings in this regard are affirmed.

Although Inspector Cook confirmed that he had no evidence that anyone had gone out under unsupported roof in the two cited locations, he nevertheless concluded that someone had performed work and travelled through the supported intersection past the

unsupported roof areas off of the intersection. Mr. Cook's conclusion in this regard was based on his observations of "ridges of coal" accumulations which had apparently been pushed into the crosscut between the No. 6 and No. 7 entries, rubber-tired scoop or tractor tracks going down the No. 6 heading, and his belief that miners had to pass by one of the openings off of the intersection to mine the other opening. Fire boss Richard Patton and electrician Ronald Kennedy confirmed that they observed the tire tracks, but did not know the direction in which they travelled. Mr. Kennedy believed that a pump car may have been in the area, but he could not recall for certain. However, he confirmed that he had to travel the intersection to conduct his preshift examination (Tr. 116).

I conclude and find that the credible testimony of Inspector Cook establishes that the two cited locations off of the intersection in the No. 6 entry as shown on the mine map, (Exhibit R-3), were not supported as required by the respondent's approved roof control plan, and that work or travel had been performed in those areas without the required additional roof support. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Fact of Violation, Order No. 3740214, 30 C.F.R. § 75.208.

Inspector Cook issued the violation after finding that the unsupported roof areas which he previously cited in Citation No. 3740213, were lacking the readily visible warning devices required by mandatory safety standard 30 C.F.R. § 75.208, which provides as follows:

Except during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support.

Inspector's Cook's credible and un rebutted testimony clearly establishes that at the time he inspected the intersection and the adjacent two cited unsupported roof areas, there were no readily visible warnings posted to warn miners not to enter those areas. As a matter of fact, in the course of the hearing, respondent's counsel conceded that "there was no reflector in the intersection" when the inspector was at that location at 7:15 a.m., and counsel asserted that the respondent has "never taken the position that there was a reflector there. There wasn't" (Tr. 18, 163). The failure to post such reflectors, or other appropriate warning devices, constitutes a violation of section 75.208. See: Day Branch Coal Co., Inc., 12 FMSHRC 247 (February 1990); Ramblin Coal Co., 14 FMSHRC 1025 (June 22, 1992). Under all of these circumstances, I conclude and find that the petitioner has established a violation of

section 75.208, by a preponderance of the credible evidence adduced in this matter, and the violation IS AFFIRMED.

Docket No. WEVA 92-247

Fact of Violation. Order No. 3739989, 30 C.F.R. § 75.400.

Inspector Cook issued the violation after finding accumulations of loose coal and coal dust at the locations described in the order, and he cited a violation of 30 C.F.R. § 75.400, which provides as follows:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

I conclude and find that the credible testimony of Inspector Cook with respect to his observations and measurements of the accumulations in questions has not been rebutted by the respondent and it clearly establishes the existence of the accumulations. Indeed, in the course of the hearing the respondent's counsel conceded that the cited accumulations did in fact exist (Tr. 19, 164). However, in closing arguments, counsel raised the issue as to whether or not accumulations of loose coal and coal dust which are not combustible may support a violation of section 75.400 (Tr. 164-165).

Inspector Cook testified that notwithstanding the absence of any ignition sources, accumulations of loose coal and coal dust are still considered to be combustible materials that will burn if ignited by an ignition source (Tr. 101, 103). He acknowledged that he did not sample the coal or make any combustibility tests because he had no way to make that determination with the damp and wet coal which was present (Tr. 105). Mr. Cook also acknowledged that in his prior deposition, he answered "no" in response to a question as to whether he believed the cited accumulations were combustible (Tr. 103). In explanation of that answer, Mr. Cook suggested that his answer may have been taken out of context, and that the question may have been preceded by other questions dealing with his "S&S" finding (Tr. 103-104).

The respondent's suggestion that the violation should be dismissed because of the inspector's failure to establish that the coal accumulations were in fact combustible IS REJECTED. Although the inspector agreed that no ready sources of ignition were present, he testified credibly that although the coal accumulations were damp, they were nonetheless combustible. See: R.B.M Enterprises, Inc., 13 FMSHRC 222 (February 1991), holding that wet and muddy mine conditions did not preclude a

violation of section 75.400, since wet accumulations are still combustible. See also: Secretary v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 at pgs. 1120-1121 (August 1985); and Utah Power & Light Company v. Secretary, 12 FMSHRC 965, at pgs. 968-969 (May 1990), where the Commission observed that even though coal accumulations may be damp or wet they are still combustible.

I conclude and find that Inspector Cook's credible and unrebutted testimony with respect to his personal observations and measurements of the cited coal accumulations establishes that they existed as charged in the notice of violation served on the respondent. With regard to the issue of combustibility, while it is true that Mr. Cook testified at his deposition that he did not believe the accumulations were combustible, after reviewing the deposition page submitted by the respondent's counsel, I agree with Mr. Cook's assertion that his response, taken in contest, was in connection with other questions concerning his "S&S" finding. In any event, it seems clear to me from Mr. Cook's credible and unrebutted hearing testimony that while wet and damp coal cannot be ignited in the absence of an ignition source, such accumulations are nonetheless still combustible.

In view of the foregoing, and after careful consideration of all of the evidence in this case, and in the absence of any credible rebuttal by the respondent, I conclude and find that the cited coal accumulations were combustible and constituted a violation of section 75.400, and the violation is therefore AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the 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 FMSHRC 822, 825 (April 1981).

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Citation No. 3740213

In support of his significant and substantial (S&S) finding Inspector Cook took into account his prior knowledge of fatal and serious accidents (not at respondent's mine) resulting from mining past an opening that is not supported. Although Mr. Cook did not personally observe anyone under unsupported top, based on his observations of coal accumulations and tire tracks, he concluded that the coal had been pushed through the breakthrough and that someone had passed by the unsupported roof area while travelling through the area doing this work. He also indicated that the two unsupported roof areas had been mined, and that in the next step in the mining cycle miners would go to those areas to support the roof before cleaning up the coal accumulations. Mine Electrician Kennedy confirmed that he had to travel through the intersection while performing his preshift examination, and this was before Mr. Cook arrived in the area.

Although Mr. Cook confirmed that he saw no evidence that the roof was dripping and did not believe that there was an immediate danger of the roof falling, he nonetheless confirmed that he was concerned that the unsupported top could fall, and if it did, it could "ride back past your permanent supports" (Tr. 29).

Further, even through he acknowledged that he observed no one in the area, he was still concerned that miners had been exposed to the unsupported roof areas when they were mined and he did not want the miners exposed again to unsupported roof areas because "the more times you expose miners to this type of areas leads them up to having more chances of them getting roof on them" (Tr. 63).

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Roof Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

In the Consolidation Coal Company case, supra, the Commission affirmed my "S&S" finding concerning an over-wide roof bolting pattern which had existed along a supply track for a period of 6-months, and stated that "[T]he fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall."

In U.S. Steel Mining Company, Inc., 6 FMSHRC 1369 1366 (May 1984), Judge Melick found that a hazardous roof condition was significant and substantial notwithstanding testimony from a mine foreman that it was unlikely that the roof would fall "right away," and his belief that the condition was not unsafe because he and the inspector were under the roof while taking certain measurements. In R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986), Judge Melick cited Mathies Coal Company, 6 FMSHRC 1 (1984), in support of his finding that a hazardous roof condition constituted a significant and substantial violation even in the absence of an "immediate hazard."

In Halfway Incorporated, supra, the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the

violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

I agree with Inspector Cook's credible and unrebutted testimony that in the context of continued mining operations on the section, miners would be exposed to the hazards of a roof fall in the two cited unsupported roof areas adjacent to the intersection in the No. 6 entry, and that if the roof was to fall it could ride back past the supported intersection. If this were to occur, I believe one may reasonably conclude that any miners working or travelling the intersection would be exposed to the hazards of a roof fall. If a roof fall had occurred, I further believe that that it was reasonably likely that the affected miners would sustain injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that Inspector Cook's "S&S" finding was both reasonable and proper, and IT IS AFFIRMED.

Order No. 3740214

Inspector Cook based his "S&S" finding on his belief that in the absence of a visible warning device someone could venture out beyond the supported intersection into the areas of unsupported roof in the No. 6 entry and the No. 6 to No. 7 crosscut break where coal accumulations had been pushed. Since the areas in question were in an active working section, Mr. Cook believed that anyone could have gone into these areas under unsupported roof and exposed themselves to the hazards of a roof fall. Although Mr. Cook did not believe that there was an immediate danger of the unsupported roof areas falling, he nonetheless believed that under normal mining operations the absence of visible warnings to alert miners to stay out of the unsupported roof areas exposed them to a hazard and increased the chances of a fatality if the roof were to fall.

The obvious purpose of requiring visible warnings is to alert miners to stay out of areas where the roof is not supported. Although preshift examiner Kennedy's testimony reflects that he found a warning tape installed at the No. 6 to No. 7 break when he conducted his preshift approximately two hours before Inspector Cook observed the area, I take note of the fact that Mr. Kennedy confirmed that no warning was posted in the No. 6 entry. However, the fact remains that Inspector Cook found no warning devices in place at either location when he inspected the areas. Under the circumstances, I agree with Mr. Cook's safety concerns, and I conclude and find that in the course of continued normal mining operations a measure of danger to safety was contributed to by the violation, and that it was reasonably likely that miners would venture beyond the unsupported areas which were not posted with visible warnings, thereby exposing

them to the dangers of fall of unsupported roof. If the unsupported roof were to fall on a miner, I believe it would result in a fatality, or injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Order No. 3739989

In the course of the hearing, petitioner's counsel requested that the prior "S&S" finding made by the inspector be modified to non-"S&S" (Tr. 16, 97). In support of the request, counsel stated that the inspector has now determined that the violation was not significant and substantial (Tr. 16-17). Inspector Cook confirmed that this was the case, and he stated that in the absence of any ignitions sources, and any history of excess liberation of methane, he did not believe that the cited damp and wet coal accumulations constituted a significant and substantial violation (Tr. 104-105) Respondent's counsel agreed that in the absence of any ignition sources, the accumulations which were present in the damp return entry did not constitute a significant and substantial violation (Tr. 19). Under the circumstances, the petitioner's request to modify the violation to non-"S&S" was granted from the bench, (Tr. 97), and my decision in this regard is herein reaffirmed.

Unwarrantable Failure Violations

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several subsequent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company,

10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless", or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Citation No. 3740213

Inspector Cook testified that he considered the violation to be an unwarrantable failure because the approved roof control plan is the respondent's plan and everyone working on the section should review it and know what the plan requires (Tr. 32-33; 40). Mr. Cook also testified that when he assembled the crew after the citation was issued to speak to them about the matter, they acknowledged that they were aware of the roof control plan for supporting the cited locations and no one spoke up to the contrary or suggested that a violation had not occurred (Tr. 35-37).

Inspector Cook had no knowledge as to which production crew may have last mined the cited areas and he confirmed that he did not review any mine production records to determine when anyone was last present in those areas. Based on the reconstructed mine map and legend produced by the respondent (Exhibit R-2), Mr. Cook stated that it would appear that mining took place in the area three days prior to his inspection (Tr. 87). Although Mr. Cook believed that a water pump car may have travelled through the

area, and he observed coal pushed into the break adjacent to the intersection in the No. 6 entry, he had no evidence to establish when these events may have occurred, and he conceded that these activities would have occurred under supported roof in the intersection, and he had no evidence that anyone actually travelled under unsupported roof.

