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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-230  
A.C. No. 05-00301-03548

v.

Docket No. WEST 88-231  
A.C. No. 05-00301-03549

MID-CONTINENT RESOURCES,  
INC.,  
RESPONDENT

Dutch Creek No. 1 Mine

DECISION

Appearances: James H. Barkley, Esq., Margaret A. Miller, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
For Petitioner;  
Edward Mulhall, Jr., Delaney & Balcomb, Glenwood  
Springs, Colorado,  
For Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and  
Health Administration, (MSHA), charged respondent Mid-Continent  
Resources, Inc., (Mid-Continent), with violating various  
regulations promulgated under the Federal Mine Safety and Health  
Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held  
in Glenwood Springs, Colorado.

Mid-Continent filed a post-trial brief.

Introduction

These cases involve the following alleged violations of 30  
C.F.R., Part 75.

Docket No. WEST 88-231

104(d)(2) (FOOTNOTE 1) Order No.	Date	30 C.F.R. Regulation Section
3223449	1-20-88	75.1110-3
2832627	1-26-88	75.305

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Docket No. WEST 88-230

104(d)(2) Order No.	Date	30 C.F.R. Regulation Section
2832624	10-24-87	75.305
2832625	10-24-87	75.305
3076182	12-10-87	75.316
3076185	12-11-87	75.400
3076189	12-11-87	75.316
3076190	12-11-87	75.316
3076193	12-12-87	75.1105
3076194	12-12-87	75.1105
3076195	12-12-87	75.1105
3223121	12-12-87	75.200
3223122	12-12-80	75.1704
3223124	12-13-87	77.502
3223125	12-13-87	75.400
3223159	12-28-87	75.316
3223185	12-29-87	75.316
3223207	1-12-88	75.1100-3
3223220	1-15-88	75.403
3223445	1-20-88	75.400
3223446	1-20-88	75.403
3223447	1-20-88	75.316

#### Transcripts of Proceedings

The evidentiary hearings in the foregoing proceedings were conducted in separate hearings over periods of several days each.

The hearings in Docket No. WEST 88-231 were conducted on November 29 and December 1, 1988. These transcripts are in two volumes and consist of pages 1-205 and 206-288, respectively. For convenience of reference these two volumes are consolidated and they will be referred to as Volume I in the following manner; i.e., "(Tr. 1-266)." [Illustrative emphasis supplied.]

The hearings in Docket No. WEST 88-230 were conducted in two sets of hearings. The first of these was held November 30, December 1 and December 2, 1988. The transcripts in this first

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evidentiary hearing are in three volumes and consist of pages 1-230 and 231-320 and 321-412 respectively. For convenience of reference these three volumes are consolidated and they will be referred to as Volume 2 in the following manner; i.e., "(Tr. 2-411)." [Illustrative emphasis supplied.]

The final hearings in Docket No. WEST 88-230 were conducted January 17, 18 and 19, 1989. The transcripts in the second evidentiary hearing are in three volumes and consist of pages 321-514, 515-733 and 734-778. For convenience of reference these three volumes are consolidated and they will be referred to as Volume 3 in the following manner; i.e., "(Tr. 3-758)." [Illustrative emphasis supplied.]

By these groupings of the transcripts into three consolidated volumes, according to hearing dates and docket numbers, the potential confusion resulting from duplicated pagination should be avoided.

#### Mid-Continent's Legal Position

Mid-Continent's legal position is straightforward. Except for three alleged violations (Order No. 3076189, Order No. 3223122 and Order No. 3223185) Mid-Continent does not deny the existence of the conditions described by the Secretary in the foregoing orders or that such conditions constituted violations of the applicable sections of 30 C.F.R. Part 75. Instead, Mid-Continent disputes the "unwarrantable failure" characterization, the alleged violation of section 104(d)(2), and the corresponding special penalty assessment for such violations.(FOOTNOTE 2)

#### Structure of the Decision

Several of the alleged violations are related to type of circumstances or by date of occurrence. Accordingly, several of the individual orders have been grouped when logic indicates the grouping is warranted. The review of these orders in this decision is neither consecutive nor chronological.

Frozen Waterlines in Rock Tunnels Project  
North Adit During Winter Weather

Order No. 3223449  
(Issued January 20, 1988)

This portion of the decision addresses two 104(d)(2) orders alleging violations of 30 C.F.R. 75.1100-3. (FOOTNOTE 3)

The narrative allegations of Order No. 3223449, alleging a violation of 30 C.F.R. 75.1100-3, are as follows:

The firefighting equipment (waterlines) along the No. 1 and the No. 2 belt conveyors in the Rock Tunnel Project were not being maintained in a usable and operative condition. The waterlines did not contain water.