The cited roof control plan requires roof support across an intersection opening before any other work or travel in the intersection. Thus, it would appear that such support is not required until such time as men are expected to work or travel in the intersection. Mr. Argon testified that the foreman's report for April 12, 1991, shows that the No. 6 entry was bolted, but that the April 13, 1991, report shows that it was not bolted. Mr. Argon could not further explain these entries and he deferred to foreman Steve Bailey, the individual whose signature appears on the reports. However, Mr. Bailey was not called or subpoenaed for testimony and it does not appear that he was deposed. In the absence of any credible testimony from witnesses who were actually present during the mining activities which may have taken place during the days prior to Mr. Cook's inspection, I find no credible evidence to establish that the respondent deliberately and consciously failed to act, or engaged in conduct which one may reasonably conclude was aggravated. I also note the absence of any prior violations of section 75.220(a)(1). Under the circumstances, and coupled with the inspector's belief that the violation was an unwarrantable failure because the respondent "knew or should have known" about the requirements of its own roof control plan, I cannot conclude that the petitioner has carried its burden of proof to establish that the violation was in fact an unwarrantable failure violation within the parameters established by the Commission's decisions. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a) citation.

Order No. 3740214

Inspector Cook testified that the requirement for visible warning devices at the end of permanent roof supports was a part of the respondent's roof control plan until it was enacted as a part of MSHA's mandatory safety standards. Mr. Cook based his unwarrantable failure finding on his belief that the respondent should have known about any roof control requirements as well as the regulatory standards pertaining to roof control (Tr. 73). However, Mr. Cook confirmed that after reviewing the preshift inspection book for April 16, 1991, he assumed that someone had placed warning reflectors in the areas shown in the book entries (Tr. 86). Further, although his prior deposition testimony that one warning reflector placed in the middle of the intersection would suffice to comply with section 75.208, was contrary to his hearing testimony that two reflectors would be required (one at

each cited location), Mr. Cook candidly conceded that he would not consider this to be an unwarrantable failure violation because "they at least tried to post it off" (Tr. 81).

I accept as credible the un rebutted testimony of mine electrician Ronald Kennedy who conducted a preshift examination on April 16, 1991, approximately two hours before Inspector Cook arrived on the section to conduct his inspection. Mr. Kennedy testified that he observed a reflector at the No. 6 to No. 7 break and that the inspection book contained no additional notations as to what he may have observed in the No. 6 entry. I take note of the fact that the foreman's reports for the three or four days prior to the inspection on April 16, 1991, contain no information that reflectors were needed at the cited locations in question (Exhibit R-3). I also note the absence of any prior citations for violations of section 75.208, in the respondent's history of prior violations (Exhibit P-1).

After careful consideration of all of the evidence and testimony in this case, I find no credible evidence of any egregious or aggravated conduct on the part of the respondent in connection with this violation. In my view, the inspector's belief that the respondent knew or should have known about the requirements found in section 75.208, falls short of the standard of conduct required by the Commission's decisions to support an unwarrantable failure violation. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) citation.

Order No. 3739989

In support of the order in question, Inspector Cook relied on the previously issued section 104(d)(1) Citation No. 3740213, which has been modified to a section 104(a) citation. With regard to his prior "S&S" finding with respect to the order, Inspector Cook changed his position and agreed that the violation was non-"S&S", and the order was modified accordingly. Inspector Cook agreed that if the section 104(d)(1) citation which he cited in support of the order is found not to be an unwarrantable failure citation, the order would not be an unwarrantable failure order and the violation would not be "S&S" because it has been modified to a non-"S&S" violation (Tr. 100).

In its posthearing brief the respondent argues that the order was issued at the end of a "d-chain" beginning with Citation No. 3740213, and it believes that this citation, as well as Citation No. 3740214, should be modified to section 104(a) citations. Assuming that this is done, the respondent further believes that Order No. 3739989, is no longer part of a "d-chain" and should initially be considered as a section 104(d)(1) citation and nor an order. However, the respondent concludes that a section 104(d)(1) citation must describe a significant and

substantial condition, and that since the cited condition has been modified to a non-significant and substantial violation, it concludes that a section 104(d)(1) citation cannot stand as a matter of law and that the order should be modified to a section 104(a) citation.

After careful review of all of the facts and circumstances surrounding the issuance of the order in question, and the arguments presented by the parties, I agree with the respondent's position and adopt its aforementioned arguments as my findings and conclusions. Accordingly, the contested section 104(d)(1) order IS MODIFIED to a section 104(a) non-"S&S" citation.

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

The parties have stipulated that the respondent is an average sized mining operator and that the imposition of appropriate civil penalty assessments will not adversely affect its ability to continue in business. I conclude and find that the civil penalty assessments which I have imposed for the violations which have been affirmed are appropriate and will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent has a low history of prior violations, and I cannot conclude that its compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question.

Gravity

On the basis of my "S&S" findings and conclusions, I conclude that the roof control and warning device violations (Citation Nos. 3740213 and 3740214) were serious violations, and that the coal accumulation violation (Citation No. 3739989) was non-serious.

Negligence

I conclude and find that the roof control and warning device violations were the result of the respondent's failure to exercise reasonable care to prevent the violative conditions which it knew or should have known existed on the section and that this amounts to ordinary or moderate negligence. With regard to the coal accumulations violation, I conclude and find that the inspector's credible testimony concerning the duration of the existence of the cited accumulations, including his testimony that the coal was pushed into piles and left unattended

and not cleaned up, supports a finding of a high degree of negligence for this violation. I therefore conclude and find that the violation resulted from a high degree of negligence on the part of the respondent because of its failure to promptly clean up and remove the cited accumulations in question.

Good Faith Compliance

The parties stipulated that the respondent exhibited good faith in timely abating the violations in question and I adopt this as my finding and conclusion with respect to all of the violations.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Docket No. WEVA 92-246

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. Section</u> | <u>Assessment</u> |
|---------------------|-------------|--------------------------|-------------------|
| 3740213 | 4/16/91 | 75.220(a)(1) | \$275 |
| 3740214 | 4/16/91 | 75.208 | \$150 |

Docket No. WEVA 92-247

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. Section</u> | <u>Assessment</u> |
|---------------------|-------------|--------------------------|-------------------|
| 3739989 | 4/29/91 | 75.400 | \$225 |

ORDER

IT IS ORDERED THAT:

1. The initial section 104(d)(1) "S&S" Citation No. 3740213, April 16, 1991, citing a violation of 30 C.F.R. § 75.220(a)(1), IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED.
2. The initial section 104(d)(1) "S&S" Order No. 3740214, April 16, 1991, citing a violation of 30 C.F.R. § 75.208, IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED.
3. The initial section 104(d)(1) "S&S" Order No. 3739989, April 29, 1991, citing a violation of 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED.

4. The respondent shall pay civil penalty assessments in the amounts shown above for the three (3) violations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of these decisions and Order, and upon receipt of payment, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 16 1992

ALUMINUM COMPANY OF AMERICA, : CONTEST PROCEEDING
Contestant :
v. : Docket No. CENT 92-362-RM
: Order No. 4107581; 9/11/92
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Point Comfort Operations
ADMINISTRATION (MSHA), :
Respondent : Mine ID 41-00320

DECISION

Appearances: Timothy P. Ryan, Esq., Eckert Seamans Cherin & Mellott, Pittsburgh, Pennsylvania, for Contestant; Gretchen Lucken, Esq. Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Maurer

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, challenging the legality and propriety of a section 103(k) order issued at its Bayer Alumina Plant on September 11, 1992. An expedited hearing was requested and subsequently held on October 6, 1992, in Victoria, Texas, and the parties appeared and participated fully therein. After the Secretary rested, contestant moved that the section 103(k) order at issue herein be vacated. I granted that motion on the record at the hearing. For the purposes of ruling on contestant's motion, I accepted as true all the factual testimony in the record and all the Secretary's expert testimony as well, save their legal conclusions that a section 103(k) order was an appropriate legal device to address the instant mercury contamination problem at the contestant's Point Comfort Facility. Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing.

Order No. 4107581, issued pursuant to section 103(k) of the Act on September 11, 1992, by Supervisory Inspector Fink, states as follows:

Mercury contamination has occurred at all the R-300 facility and area approximately 70 feet west extending to the paved roadway parallel to the R-300 facility to

be covered by this 103(k) order. In order to protect the health and safety, all persons are prohibited from entering this area, except with the approval of the District Manager or his representative pending further investigation of the extent of the hazard.

In my opinion, there is no question that the Secretary has turned up a serious incidence of mercury contamination at the contestant's R-300 facility and adjacent area and it must be dealt with. The sooner the better. I only disagree with the legality of the means the Secretary has chosen to address the problem.

Section 103(k) of the Mine Act states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

An "accident" is a necessary precondition to the issuance of a section 103(k) order and there has been no discernible accident proven by the Secretary in this case. Simply calling it an "accident" does not make it so. Likewise, forming an "accident committee," does not make whatever that committee is investigating an "accident." Furthermore, although the list is not meant to be exclusive or exhaustive, I note that mercury contamination, or indeed any type of chemical spills or contamination is not included in the definition of "accident" provided by section 3(k) of the Mine Act. Nor is this type of situation included in the definition of "accident" in the MSHA regulations found at 30 C.F.R. § 50.2(h).

Legal niceties aside, the Secretary urges that as a remedial statute, the Mine Act should be interpreted broadly to effectuate its important health and safety purposes. I certainly agree with that proposition but the basis for my vacation of the order at bar is the very candid testimony of Inspector Fink, the man who issued the contested section 103(k) order in the first instance.

Inspector Fink testified that the section 103(k) order was actually issued to force compliance with several sections of 30 C.F.R. Part 56. He also agreed that section 104 of the Act or in a proper case, section 107(a), was the more usual compliance

tool. Most importantly, in response to questioning by the court, he admitted that the result obtained by the issuance of the 103(k) order could have also been obtained by regular enforcement of the mandatory standards pursuant to section 104 of the Act. The inspector testified at Tr. 133:

Q. Okay, so basically those . . . standards, if they were enforced, would do everything that you want to do with this 103(k) order, correct?

A. Yes sir, if they were enforced, by all parties concerned.

By his qualification, the inspector meant that the section 104 enforcement would only be effective if the company complied. But I believe that the mechanism exists in section 104 to force compliance upon even the most reluctant operator if it is properly used.

I also believe that Inspector Fink was directed to issue the instant 103(k) order by the district manager because MSHA was concerned about what they perceived to be a lack of compliance disposition on the part of ALCOA concerning previous citations issued to the company with regard to the mercury contaminated area. In a reactive manner, MSHA impermissibly stretched the law to force compliance with the applicable mandatory standards when the Mine Act has an existing, readily usable and legal mechanism to do exactly that in section 104 or in the proper case, 107.

If violations of mandatory standards were involved, as they apparently were, MSHA should have proceeded apace with enforcement under section 104. This course of action was embarked on, but later abandoned by MSHA in favor of the quicker fix thought to be available in section 103(k). Moreover, if at any time MSHA determines that an imminent danger is involved, an imminent danger withdrawal order under section 107(a) could be issued. But a section 103(k) accident control order is not a legally viable option in this situation. An "accident" is a statutory precondition to its issuance, and without torturing the terminology, simply cannot be found herein.

ORDER

In view of the foregoing findings and conclusions, the contested section 103(k) Order No. 4107581, issued on September 11, 1992, **IS VACATED**, and the Notice of Contest filed by the contestant **IS GRANTED**.


Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 16 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 91-190
Petitioner : A.C. No. 15-13881-03749
v. :
PYRO MINING COMPANY, : Pyro No. 9 Slope
Respondent :
COSTAIN COAL INCORPORATED, :
Successor-In-Interest :

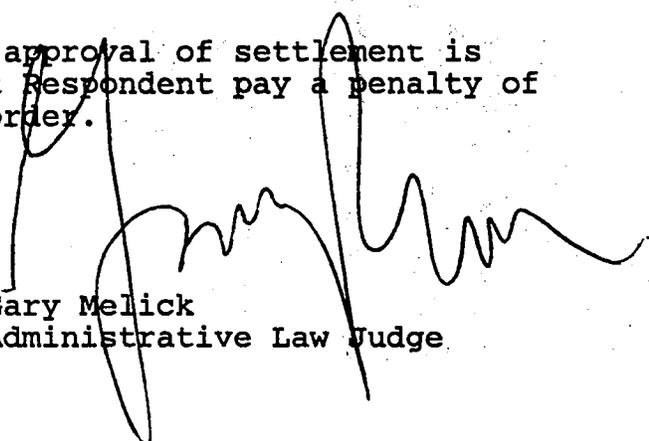
DECISION APPROVING SETTLEMENT

Appearances: Stephen D. Turow, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner;
Catherine A. Lamey, Legal Affairs Manager,
Pyro Mining Company, Sturgis, Kentucky,
for the Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$1,500 to \$1,200 was proposed. I have considered the representations and documentation submitted in this case, including the representations on the record at hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$1,200 within 30 days of this order.


Gary Melick
Administrative Law Judge

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OCT 20 1992

LINDA J. VAN TASSEL, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. WEST 91-197-DM
 :
 : WE MD-04
 :
BARRICK GOLDSTRIKE, INC., :
Respondent :

ORDER OF DISMISSAL

Before: Judge Morris

The parties moved that the above case be dismissed with prejudice.

The motion is GRANTED and the hearing scheduled in Elko, Nevada, for October 27, 1992, is CANCELED.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 21 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-72-M
Petitioner : A.C. No. 41-03504-05520
v. :
: Four Mile Draw
ROBERT FOSTER, Employed by :
SUN PAVING INCORPORATED, :
Respondent :

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Robert Foster, Michael F. Harrison, El Paso,
Texas, for Respondent.

Before: Judge Barbour

BACKGROUND

This case concerns proposals for assessment of civil penalties filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), Petitioner, against Robert Foster, Respondent, pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). Petitioner seeks civil penalty assessments for two alleged violations of certain mandatory safety standards for surface metal and non-metal mines found in Part 56, Title 30, Code of Federal Regulations. The Secretary alleges that Respondent, as the agent of corporate mine operator Sun Paving Incorporated, knowingly authorized, ordered or carried out the subject violations. The Respondent filed an answer and the case was docketed for hearing on the merits in El Paso, Texas on September 29, 1992, at 8:30 A.M.

THE PROCEEDINGS

On September 29, 1992, shortly before the start of the hearing, I was advised by Counsel for the Secretary that he had received a telephone call from Respondent on the previous night at counsel's hotel in El Paso and that Respondent had stated he wished to settle the matter by paying in full the proposed civil

penalties for the violations. Counsel further stated that he had advised Respondent that although this would be a satisfactory resolution of the case as far as the Secretary was concerned, any such result would have to be approved by me.

When Respondent, representing himself, arrived at the hearing he and Counsel for the Secretary conferred briefly in private. Following their conference, I convened the hearing and Counsel for the Secretary explained on the record the circumstances of the telephone call and further stated that Respondent admitted liability and wished to pay in full the proposed civil penalties. ¹ Counsel further stated the Secretary believed the proposed penalties to be appropriate for the violations and that this resolution was acceptable to the Secretary. Tr. 6-7

Respondent then stated on the record that Counsel had described their agreement accurately. When asked by me whether he admitted that the violations had occurred and that he had knowingly authorized them, he stated, "Yes." Tr. 8. He further stated that he is the president and general operating manager of Sun Paving Incorporated, and that although the company had been assessed civil penalties in the past this was the first instance in which he or the company had been involved in the administrative hearing process. Tr. 8-9. Finally, Respondent apologized for his tardiness in contacting Counsel for the Secretary regarding this matter. Tr. 11.

¹The violations are cited in an order of withdrawal and a citation. The order, citation and proposed civil penalty amounts are as follows:

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. Section</u> | <u>Assessment</u> |
|--------------------------------|-------------|------------------------------|-------------------|
| 3448601 | 11/5/90 | 56.14101 | \$700 |
| 3448615 | 11/5/90 | 56.1400(b) | \$300 |

Order No. 3448601 states that Respondent knowingly permitted a front end loader to operate without a service brake capable of holding or stopping the loader with its typical load on the maximum grade it traveled. Citation No. 3448615 states that Respondent knowingly permitted the front end loader to operate with a loose steering mechanism.

I accepted Respondent's apology, but I explained to Respondent that his procrastination had put the government to a great deal of unnecessary expense, and that I expected in the future he would resolve such matters on a timely basis. I emphasized that I was not required to accept the parties' proposal, and I explained that only because this was his first experience with the hearing process would I do so in this instance. Tr. 10-11.

FINDINGS AND CONCLUSIONS

Respondent acknowledged liability and authorizing the violations, and I so find. I further find that the violations were serious in that they could have contributed to a haulage accident. In addition, Respondent abated the violations in a timely fashion. Finally, Respondent is small in size and has a medium applicable history of previous violations.

After review and consideration of the statements in support of the proposed resolution of this matter made by Counsel for the Secretary and the by the Respondent, and keeping in mind Counsel for the Secretary's assurance that the Secretary is fully satisfied that payment in full of the proposed civil penalties is appropriate, I conclude the proposed civil penalties accurately reflect the statutory civil penalty criteria. The parties are put on notice, however, that in the future I will accept such last minute agreements only in the most extraordinary of circumstances.

ORDER

Respondent IS ORDERED to pay in full the proposed civil penalties in the amounts shown above in satisfaction of the violations in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and upon receipt of payment, this proceeding is **DISMISSED**.



David F. Barbour
Administrative Law Judge
(703) 756-5232

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Mr. Robert Foster, Mr. Michael F. Harrison, 1840 Lee Trevino, Suite 110, El Paso, TX 79936 (Certified Mail)

/epy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 21 1992

RICKY HAYS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 90-59-D
LEECO, INC., : MSHA Case No. BARB CD 89-32
Respondent : No. 62 Mine

DECISION APPROVING SETTLEMENT
and
ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit, Leeco, Inc. v. Ricky Hays & FMSHRC, 965 F.2d 1081 (1992). On August 3, 1992, after the judgment of the Court remanding the case, counsel for complainant Ricky Hays filed a motion with the Commission requesting that the proceeding on remand be dismissed on the basis that "Hays and Leeco have entered into a settlement agreement of this matter". Thereafter, on September 22, 1992, the Commission remanded the matter to me with instructions to consider the motion to dismiss and, if necessary, for further proceedings consistent with the Court's opinion.

In his motion to dismiss, complainant's counsel stated that the parties have reached a full and final settlement of this litigation, including the matter of attorneys fees, and that their dispute has been fully resolved without the need for further court proceedings. Counsel further stated that the settlement agreement is confidential, and that since it fully resolves the matter, there is no need for the Commission to reconsider the matter. However, given the Commission's comments on remand that "Oversight of proposed settlements is an important aspect of the Commission's adjudicative responsibilities under the Mine Act and is, in general, committed to the Commission's sound discretion", and notwithstanding the confidentiality of the settlement, I issued an order directing the parties to file a copy of their settlement agreement with me for my in camera review and appropriate disposition.

Discussion

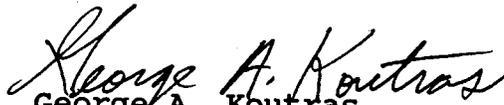
The parties have complied with my Order and a copy of their settlement agreement has been filed for my in camera review. The complainant's counsel has confirmed that the parties have fully complied with the terms of the settlement agreement, and that the complainant Ricky Hays and the respondent Leeco, Inc., jointly request that I approve the settlement and dismiss this matter.

Conclusion

After careful review and consideration of the motion and supporting settlement agreement, I conclude and find that the settlement disposition is reasonable and in the public interest. Accordingly, the settlement disposition is APPROVED, and the motion to dismiss IS GRANTED.

ORDER

In view of the mutually agreeable settlement disposition of this case, this matter IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of
Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508
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Main Street, P.O. Drawer 5087, London, KY 40745-5087
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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

101 21 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-556
Petitioner : A. C. No. 46-01456-03501 JDC
v. : Federal No. 2
EIMCO COAL MACHINERY, INC., :
Respondent :

DECISION

Appearances: Javier I. Romanach, Esq.,
Arlington, VA, for Petitioner;
James A. Liotta, Esq., Fairmont,
WV, for Respondent.

Before: Judge Fauver

At the hearing on September 22, 1992, at Morgantown, West Virginia, the parties moved for approval of a settlement agreement. For the reasons stated on the record, the motion is GRANTED.

Accordingly, it is ORDERED that Respondent shall pay the agreed civil penalty of \$140 within 30 days from the date of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U. S.
Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington,
VA 22203 (Certified Mail)

James A. Liotta, Esq., Liotta & Janes, Attorneys at Law, P. O.
Box 1509, First National Bank Building, Fairmont, WV 26554
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/fccca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 23 1992

| | | |
|--------------------|---|---------------------------|
| ROY LEE STROUD, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| v. | : | Docket No. KENT 91-986-D |
| | : | |
| CBM MINING, INC., | : | PIKE CD 91-09 |
| ROY F. COLLIER AND | : | |
| JAMES H. BOOTH, | : | No. 2 Mine |
| Respondents | : | |

DECISION

Appearances: Tony Opegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for Complainant;
Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Walker, Paintsville, Kentucky, for Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint, as presently amended, filed by the complainant, Roy Lee Stroud, against the corporate respondent, CBM Mining, Inc. (CBM), and the individual respondents, Roy F. Collier and James H. Booth, who are both part-owners and corporate officials of CBM, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

Pursuant to notice, a hearing was conducted in Paintsville, Kentucky, on April 15-16, 1992. Subsequently, both parties filed post-hearing briefs and/or proposed findings and conclusions, which I have considered along with the entire record of proceedings in this case in making the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant, Roy Lee Stroud, is the brother-in-law of respondent, Roy F. Collier. Collier is married to Stroud's sister, Patricia.