Order No. 3223207  
(Issued January 12, 1988)

The narrative allegations of Order No. 3223207, alleging a violation of 30 C.F.R. 75.1100-3, are as follows:

The waterlines and the firehose outlet (fire fighting equipment) installed along No. 1 belt conveyor (in the north adit) were not maintained in a usable and operative condition. The waterlines and the firehose outlets were frozen beginning at the portal and extending inby for 4 crosscuts, about 1,300 linear feet.

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The belt conveyor was in use when this condition was observed.

The air used in this belt entry is used to ventilate active working sections.

#### The Evidence

PHILLIP R. GIBSON, JR., a person experienced in mining, is a safety and health inspector at MSHA's Glenwood Springs, Colorado office.

Order No. 3223449

After completing an inspection on the longwall unit he went to the No. 1 mine intercept located at the No. 34 crosscut. At the intercept he entered the belt conveyor entry and began walking to the surface. At the intercept he saw a waterspray that was not emitting water as required by the operator's ventilation plan.

After issuing a citation for lack of a waterspray, he opened an inby water hydrant. The waterline runs the length of the conveyor but there was no water in it. The fire hydrant is the only means available for fighting fires in this area. A man was stationed at this transfer point so a preshift examination should have been done. Firefighting equipment is subject to a preshift examination.

The order was abated by turning on a high pressure pump 3000 feet above the hydrant. The inspector would have issued this order even if the line was frozen because MSHA regulations require, as a minimum, 60 psi and 50 gallons of water per minute. Fire hydrants are required at 300 feet intervals. As a result of this condition, about 1200 feet of the entry lacked firefighting protection. If a fire occurred it could extend into the working section. Also the smoke could migrate with the intake air into the entry. Several sources of ignition included coal on the conveyor belt, power cables, electrical control boxes and a transformer of 72,000 volts.

Inspector Gibson did not know the temperature on the date he issued the order. But he agreed the base elevation of the mine is about 10,000 feet. Water freezes at 32 degrees F.

On this particular day there were miners in the longwall section but the section was not operating.

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The inspector discussed various choices available to the company. He indicated he would recommend that the operator apply for a modification. However, the inspector did not know if Mid-Continent had filed a modification in Docket No. M-86-226-C. Nor did he know if there was a modification order in affect when he wrote his 104(d) order.

Inspector Gibson didn't recall any other freezing problems in January [1988] but Order No. 3223207 involves frozen waterlines and it was written on January 12, 1988 [in Docket No. WEST 88-230].

#### Order No. 3223207

Inspector Gibson wrote Order No. 3223207 on January 12, 1988. The order refers to waterlines that are adjacent to the belt conveyor suspended from the mine roof.

On the date of this order the inspector saw several sections of dismantled waterlines. For a distance of about 1600 feet there was no source of water for firefighting.

This belt entry was located in the intake air; the entry contained ignition sources. The inspector did not observe anyone in the area nor anyone working on the waterlines. He considered the violation to be S&S because of the unavailability of firefighting capability.

In the two years before this order was written, Mid-Continent had been cited for some 36 citations and orders dealing with the maintenance of firefighting equipment. Because of its repetitive nature and seriousness, he believed the violation was unwarrantable. In addition, management necessarily had prior knowledge that the lines had been dismantled.

The inspector acknowledged that Mid-Continent had filed petitions for modification involving firefighting equipment (Ex. R-3 in Docket No. 88-231).

#### Further Findings

For the reasons hereafter discussed the judge declines to rule on several threshold issues that are raised by Mid-Continent's evidence. However, it is appropriate to review the evidence relating to these issues.

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RICHARD REEVES, Assistant Superintendent for Mid-Continent, indicated the mine portals are located at an elevation of approximately 8500 feet. Coal Basin, near Redstone, Colorado, is probably one of the coldest places in the state. About 80,000 to 100,000 feet of air is ventilated through the north adit beltline entry. A 20 to 30 degree wind chill factor exists. Everything freezes and breaks in the beltline entries during the winter months. In January 1988 temperatures in the Coal Basin exceeded the freezing point eight times (Tr. 1-114 - 1-117, 3-439, 3-440, Ex. R-11).

In view of such "freeze and break" conditions it had been the practice at Mid-Continent to maintain empty or "dry waterlines" during the winter months. Such lines could have been quickly pressurized in the event water is needed (FOONOTE 4) (Tr.1-242).