2. Over the previous several years, going back to at least 1986, Stroud had sought employment at one or the other of Collier's businesses to no avail. They had a very poor personal and family relationship and Collier absolutely did not like Stroud for a variety of personal reasons. The record reflects a long history of animosity between them. However, Collier's wife,

Patricia, wanted him to give her brother a job, so at one point he finally gave his approval for Stroud to work for CBM and he was subsequently hired as a belt shoveler at \$8.00 per hour.

3. His career at CBM was short-lived, however. Stroud's first day of work was January 29, 1991. He worked 8 hours that day. The next day, January 30, 1991, he worked 2 hours and walked off the job over a dispute with the mine superintendent about his rate of pay. The superintendent had erroneously told him that his rate of pay was going to be \$6.00 per hour. When Collier learned of this later, and was teased about it, he became quite upset and threatened to whip Stroud the next time he saw him.

4. On February 5, 1991, Stroud filed a complaint of discrimination with MSHA, falsely alleging that he had been fired from his job as a beltline shoveler, by Superintendent Tommy Rouse on January 31, 1991, ostensibly because he had complained to Rouse about his smoking underground.

5. MSHA mailed two separate copies of Stroud's discrimination complaint to CBM on February 5, 1991, each with a cover letter informing the company that a discrimination complaint under section 105(c) of the Mine Act had been filed against it. One of the letters was addressed to Booth (Complainant's Exhibit No. 3); the other letter was addressed to Rouse (Complainant's Exhibit No. 4). The complaints were both received by the company on February 7, 1991.

6. Even though Collier and Booth claim not to have known about this section 105(c) complaint until sometime later, the circumstantial evidence is strong that both Collier and Booth knew that Stroud had filed a section 105(c) complaint with MSHA on or about February 7, 1991, and in any event before the assault actually took place on February 8, 1991 (See Finding and Conclusion No. 8, *infra*). In accordance with the preponderance of that evidence I find that all the respondents did have knowledge that Stroud had engaged in protected activity, i.e., filed a section 105(c) complaint, prior to the adverse action that was taken against him.

7. In the days between January 30, 1991 and February 8, 1991, Collier was becoming still angrier with Stroud because he would stop by the mine office frequently trying to pick up his paycheck for the 10 hours pay he had coming. The regular payday was not until February 15, 1991, but Stroud continued to stop in the office seeking his check. Collier had asked one of the clerks there, Gladys Parsons, to notify him the next time Stroud came into the office.

8. On February 8, 1991, Stroud once again was on his way to the mine office to check on his paycheck. On his way to the office, Stroud drove by Collier's home in nearby Beauty, Kentucky. When Stroud passed Collier's home around noon, Collier was standing outside talking with Booth. Collier and Booth saw him and followed him to the mine office, arriving separately, but simultaneously a few minutes later. Collier told Booth to clear the female employees out of the front office and he picked up an 18-inch long piece of hydraulic hose and went into the office after Stroud. Booth did as he was requested. Collier then entered the office and started whipping Stroud with the hydraulic hose. He struck him multiple blows on the head and back while Stroud attempted to fend off the blows. Booth did not participate in the assault.

9. Prior to February 8, 1991, Booth and Stroud had no personal relationship whatsoever; and I find no credible evidence in this record to prove that Booth participated in the assault on Stroud. The only evidence to that effect comes from Stroud himself, whose credibility approaches zero. The mere fact that Booth was present in the office and did not come to the aid of Stroud or try to stop Collier does not amount to taking adverse action against Stroud on the part of Booth. Therefore, I am ordering dismissal of Stroud's complaint against Booth on this basis alone.

10. On February 8, 1991, after being examined at a hospital for the injuries he received during the assault, Stroud notified MSHA by telephone of the assault. MSHA thereafter investigated Stroud's assault claim as part of his previously filed discrimination case.

11. On April 3, 1991, MSHA issued its determination that in its opinion, a violation of section 105(c) had not occurred. Stroud then filed a pro se complaint with the Commission alleging that he had been discharged by CBM for reporting safety violations and that he had also been "beaten by officials of the company" after reporting safety violations to the Department of Labor, meaning the original discrimination complaint filed with MSHA.

12. On October 22, 1991, I granted Stroud's motion to amend his pro se complaint. By this time he was represented by counsel. Stroud's amended complaint dropped his claim that he had been discharged by CBM in violation of section 105(c) of the Mine Act, but retained the claim that he had been assaulted by officials of the company because of the filing of his original discrimination complaint with MSHA. In addition, the amended complaint added Collier and Booth as individual respondents, based on Stroud's allegation that Collier and Booth assaulted him on February 8, 1991.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The general principles governing analysis of discrimination cases under the Mine act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642, (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

There is no doubt that Stroud engaged in protected activity in this instance. The mere filing of a discrimination complaint under section 105(c) of the Mine Act constitutes protected activity. And that is so even if that complaint contains allegations which are known to be false by the complainant at the time he makes them. There is also no doubt that adverse action in the form of a physical assault on the person of Stroud was taken by Collier on February 8, 1991, some 3 days after he filed that discrimination complaint. Furthermore, the preponderance of the circumstantial evidence is clearly to the effect that Collier's assault on Stroud was motivated at least in part by complainant's filing of the discrimination complaint with MSHA. The coincidence in time alone is enough to convince me that the two events are related.

Collier has, however, raised an affirmative defense in this case. He maintains that he was motivated to assault the complainant by his unprotected activity and in fact assaulted him for that reason alone. But since I have already determined above that he was motivated at least in part by Stroud's protected activity, he then urges that this is a mixed motivation case and that he would have taken the adverse action in any event for Stroud's unprotected activity alone.

There is certainly more than adequate evidence in this record of trial that there have been hostile feelings both ways between Stroud and Collier for years prior to this assault at bar. They have been on the threshold of coming to blows on several prior occasions. The police have been called on one occasion. There is jealousy on the part of Stroud over Collier's material possessions. There is disdain on the part of Collier towards Stroud because he perceives him to be a ne'er-do-well, dependent on the charity of his family, most particularly when it involves his own wife, Patricia. The fact that Collier for years would not give him a job in one of his many businesses grated on Stroud. Then when Collier finally relented and gave him a job, he only lasted 2 hours into the second day before he quit. That embarrassed and grated on Collier, especially when others teased him about it, as did State Mine Inspector Sexton at the CBM Mine Office the same day that Stroud quit. Collier at that time already promised to whip Stroud the next time he saw him. Stroud continued to aggravate the situation by frequently stopping by the mine office trying to pick up his paycheck for the short time that he did work. Collier perceived this as harassment of his clerical help. Finally, he received word somehow, I am quite sure, that Stroud had filed the discrimination complaint with MSHA.

It is difficult in this case to determine at what exact point Collier was pushed to his limit and formed the intent to perpetrate the assault on Stroud. It does not help that there is little in the way of credible evidence contained in this lengthy record from the principals involved. I find the credibility of Stroud, Collier, and Booth to be tainted by inconsistent and illogical testimony. And the testimony of the supporting witnesses, which primarily consists of various members of the Stroud family, is mostly in direct conflict depending on which side that particular witness supports. The Stroud family siblings are split over whether they are on the side of Collier and his wife, Patricia, or Stroud and his wife, Rose.

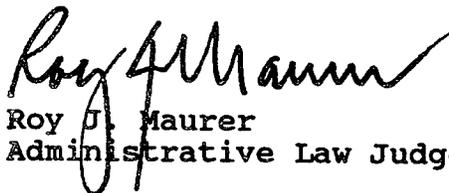
This is basically a domestic relations case that wound up before this Commission simply because a coal mine was peripherally involved as the situs of employment of the complainant. The case has nothing to do with mine safety or health issues. The incident giving rise to the case could just as easily have played out in one of Collier's gas stations. Perhaps more appropriately, there is also concurrently a civil tort action pending in state court in Kentucky for damages as a result of the admitted assault.

After reviewing the evidence once again and considering the arguments of the parties, I find that the assault on Stroud by Collier was based upon long-standing personal animosity between the two men, and would have taken place with or without Stroud filing the discrimination complaint. Accordingly, I find that

Collier would have taken the adverse action complained of herein because of the unprotected activity of the complainant, Stroud, alone.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.


Roy J. Maurer
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Mine Safety Project, Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Walker, 327 Main Street, P. O. Box 1179, Paintsville, KY 41240-5179 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

OCT 27 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-42-M
Petitioner : A.C. No. 29-01433-03526
: :
v. : Grefco Inc.
: :
GREFCO INCORPORATED, :
Respondent :

DECISION

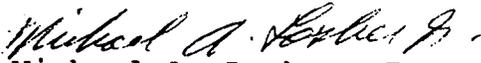
Appearances: Robert A. Fitz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Michael Conley, Esq., GENERAL REFRACTORIES
COMPANY, Bala Cynwyd, Pennsylvania,
for Respondent.

Before: Judge Lasher

At the commencement of hearing in this matter in Albuquerque, New Mexico, on September 9, 1992, the parties announced their accomplishment of a settlement covering the three enforcement documents (citation and two withdrawal orders) involved. The agreement reached was considered and approved from the bench on the record (T. 8) and such is here **AFFIRMED**. The settlement called for the withdrawal of Section 104(d)(1) Citation No. 3448924 and the modification of Section 104(d)(1) Withdrawal Order No. 3446523 from an Order to a 104(d)(1) Citation. Withdrawal Order No. 3448925, also issued under the authority of Section 104(d)(1) of the Act was not modified. Thus, with the modification of Order No. 3446523 to a 104(d)(1) Citation, such enforcement document became the underlying Citation for 104(d)(1) Order No. 3448925 in the 104(d) chain. Petitioner agreed that appropriate penalties for Citation No. 3446523 and Order No. 3448925 were \$18,500 and \$13,500, respectively, and Respondent agreed to the payment of such as part of the settlement. Such penalties are here **ASSESSED**. In effectuation of this settlement, the following order is entered:

ORDER

1. Citation No. 3448924 is **VACATED**.
2. Withdrawal Order No. 3446523 is **MODIFIED** to change its nature from a Section 104(d)(1) Withdrawal Order to a Section 104(d)(1) Citation.
3. Section 104(d)(1) Withdrawal Order No. 3448925 is **AFFIRMED**.
4. Respondent, if it has not previously done so, **SHALL**, within 30 days from the date of issuance hereof, **PAY** to the Secretary of Labor the total sum of \$31,500 as and for the civil penalties here assessed.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202
(Certified Mail)

Michael Conley, Esq., GENERAL REFRACTORIES COMPANY, 225 City Avenue, Bala Cynwyd, PA 19004 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

OCT 28 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 91-167-M
Petitioner : A.C. No. 29-01880-05501 BY 2
: :
v. :
: Goat Ridge Mine
SOUTHWAY CONSTRUCTION COMPANY, :
INCORPORATED, :
Respondent :

DECISION

Appearances: William E. Everheart, Deputy Regional Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mr. John T. Ungefug, Engineer, SOUTHWAY CONSTRUCTION CO., INC., Alamosa, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Southway Construction Company, Incorporated ("Southway") with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

A hearing on the merits was held in Alamosa, Colorado, on April 7, 1992. The parties waived the filing of post-trial briefs.

At the commencement of the hearing, Southway moved to withdraw its notice of contest as to Citation No.s 3900555 and 3900556. The motion should be granted.

STIPULATION

The parties stipulated as follows:

1. Southway is subject to the jurisdiction of the Commission.

2. The operator's size is 57,690 hours of work per year.

3. The Citations herein were abated in good faith and civil penalties will not affect the operator's ability to continue in business.

4. The Goat Ridge Mine is not owned by Southway. The owner is Lucina Mine.

ISSUE

The issue is whether Southway is required to provide a suitable communication system at a mine owned by another party.

Citation 3900557 alleges a communication system was not provided. The regulation, 30 C.F.R. § 56.18013 provides that "[a] suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency,."

Southway maintains it is the obligation of the mine owner (Lucina) to provide the communication system.

WILLIAM TANNER, experienced in mining, inspected this open pit silica mine on April 2, 1991. There were four Southway employees at the mine using a crusher, conveyor belts, loaders, and haul trucks. Southway was crushing for the mine owner. There were no Lucina employees on the site.

The morning after the inspection, the foreman said he had a radio but no one knew the call numbers. Abatement was achieved by the presence of the foreman with a radio.

JOHN UNGEFUG confirmed that Southway was working as the crusher contractor. He further submitted quotes and copies of start-up and termination activities. (Ex. R1-R5).

DISCUSSION

Section 3 of the Mine Act states as follows:

Sec. 3. For the purposes of this [Act], the term--

(d) "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

The uncontroverted evidence establishes that Southway is within the statutory definition of an "operator" cf. Otis Elevator Company, 11 FSMHRC 1896, 1899 (1989), aff'd, 921 F.2d 1285 (1990); Bulk Transportation Services, Inc., 13 FMSHRC 1354 (1991).

Southway was the crusher operator, both controlling and supervising the crushing operation. This operation is an integral portion of the mineral extraction process. Accordingly, Southway was an operator within the meaning of the Act. As such, Southway is obligated to furnish a suitable communication system to be used in the event of an emergency. Citation No. 3900557 should be affirmed.

Considering the criteria under Section 110(a) of the Act, I find that the penalties assessed herein are appropriate.

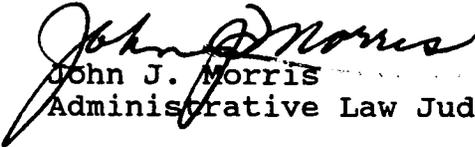
ORDER

1. Citation No. 3900555 and the proposed penalty of \$98 are **AFFIRMED**.

2. Citation No. 3900556 and the proposed penalty of \$20 are **AFFIRMED**.

3. Citation No. 3900557 and the proposed penalty of \$20 are **AFFIRMED**.

4. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of \$138 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

William E. Everheart, Esq., Deputy Regional Solicitor, 525 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. John T. Ungefug, SOUTHWAY CONSTRUCTION CO., INC., 117 White Pine Drive, Alamosa, CO 81101 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 28 1992

TIM RAGLAND, : COMPENSATION PROCEEDING
Complainant :
v. : Docket No. CENT 92-227-CM
: :
CULLOR ROCK QUARRY, : Mine No. 23-01924
Respondent :

ORDER OF DISMISSAL

Before: Judge Feldman

The complainant has filed a request for authority to withdraw his complaint for compensation in the captioned case. For the reasons stated by the complainant, permission to withdraw is granted. This case is therefore **DISMISSED** with prejudice and the hearing in this matter scheduled for November 5, 1992, in Joplin, Missouri is canceled.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

Distribution:

Mr. Tim Ragland, 2123 W. Austin, Nevada, Missouri 64772
(Certified Mail)

Mr. Jim Cullor, Cullor Rock Quarry, Rt. 1, Eldorado Springs,
Missouri 64744 (Certified Mail)

Cullor, Incorporated, 20th and Sidney, Ft. Scott, Kansas 66701

/vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 28 1992

BILL BURRIS, : COMPENSATION PROCEEDING
Complainant :
v. : Docket No. CENT 92-228-CM
: :
CULLOR ROCK QUARRY, : Mine No. 23-01924
Respondent :

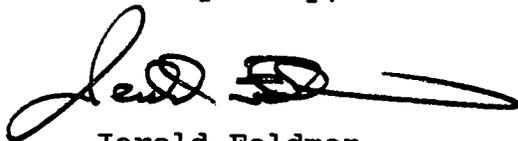
ORDER OF DEFAULT
ORDER OF DISMISSAL

Before: Judge Feldman

A hearing in the captioned matter was scheduled for November 5, 1992, in Joplin, Missouri. During the course of a September 17, 1992, telephone conversation with Mr. Tim Ragland, a co-complainant in this matter who has withdrawn his complaint for compensation, I was advised that Mr. Burris may no longer be interested in pursuing his complaint. Mr. Ragland also informed me that Mr. Burris did not have a telephone. In a letter dated October 1, 1992, I requested Mr. Burris to contact my office within ten days to inform me whether he still wished to proceed. I indicated that his failure to timely respond would be construed as an indication that he was no longer interested in prosecuting his compensation case.

Having failed to reply to my October 1, 1992, request, on October 13, 1992, I ordered Mr. Burris to show cause (explain why) in writing on or before October 19, 1992, why a default decision should not be issued dismissing with prejudice his complaint for compensation. The order was delivered via express mail.

Despite my repeated requests, the Mr. Burris has failed to convey that he is interested in prosecuting his complaint. **ACCORDINGLY**, judgement by default is hereby entered in favor of the respondent and the compensation complaint filed by Mr. Burris is **DISMISSED** with prejudice. Consequently, the hearing in this matter is canceled.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

Distribution:

Mr. Bill Burris, 1002 E. Berry Nevada, MO 64772
(Certified Mail)

Mr. Bill Burris, 2123 W. Austin, Nevada, Missouri 64772
(Certified Mail) (Old Address)

Cullor, Incorporated, 20th and Sidney, Ft. Scott, Kansas 66701
(Certified Mail)

/vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

OCT 28 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-429
Petitioner : A.C. No. 05-02342-03509
: :
v. : Coal Basin Mine
: :
MID-CONTINENT RESOURCES, INC., : Docket No. WEST 91-595
Respondent : A.C. No. 05-00351-03501
: :
: Bear Creek Mine

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C.
Glenwood Springs, Colorado,
for Respondent.

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner, the Secretary of Labor, against Respondent, Mid-Continent Resources, Inc. ("Mid-Continent"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing on the merits was held in Glenwood Springs, Colorado, on February 26, 1992. The parties filed post-trial briefs.

Docket No. WEST 91-429 contains a 104(a) Citation and a Section 104(b) order for failure to abate.

Citation No. 3410979 alleges Mid-Continent violated 30 C.F.R. § 75.1711. The Citation reads as follows:

Work to seal this inactive mine was not commenced promptly after a 90-day period elapsed during which the mine was not ventilated by means of the main fan.

The regulation provides as follows:

§ 75.1711 Sealing of mines.

[STATUTORY PROVISIONS]

On or after March 30, 1970, the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary. Openings of all other mines shall be adequately protected in a manner prescribed by the Secretary to prevent entrance by unauthorized persons.

Docket No. WEST 91-595 involves a Section 104(a) Citation.

Citation No. 3410732 alleges Mid-Continent violated 30 C.F.R. § 75.1204. The Citation reads as follows:

A revised mine map was not filed with the Secretary after a 90-day period elapsed from the date the mine was permanently closed.

The regulation provides as follows:

§ 75.1204 Mine closure; filing of map with Secretary.

[STATUTORY PROVISIONS]

Whenever an operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of more than 90 days, he shall promptly notify the Secretary of such closure. Within 60 days of the permanent closure or abandonment of the mine, or when the mine is temporarily closed, upon the expiration of a period of 90 days from the date of closure, the operator shall file with the Secretary a copy of the mine map revised and supplemented to the date of the closure. Such copy of the mine map shall be certified by a registered surveyor or registered engineer of the State in which the mine is lo-

cated and shall be available for public inspection.

ISSUES

The issues are whether Mid-Continent violated the regulations. If so, what penalty is appropriate?

BRIEF SUMMARY OF THE EVIDENCE

Phillip R. Gibson, Jr., Gary K. Frey, and Lee H. Smith testified for the Secretary.

James E. Kiser testified for Mid-Continent.

On September 29, 1989, MSHA Inspector Gibson inspected the Coal Basin Mine. The mine was not mechanically ventilated and the coal silo had been removed. (Tr. 35, 57, 58). Further, daily examinations were not being made and ~~no~~ coal was being produced. Mr. Gibson issued Citation No. 3410979. Extensions were also granted.

On July 8, 1991, one of the portals had not been sealed.

Mid-Continent had ceased all operations in its mines on January 25, 1991. (Tr. 77, 78).

According to MSHA's Supervisor Lee H. Smith, Mid-Continent did not ventilate the two mines involved here mine after 1983. The company's equipment had been removed. (Tr. 94, 95). There was no employment nor was any coal being produced according to Mid-Continent's reports. (Tr. 97).

The Coal Basin Mine was taken off 103(i) status on October 1, 1981. (Tr. 106).

In concluding the mines were abandoned, Mr. Smith considered the physical condition of the mines, the removal and reassignment of miners, and the cannibalizing of equipment. (Tr. 128, 129, 181; Ex. P-4).

DISCUSSION AND FURTHER FINDINGS

The evidence here is essentially uncontroverted.

MSHA's position is that the mines in question should be sealed since they were "abandoned" by the operator. Mid-

Continent takes a contrary view and urges the operator did not "abandon" the mines.

The regulations, 30 C.F.R. § 75.1711 and § 75.1204 both use the term "abandon," although in slightly different fashion. A resolution of the meaning of the term would appear to resolve the conflict.

It is appropriate to place certain uncontroverted evidence in focus:

After 1981 and 1982, the operator removed the face-mining equipment, the continuous miner, loading machines, and shuttle cars from the Coal Basin and Dutch Creek mines. In addition, Mid-Continent removed the main fans, a conveyor belt, the coal silo and the diesel equipment. It was basically a salvage operation.

Further, all personnel were removed, daily examinations were not made, and no coal was produced. After 1983 Mid-Continent was no longer mechanically ventilating the mines.

On September 29, 1989, Mr. Gibson an MSHA Inspector, confirmed the lack of activity and the failure of Mid-Continent to seal the mine.

Section 75.1711 does not define the term "abandoned" or "abandoned mine," but the definitional section of Part 75 does contain a definition of "abandoned area" in Section 75.2(h), which provides:

"Abandoned areas" means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D in this Part 75.

Mid-Continent argues a finding of abandonment must be based on the congruence of two elements: non-use together with a concurrent intention by the operator to abandon.

I find Mid-Continent's evidence concerning its intentions to be credible but such future intentions cannot override the objective facts. These facts clearly establish that the operator had, at least on a prima facie basis, abandoned the Coal Basin Mine and the Bear Creek Mine.

In support of its views, Mid-Continent cites the definition from the American Heritage Dictionary, Second College Edition 66 (Houghton Mifflin Co., 1976), wherein "abandoned" is defined as:

- [Abandoned ... 1. Deserted or forsaken,
2. Recklessly unrestrained; shameless.

The dictionary definition cannot take precedence over the technical definition in Section 75.2(h). The evidence established the Coal Basin and Bear Creek Mines were neither ventilated nor examined as required by the Part 75 definition. Accordingly, they were "abandoned."

In Sewell Coal Company, 1 MSHC 1641, March 30, 1978, Judge Richard C. Steffey reached a similar result ruling the operator's failure to properly ventilate renders the unit "abandoned" within the meaning of 30 C.F.R. § 75.2(h). Further, in Sewell, the operator raised as a defense and relied on the definition of "given up, forsaken, or deserted." 1 MSHC at 1642; Judge Steffy rejected this contention.

Citation 3410979 should be affirmed.

Order No. 3586533 was issued by Inspector Gary K. Frey for the failure of Mid-Continent to abate Citation No. 3410979. The Inspector testified as to the issuance of the Order (Tr. 67-72) and the parties addressed the Order in their post-trial briefs; however, the Order does not appear in the Commission files.

The parties were so advised and counsel for the Secretary forwarded the Judge a facsimile of the Order and its modifications. They further agreed the Judge could consider the Order and its modifications in rendering the decision in this case.

The record reflects that Inspector Frey issued the Order on July 8, 1991, when he was told by Mid-Continent representatives that the mine was not completely sealed. (Tr. 67, 70). The Order was for a failure to abate Inspector Gibson's Citation No. 3410979. The Order read "no apparent effort was made by the operator to seal the mine." On July 10, 1991, Inspector Frey modified the Order to read from "no apparent effort" to "little effort."

The uncontroverted evidence establishes the Section 104(b) Order was properly issued and Order No. 3586533 should be affirmed. Since no penalty was sought in the penalty proposal, none will be assessed.

Citation No. 3410979 issued for the Bear Creek Mine alleged the operator violated 30 C.F.R. § 75.1204 in that a final mine map was not filed with MSHA.

I again reject Mid-Continent's renewed argument concerning the operator's future intentions to operate these mines.

Mid-Continent contends that the Secretary's arguments are based on the mistaken assumption that MSHA has the ultimate authority to determine whether a mine operator has, in law and in fact, abandoned or temporarily closed a mine. I disagree with this argument. The facts and not MSHA determine whether an operator has abandoned a mine. In this case, there were more than sufficient facts to justify MSHA's conclusions.

Mid-Continent states that Judge Steffey's decision in Sewell Coal Company, supra, correctly applied section 75.2(h) in relation to § 74.316-2(c). The latter section applies to discrete areas that are being abandoned in a working mine. However, when the entire mine which is unconnected to other mines is idled, there is no threat to the ventilation.

Contrary to Mid-Continent's views, I conclude other hazards exist besides lack of ventilation. In fact, the very lack of ventilation could cause oxygen deficiency and methane accumulation - both serious mine hazards. In sum, "abandoned area" within the meaning of § 75.2(h) means "areas not ventilated and [not] examined." The definition is broad enough to include an entire mine.

The Secretary urges the Commission to analogize to the definition of "abandoned mine" found in 30 C.F.R. § 57.2 which provides:

[A]n [a]bandoned mine means all work has stopped on the mine premises and an office with a responsible person in charge is no longer maintained at the mine.

I decline to make such an analogy. Section 57.2 has no relationship to underground coal mines which are controlled by Part 75 of 30 C.F.R.

Mid-Continent further asserts the Commission should define "abandonment" in accordance with its historical and traditional meaning. For example, it refers to the U.S. Department of Interior Volume A, Dictionary of Mineral and Related Terms (DMMRT) (1968). Respondent's Exhibit R-1 indicates that both non-use and intention to abandon are required. The DMMRT at page 2 defines abandoned workings as follows:

Abandoned Workings: Excavations, either caved or scaled, that are deserted and in which further mining is not intended and opening workings which are not ventilated and inspected regularly. U.S. BuMines Federal Mine Safety Code--Bituminous Coal and Lignite

Mines, Pt. Underground Mines, October 8, 1953. (Ex.-R-1).

It is true that the Commission frequently refers to DMMRT. However, as previously noted, a definition of "abandon" already is contained in the definition section of Part 57. It is unnecessary to explore elsewhere for other definitions.

Mid-Continent states that abandonment is a question of fact to be determined from all the evidence. United States v. Eaton Shale Co., 433 F. Supp. 1256, 1274 (D. Colo. 1977). Further, the burden rests on the party asserting it. Finally, the burden of proving an intention to abandon must be by clear and convincing evidence and rests upon the party asserting it.

I disagree with Mid-Continent's statement that "clear and convincing evidence" is required. The burden of proof rests on MSHA but the burden is a preponderance of the evidence. Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975); 5 U.S.C. § 556(d).

Mid-Continent further compares abandonment of an underground mine to abandonment of a water right under Colorado law, citing 15 Colo. Rev. Stat. § 37-92-103(2) (1990 Real. Vol.). Such comparison is not warranted. Part 75 C.F.R. regulates underground mines. On the other hand, the law of Irrigation and Water Rights of Colorado seeks to accomplish other objectives much broader than regulating coal mines.

I agree MSHA's supervisor, Lee Smith, did not contact Mid-Continent's management to learn their intentions. However, given the objective uncontroverted evidence, MSHA could only have concluded that the two mines has been abandoned irrespective of management's future intentions.

A portion of the Secretary's evidence deals with Mid-Continent's possible motives for claiming the Coal Basin and Bear Creek Mines have not been abandoned. It was stated that a declaration of abandonment would require Mid-Continent to reclaim and restore the area to its natural state and abandonment may result in the loss of Mid-Continent's federal coal lease. (Tr. 177-178).

I am not persuaded by the foregoing evidence. Mr. Smith was not qualified as an expert on either the Colorado Mined Land Reclamation Act, 14 Colo. Rev. Stat. § 34-32-101 to 125 (1984 and Supp. 1991) or on the federal mineral leasing program.

Mid-Continent further argues Citation No. 3410732 alleges the mine was permanently closed. Accordingly, Mid-Continent advances the argument that the Secretary cannot prevail because she states the mine was abandoned or temporarily closed.

Section 75.1204 requires the filing of a map under various circumstances. Since the parties litigated and briefed the issue of abandonment, it is appropriate to amend the Citation to conform to the evidence.

Both citations herein should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties are contained in Section 110(i) of the Act, 30 U.S. C. § 820(i).

Mid-Continent must be considered a small operator especially since the company is no longer producing coal and only a small crew remains at the mine.

The operator is no longer in business and the \$20 penalties assessed in this decision are the same as those proposed by the Secretary.

By way of previous history the evidence indicates the company had no violations in the two years ending November 4, 1990, and for the two years ending September 28, 1989. (Exs. P-1, P-2).

The company was negligent in that it failed to seal the mine and file a mine map.

The gravity of the violations was low as no miners were placed at risk.

Mid-Continent did not promptly seal the mine but it promptly filed the mine map.

Payment of the penalties herein are subject to the approval of the Bankruptcy Court.

For the above reasons stated herein I enter the following:

ORDER

DOCKET NO. WEST 91-429

1. Citation No. 3410979 and the proposed penalty are **AFFIRMED.**
2. Order No. 3586533 for a failure to abate is **AFFIRMED.**

DOCKET NO. WEST 91-595

3. Citation No. 3410732 and the proposed penalty are **AFFIRMED.**

4. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is ordered that civil penalties will be assessed against the Respondent in the amount of \$40 and Petitioner is authorized to assert such assessment as a claim in Respondent's bankruptcy case.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 28 1992

| | | |
|------------------------|---|----------------------------|
| WYOMING FUEL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| | : | Docket No. WEST 91-598-R |
| v. | : | Order No. 3244426; 7/28/91 |
| | : | |
| SECRETARY OF LABOR, | : | Golden Eagle Mine |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Mine I.D. 05-02820 |
| Respondent | : | |
| | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 92-335 |
| Petitioner | : | A.C. No. 05-02820-03616 |
| | : | |
| v. | : | Golden Eagle Mine |
| | : | |
| | : | |
| WYOMING FUEL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Charles W. Newcom, Esq., SHERMAN & HOWARD, Denver, Colorado, for Contestant;
Margaret A. Miller, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

In WEST 91-598-R Contestant Wyoming Fuel company ("WFC") challenged Order No. 3244426 issued by the Secretary of Labor under Section 104(d)(2) of the Act.

After notice to the parties, a hearing on the merits took place in Denver, Colorado, on December 10, 1991. The parties filed post-trial briefs.

On June 30, 1992, by agreement of the parties, the contest proceedings were consolidated with the civil penalty proceedings, WEST 92-335.

WFC is charged with violating the regulatory standard at 30 C.F.R. § 715.316.¹

The contested Order No. 324442 reads as follows:

The operator was not complying with the approved ventilation methane and dust control plan dated 11-15-90, p. 37, Item E, in that water ranging from 4" to 28" was allowed to accumulate in different locations in the #1 and #2 bleeder rooms starting at the exhaust air shaft to cross-cut #69 of the tailgate entries. In the #1 bleeder room starting at exhaust air shaft back to cross-cut #70 of the tailgate entries, there was no air pump installed in this area. Water was not being pumped on the #2 entry of headgate. Water accumulated between #73 and #74 cross-cut a distance of about 70 feet. In #3 entry of the headgate water accumulated from cross-cut #70 to cross-cut #75, all the conditions would prevent the fire boss from making a

¹ § 75.316 Ventilation system and methane and dust control plan.

[Statutory Provisions]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1980. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

WFC denies it violated the ventilation plan. If a violation is found, the operator contends it was not significant and substantial ("S&S"), nor was it a result of the operator's "unwarrantable failure."

The part of the ventilation plan, as contained in Exhibit S-2, provides that "[p]umps will be installed to remove water that accumulates in sufficient quantity or depth to present a hazard."

Brief Statement of the Evidence

On July 28, 1991, MSHA coal mine Inspector Melvin Shiveley inspected WFC's Golden Eagle Mine. He accompanied Gene Costello,² WFC fire boss. He saw water accumulations at crosscut 73 and it was necessary to walk the rib line to avoid the water. (Tr. 20). Some of the water in the No. 2 bleeder was as high as his boots.

Mr. Shiveley followed Mr. Costello who was making his normal daily run. (Tr. 22, 23). On July 28 the depth of the water ranged from 4 to 28 inches. (Tr. 26). Mr. Costello walked in the 28-inch water after putting on hip waders. In some areas the water was up to Mr. Costello's "belly." (Tr. 27). It was unsafe to walk along the ribs.

Mr. Shiveley first observed the water on July 22, when Mr. Felthager was attempting to get the pumps operational. (Tr. 33, 34).

When Mr. Costello entered the No. 2 bleeder room from crosscut 68 to 69, he was knee-deep in water and wearing his waders. (Tr. 36). Mr. Shiveley considered the violation S&S. (Tr. 40).

On July 28 the pumps were not operating but Mr. Shiveley did not know if they were operating between July 22 and 28.

NED ZAMARRIPA inspected various parts of the mine on July 25. On that day the pumps were operating and no citations were written. Mr. Zamarripa believed there were slip, trip, and fall hazards when Mr. Shiveley wrote his order.

RONALD G. THOMPSON, WFC mining engineer, installed the equipment to pump out the water. Six hundred feet of pipe was laid and installed. Mr. Thompson did not believe he could have gotten the air pumps operational after MSHA's citations for electrical pumps. (Tr. 127).

² Misspelled as "Caustillo" in transcript.

RONALD G. THOMPSON, WFC mining engineer, installed the equipment to pump out the water. Six hundred feet of pipe was laid and installed. Mr. Thompson did not believe he could have gotten the air pumps operational after MSHA's citations for electrical pumps. (Tr. 127).

During the weekend of July 22, the water went down 21 inches. Two additional pumps were installed on July 29.

In addition to Ron Thompson, Daniel McClain and Gene Costello testified for WFC. **WILLIAM REITZE**, MSHA's mining engineer, testified primarily concerning the hazards from an excessive water accumulation.

Discussion and Further Findings

The initial issue is whether WFC violated its ventilation control plan. The issue framed by the record is whether there was an accumulation of water of a sufficient quantity or depth to present a hazard.

I credit Inspector Shiveley's testimony. On July 28 he followed Mr. Costello as the fire boss inspected the bleeder system. There was water throughout the bleeder stem but it is necessary to ascertain whether areas of water accumulation presented a hazard.

Accumulations that presented a hazard were: in the area of crosscut 73 it was necessary for the men to walk the rib line and some of the water in the #2 bleeder room was boot high. On July 28 the depth of the water ranged from 4 to 28 inches in different locations. When Mr. Costello entered the #2 bleeder room from crosscut 68 to 69, he was waist deep in water. Mr. Costello walked through the 28-inch deep water to do the bleeder evaluation.

The use of waders by Mr. Costello is particularly persuasive on the issue of excessive water that presented a hazard in the bleeder system. Waders are hardly standard issue in an underground coal mine. Water up to Mr. Costello's belly would be of a sufficient depth to cause a hazard.

In sum, I agree with the uncontroverted statement by Mr. Shiveley to Mr. Costello that there was "quite a bit" of water. Mr. Costello agreed with the statement.

I further credit the testimony of Messrs. Shiveley, Zamarripa, and Reitze concerning the hazards caused by the accumulated water in the bleeder system. The hazards are numerous: unstable footing in unclear water, possible weak ribs, the necessity of walking the rib line, the possibility of drowning, as well as the

hazard of stepping into a large sump hole. The record fairly establishes the accumulation of water was of a sufficient depth so as to present a hazard.

The Judge is aware of WFC's witnesses - Ron Thompson, Daniel McClair, and Gene Costello. However, on the issue of water accumulations and related hazards, their testimony is not persuasive.

Mr. Thompson testified principally as to the installation and operation of the air pumps. His testimony on the air pumps principally related to the unwarrantable failure issue, infra. Mr. Thompson's testimony as to the bleeder system is not persuasive since he indicates he did not walk every area in the bleeder system. (Tr. 136, 138).

In contrast, Mr. Shiveley indicated he walked all of the bleeder system (marked in blue on Exhibit S-3).

DANIEL McCLAIN, safety director for WFC, testified the company received a 107(a) order around Monday, July 15. The order required that electric pumps be replaced with air pumps. (Tr. 162). Mr. McClain was involved with Mr. Shiveley's inspection on July 22. (Tr. 164). No citations were written on July 22. Between July 22 and July 29 the water dropped 10 to 12 inches. (Tr. 166).

Mr. McClain further testified that Mr. Zamarripa did not write any citations on the 24th or 27th for the water accumulation. (Tr. 169). The witness also expressed certain legal opinions in connection with issues in the case. (Tr. 170-176).

Mr. McClain agreed there was 24 inches of water in the headgate corner but he differed as to whether it was a hazardous condition. However, he agreed a person could slip or fall on dry ground. (Tr. 181).

As previously noted on the hazard issue, I credit MSHA's witnesses. In addition, MSHA's witnesses are confirmed by WFC's preshift mine examiner's reports from July 21, through July 28. They describe water in the bleeders as a "hazardous condition." (Ex. WF-2).

EUGENE COSTELLO is a diesel mechanic for WFC. On July 28, 1991, he was fire boss and pumper. The pumps were working on that day. Mr. Costello met Mr. Shiveley at the bottom of the mine. He checked some pumps on the way into the bleeders. Mr. Costello put on his waders that morning so he wouldn't get wet.

There was water in the bleeder that morning but he didn't feel it presented a hazard in firebossing the area. Water has

never bothered Mr. Costello. Even if the water is several inches deep, you can see the bottom.

Mr. Costello described how he took his readings. He could not remember being in water up to his belly that day. (Tr. 197). The deepest part would be when he was going out to move or check a pump.

Mr. Costello did not contradict MSHA's witnesses in the critical area of whether the water depth presented a hazard.

For the foregoing reasons, Order No. 3244426 should be affirmed.

Significant and Substantial

WFC contends the violation was not S&S and accordingly such special findings should be stricken.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 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 FMSHRC 822, 825 (April 1981).

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-1575 (July 1984). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc. 10 FMSHRC 498, 500-501 (April 1988). Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 2011-12 (December 1987).

The record here establishes that WFC violated its ventilation plan. Such a plan has the force and effect of a mandatory regulation. Accordingly, the first criteria is established.

The second facet, a discrete safety hazard, is established by the evidence.

In connection with the third feature, I agree with Inspector Shiveley that the violation was S&S. (Tr. 40, 43). In particular, the insecure footing would be an obvious contribution to the hazard. Waders by themselves can cause the wearer to slip, particularly where the mine bottom is neither apparent nor easily seen.

I further concur with MSHA's witnesses that it is reasonably likely that the injury in question will be of a reasonably serious nature. Drowning, misstepping in the bleeder system, the possibility of pulling down a loose rib, all appear to be factors that could reasonably cause a serious injury.

WFC argues no S&S violation existed and in support thereof cites Eagle Nest, Incorporated, 13 FMSHRC 843, May 1991.

In Eagle Nest there were accumulations of murky water to the top of the Inspector's 16-inch boots. The water extended 20 feet across the entry and outby as far as the Inspector could see. Anyone walking in the area would be exposed to slipping hazards. Given the described scenario, Judge Weisberger held the hazard

"can be mitigated by walking cautiously to feel for submerged objects so they may be avoided." 13 FMSHRC at 847.

On July 28, 1992, after WFC's brief was filed, the Commission reversed the holding in Eagle Nest, 14 FMSHRC 1119. Specifically, the Commission noted that the "exercise of caution" is not an element in determining whether a violation rises to the level of S&S, 14 FMSHRC at 1124.

The S&S designation is within the criteria of the Commission's rulings and said allegations should be affirmed.

Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2000-2004 (December 1987), and Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that while negligence is conduct that is "inadvertent", "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

The testimony by WFC's witness Ronald G. Thompson indicates WFC was attempting to comply with MSHA's order. Mr. Thompson's testimony (supra), describes these efforts. I credit his testimony since he was the "hands on" engineer in charge of the effort.

The Secretary's post-trial brief relies on the sequence of events that occurred in the two weeks before Mr. Shiveley issued MSHA's order.

I am not persuaded by MSHA's view. Mr. Shiveley had no recollection of the water depth on July 22. (Tr. 50). Further, he is hardly in a position to refute WFC's efforts at pumping since he had "no idea" of the extent to which the pumps were operating between July 22 and July 28. (Tr. 49, 50).

Given the circumstances involved here, I conclude WFC made a reasonable effort to comply and the allegations of unwarrantable failure should be stricken.

Pursuant to the stipulation of the parties filed on May 19, 1992, the decision should address all issues presented in WEST 91-598-R as well as the penalty case, WEST 92-335.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty.

According to the Secretary's proposed assessment, WFC is a large company, as indicated by its 19,539,257 production tons. The size of the Golden Eagle Mine itself is 675,916 production tons. The penalty in this order is appropriate in relation to the size of the company and it should not affect the operator's ability to continue in business.

By way of prior history: Exhibit S-1 shows WFC was assessed 19 violations in the period from June 1, 1991, to September 24, 1991. In the period before June 1, 1991, no violations were assessed.

The operator's negligence was moderate. While the accumulated water was extensive, as noted on Exhibit S-3, such accumulations were not always a sufficient depth to present a hazard.

The gravity of the violations was high for the reasons previously discussed.

WFC demonstrated good faith in attempting to achieve prompt abatements.

For the reasons stated herein, I enter the following:

ORDER

In WEST 91-598-R

1. The allegations of unwarrantable failure in Order No. 3244426 are **STRICKEN**.
2. The contest of Order No. 3244426 is **DISMISSED**.

In WEST 92-335

3. Order No. 3244426 is **AFFIRMED**.
4. A civil penalty of \$200 is **ASSESSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEST 92-350-M
v. : A.C. No. 05-04117-05507
: Screening Operation #2
CARDER INCORPORATED, :
Respondent :

ORDER VACATING DEFAULT
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

This case is before me pursuant to Order of the Commission dated October 29, 1992.

Upon review of the file, I find that relief from the default is warranted.

The Solicitor has filed a motion to approve settlements. A reduction in the penalty from \$691 to \$359 is proposed. The Solicitor also requests that Citation Nos. 3451187, 3451188, 3451191, and 3451194 be modified to delete the significant and substantial designation and to reduce the possibility of injury to unlikely. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is ORDERED that the default dated September 29, 1992, be and is hereby VACATED.

It is further ORDERED that the motion for approval of settlements be GRANTED.

It is further ORDERED that Citation Nos. 3451187, 3451188, 3451191, and 3451194 be modified to delete the significant and substantial designation and to reduce the possibility of injury to unlikely.

It is further ORDERED that the operator pay a penalty of \$359 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is stylized with a large, sweeping initial "P" and a long, horizontal flourish extending to the right.

Paul Merlin
Chief Administrative Law Judge

Distribution: By Certified Mail

Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

Ira J. Paulin, Carder, Inc., P. O. Box 721, Lamar, CO 81052

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 29, 1992

| | | |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 92-351-M |
| Petitioner | : | A. C. No. 05-04209-05507 |
| | : | |
| v. | : | Crusher Operation #2 |
| | : | |
| CARDER INCORPORATED, | : | |
| Respondent | : | |

ORDER VACATING DEFAULT
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

This case is before me pursuant to Order of the Commission dated October 29, 1992.

Upon review of the file, I find that relief from the default is warranted.

The Solicitor has filed a motion to approve settlements. A reduction in the penalty from \$916 to \$474 is proposed. The Solicitor also requests that Citation Nos. 3451182, 3629194, 3629195, 3629196, and 3629197 be modified to delete the significant and substantial designation and to reduce the possibility of injury to unlikely. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is ORDERED that the default dated September 29, 1992, be and is hereby VACATED.

It is further ORDERED that the motion for approval of settlements be GRANTED.

It is further ORDERED that Citation Nos. 3451182, 3629194, 3629195, 3629196, and 3629197 be modified to delete the significant and substantial designation and to reduce the possibility of injury to unlikely.

It is further ORDERED that the operator pay a penalty of \$474 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: By Certified Mail

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT - 8 1992

| | | |
|--|---|--|
| IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS |) | MASTER DOCKET NO. 91-1 |
| _____ |) | |
| ONEIDA COAL COMPANY, INC., Contestant, |) | CONTEST PROCEEDINGS |
| v. |) | Docket Nos. WEVA 91-1041-R through WEVA 91-1055-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent. |) | Citation Nos. 9862040 through 9862054 |
| _____ |) | Oneida Mine No. 1 |
| ONEIDA COAL COMPANY, INC., Contestant, |) | Docket No. WEVA 91-1056-R |
| v. |) | Citation No. 9862222 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent. |) | Oneida Mine No. 4 |
| _____ |) | |
| ONEIDA COAL COMPANY, INC., Contestant, |) | Docket Nos. WEVA 91-1057-R through WEVA 91-1065-R |
| v. |) | Citation Nos. 9862257 through 9862265 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent. |) | Oneida Mine No. 11 |
| _____ |) | |

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|----------------------------|---|----------------------------|
| ONEIDA COAL COMPANY, INC., |) | |
| Contestant, |) | Docket Nos. WEVA 91-1066-R |
| |) | through WEVA 91-1073-R |
| v. |) | |
| |) | Citation Nos. 9862311 |
| SECRETARY OF LABOR, |) | through 9862318 |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Oneida Mine No. 12 |
| Respondent. |) | |
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| ONEIDA COAL COMPANY, INC., |) | |
| Contestant, |) | Docket No. WEVA 91-1074-R |
| |) | |
| v. |) | Citation No. 9862687 |
| |) | |
| SECRETARY OF LABOR, |) | Oneida Mine No. 16 |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | |
| Respondent. |) | |
| <hr/> | | |

ORDER DENYING MOTION TO DISMISS

On April 4, 1991, the Secretary of Labor (Secretary) issued 34 citations to five mines operated by Oneida Coal Company, Inc. (Oneida). On April 29, 1991, Oneida filed notices of contest with the Commission for all of the citations. Each notice asserted that there was no violation of 30 C.F.R. 70.209(b) as alleged, and that the actions described in the citation did not occur. On May 9, 1991 (received by the Commission May 10), the Secretary filed an answer and a motion for stay of proceedings until June 25, 1991, in each of the contest cases. On May 15, 1991, the cases were assigned to me. Because of inadvertence, I did not act on the motions for stay.

On June 17, 1991, the Secretary issued proposed penalty assessment notices to Oneida proposing penalties of \$1,200, \$1,300, and \$1,400 for the alleged violations. The form notice states in part:

Pursuant to 30 C.F.R. 100.7, you have 30 days from receipt of this proposed assessment to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment and that you request a hearing on the violations in question before the Federal Mine Safety and Health Review Commission. If you do not exercise the rights herein described within 30 days of receipt of this proposed assessment, this proposed assessment will become a final order of the Commission

and will be enforced under provisions of the Federal Mine Safety and Health Act of 1977.

Each notice included a form entitled "Request for Hearing with Review Commission" (the "blue card") intended to be used by the operator to request a hearing on the penalty assessment. Oneida did not return the blue card or otherwise notify MSHA that it wished to contest the proposed penalties and request a hearing before the Commission. On July 30, 1991, the MSHA Civil Penalty Compliance Office sent letters to Oneida demanding payment for the penalties proposed on June 17, on the ground that the penalties "became delinquent 30 days after the final order of the ... Review Commission." On August 11, 1991, Oneida's Safety Director wrote to the Compliance Office informing it that Oneida had filed notices of contest for each of the citations on April 29, 1991. MSHA replied by letter dated October 15, 1991, that because Oneida failed to request a Commission hearing within 30 days of its receipt of the proposed penalty assessments, the penalties were deemed by operation of law final orders of the Commission. It further stated that "[c]ontest of the underlying citations does not constitute a contest of the associated proposed civil penalty." On November 5, 1991, Oneida's counsel wrote MSHA stating that he was "reiterating for the record our intention to challenge not only the citations themselves, but also the related proposed civil penalties." The letter argued that Oneida believed that the notices of contest had indicated its intention to challenge the citations and that a further response to the penalty documents was unnecessary.

On September 18, 1992 (more than one year after the letters demanding payment), the Secretary filed a motion to dismiss the notices of contest cases on the ground that Oneida failed to timely request a hearing after the notices of assessment of civil penalties were served. On October 2, 1992, Oneida filed an opposition to the motion to dismiss.

Issue

The question presented by the motion is whether Oneida's failure to contest proposed penalty assessments within 30 days of their receipt mandates dismissal of previously timely filed notices of contest.

Section 105 of the Mine Act

Section 105(a) of the Mine Act provides that if an operator fails to notify the Secretary within 30 days from the receipt of the Secretary's notification of the civil penalty proposed to be assessed that the operator intends "to contest the citation or the proposed assessment of penalty, ... the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency."

Section 105(d) provides that if an operator notifies the Secretary within 30 days of receipt of "an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section" that he intends to contest it, the Secretary shall immediately advise the Commission of the notification, and the Commission shall afford an opportunity for a hearing. Thus the Mine Act, unlike the 1969 Coal Act, provides two avenues by which a mine operator may challenge a citation.

Commission Decisions

In an early decision under the Mine Act, Energy Fuels Corporation, 1 FMSHRC 299 (1979), the Commission, after reviewing the legislative history of the Act, found that section 105(d) permitted an operator to contest an abated citation immediately upon its issuance prior to the assessment of a penalty for the violation charged. The Commission stated that absent an urgent need for an immediate hearing, the contest proceeding would be continued and subsequently consolidated with the penalty case, after "the penalty is proposed, contested, and ripe for hearing." In Old Ben Coal Company, 7 FMSHRC 205 (1985), the Commission affirmed the dismissal of a contest proceeding after the mine operator paid the proposed penalty. The Commission held that an operator cannot deny the existence of a violation and at the same time pay a civil penalty because "paid penalties that have become final orders reflect violations of the Act and the assertion of violations contained in the citation is regarded as true." Id. at 209. In a concurring opinion, Commissioner Nelson stated that "while I agree that an operator cannot pay the penalty proposed ... and thereafter maintain before the Commission its challenge to the underlying citation, I do not share the view that absent such a payment, an operator must file a notice of contest of the Secretary's subsequently proposed civil penalty in order to continue to press its earlier filed challenge to the underlying citation" Id. at 211. The Commission considered the relationship between the two subsections at some length in Quinland Coals, Inc., 9 FMSHRC 1614 (1987) and observed at pages 1620-21:

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it.

* * *

The interrelationship between a contest proceeding and a civil penalty proceeding has, in the past, been a source of confusion and dispute over the issues that may be raised properly in each proceeding and over

their preclusive effect once raised. In resolving these arguments we have afforded a wide latitude for review and eschewed preclusion.

More recently, with respect to the payment of the penalty, the Commission stated in Westmoreland Coal Company, 11 FMSHRC 275, 276 (1989), that "where a civil penalty has been paid by genuine mistake, the operator's right to contest the violation may not be lost." In a compensation proceeding, Local 2333 v. Ranger Fuel, 10 FMSHRC 612, 618 (1988), the Commission held that "once a civil penalty is paid or becomes a final order by operation of section 105(a), the assertion of violation contained in the citation cannot be contested in a subsequent proceeding under the Mine Act." (emphasis added). In Rivco Dredging Corporation, 10 FMSHRC 624 (1988), the Commission vacated an order of dismissal of contest proceedings because the operator, apparently acting in good faith, misunderstood the need to object to the proposed penalty assessment in addition to its prior contest of the citations and orders. The Commission order stated that "in cases like this, innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders." See also Blue Diamond Coal Company v. Secretary, 11 FMSHRC 2629 (1989) (ALJ) (allowed late filing of notice of contest of citation). In Beaver Creek Coal Company v. Secretary, 11 FMSHRC 1213 (1989) (ALJ), Commission Judge Cetti, during the course of a hearing on the merits of contest proceedings, approved a settlement between the parties which in part granted the operator's motion to vacate the final order to pay resulting from its failure to contest the penalty assessments.

Rule 60(b)

The Commission's Procedural Rules provide that the Commission and its judges "shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure ..." 29 C.F.R. 2700.1. Oneida argues that the principles and policies underlying Rule 60(b)(1) of the Federal Rules of Civil Procedure, which authorizes a court on motion to relieve a party from a final judgment or order because of mistake, inadvertence, surprise, or excusable neglect, require denial of the Secretary's motion. However, Rule 60(b) requires that such a motion be filed within a reasonable time, and if based on mistake, inadvertence, surprise, or excusable neglect, "not more than one year after the judgment, order or proceeding was entered or taken." In this case, if the proposed assessment became a final order of the Commission, it did so on July 17, 1991. Oneida's response to the Secretary's motion, which it asks be deemed a motion for relief from the Secretary's demand orders, was not filed until October 1, 1992. I note that the Secretary waited for more than one year to file her motion to dismiss.

However, I cannot consider the November 5, 1991 letter from Oneida's counsel to MSHA as a motion for relief from a final order. I conclude that relief under Rule 60(b) is not available to Oneida.

Mistake, Procedural Missteps

It is clear that Oneida in the person of Edward Bauer, its Director of Safety and Training, believed that the notices of contest filed on April 29, 1991, with the Commission were sufficient to indicate that it contested the citations and the subsequent penalty assessments. There is nothing in the record to indicate that its belief was other than a good faith mistake. Unlike Rivco, Oneida was represented by counsel. Unlike Beaver Creek, Oneida's counsel is experienced in mine safety matters and has handled many cases before the Commission. On the other hand, the notices of the proposed assessments were not sent to Oneida's counsel although he had filed the contest cases many months before and the Secretary was aware of his representation. I conclude that Oneida's failure to file notices contesting the penalty assessments resulted from a good faith misunderstanding of "the need to object separately to the two different aspects of the same dispute." Rivco, supra. The dual requirements of sections 105(a) and 105(d), and their relationship are misunderstood by many mine operators and attorneys. I was one of the drafters of the Commission's Interim Procedural Rules in 1978, and they were less than crystal clear to me. A misunderstanding such as happened here is not an uncommon occurrence and is not surprising.

Prejudice

In the case of any failure to comply with time limitations, the question whether it resulted in prejudice to the other party is a very important consideration. The Secretary has not contended that she was prejudiced by Oneida's failure to file timely contests of the penalty assessments, and prejudice is not apparent from the record before me. Therefore, I conclude that she was not prejudiced.

Substance v. Formalism

Realistically, there is no doubt that Oneida intended to contest the citations and the violations alleged in the citations. It clearly indicated that intention to the Secretary by filing the notices of contest. Requiring Oneida to again notify the Secretary that it objected to the proposed penalty assessments (a "different aspect of the same dispute" as the

Rivco order terms it) is to elevate formalism¹ over substance. Oneida's failure to return the forms contesting the penalty proposals was a mistake. The mistake has not misled the Secretary or the Commission. It should not operate to severely penalize Oneida and deny it the opportunity to present its objections to the proposed penalties in proceedings before the Commission. I hold that under the circumstances present here, where the operator filed timely notices of contest of the citations, but mistakenly failed to contest the proposed penalty assessments, the citations and proposed penalties did not become final orders of the Commission.

ORDER

Accordingly, the motion to dismiss the above captioned contest cases is DENIED.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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/fcc

¹ Formalism is defined in the Concise Oxford Dictionary (8th ed. 1990) as "excessive adherence to prescribed forms ..." It is defined in the American Heritage Dictionary of the English Language (3rd ed. 1992) as "[r]igorous or excessive adherence to recognized forms ..."