This practice was accepted until 1986 when MSHA indicated dry lines would no longer be acceptable (Tr. 1-242). After MSHA's change in policy Mid-Continent was required to formalize its dry waterline practice by filing a petition for modification under section 101(c) of the Act (Tr. 1-242, 1-243). The proposed decision and order ("PDO") or modification, Docket No. M-86-226-C was issued September 1. It allowed such dry waterlines in the slope section beltline entries of both the Dutch Creek No. 1 and No. 2 mines (Exhibit P-3, WEST 88-231).

The Rock Tunnel Project was driven as a "slope or shaft" under 30 C.F.R. 77.1900 [through 77.1919]. The latter portion, Subpart T, does not contain a counterpart provision like 30 C.F.R. 75.1100-2(a) requiring waterlines in beltline entries (Tr. 1-189, 1-190). Mid-Continent, according to its witness DAVID POWELL, withdrew its application because under Part 77 a waterline was not required. Accordingly, the company didn't believe the petition for modification was needed (Tr. 1-189, Ex. R-4).

MSHA interpreted Mid-Continent's dismissal request as also negating the modification's application to the Rock Tunnels Project upon its completion, when it intercepted the coal seams -- the entire purpose for which the RTP adits were being developed. This interpretation was formally communicated on February 9, 1988. On that date Mid-Continent received a

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memorandum drafted by MSHA District Manager John M. DeMichiei (Ex. R-6). According to Mr. DeMichiei, the maintenance of dry waterlines within the beltline entry of the Rock Tunnels Project would not be allowed unless procedures supplemental to those already incorporated by the MSHA Administrator for Coal Mine Safety and Health in the PDO were instituted.

Mid-Continent argues that it is difficult to understand MSHA's actions in this situation. The Rock Tunnels Project (RTP) was a multimillion dollar endeavor which took over 5 years to complete. The project, which links with the underground mining sections as well as an extensive overland surface conveyor system in advance of the coal preparation plant, was undertaken for the express purpose of providing a more efficient coal transportation system. The project also improves ventilation and worker transportation (Tr. 1-240).

Following its installation, the beltline in the north adit of the Rock Tunnels Project replaced the mainline belts in the slope sections as the only facility to transport coal out of the Dutch Creek No. 1 and No. 2 Mines. As with the slope sections, Mid-Continent would need an additional modification of 30 C.F.R. 75.1100-2(a) to properly run a beltline through this adit

Mr. DeMichiei, according to Mid-Continent, erroneously considered the PDO to be inadequate for the RTP beltline. As with the beltlines which preceded it, and to which the PDO in Modification No. M-86-226-C was unquestionably applicable, the north adit beltline is located in the intake air which is isolated from other intake air going into the working sections (Tr. 3-356). As with all beltlines at Mid-Continent, this beltline is constructed of a fire-resistant conveyor belt with metal supporting hardware (Tr. 3-451). In fact, the only difference of a substantial nature between these belts is that the RTP north-adit beltline is surrounded by solid rock and not coal (Tr. 1-37, 3-451).

Mid-Continent contends Mr. DeMichiei's treatment of the Rock Tunnels Project in this instance as an entity separate and distinct from that of the Dutch Creek No. 1 Mine is grossly inconsistent with MSHA's historical treatment of these entities. Since the inception of the Rock Tunnels Project, the north and south adits have been considered and treated by MSHA as a part of the Dutch Creek No. 1 Mine. Whenever a citation or order was issued for a violative condition in the Rock Tunnels Project, the Dutch Creek No. 1 Mine was the entity named in the citation and order. When the additional penalty point assessments were

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determined for such violations under 30 C.F.R. 100.3(b), MSHA used tonnage figures derived from the Dutch Creek No. 1 Mine's production. Effective July 1, 1988, the Dutch Creek No. 1 Mine, the Dutch Creek No. 2 Mine, and the Rock Tunnels Project were all consolidated into a single operating entity.

Under Mr. DeMichiei's view, it would appear that numerous citations and orders have been erroneously issued and numerous assessments erroneously calculated -- an error involving thousands of dollars which should be reimbursed if the Rock Tunnels Project is not inextricably tied to the Dutch Creek No. 1 Mine (Exhibit R-7).

Mid-Continent asserts there is nothing in either the 1977 Mine Act or the regulations that allow Mr. DeMichiei's unilateral, rule-making alteration of a PDO which has become final. Under 30 C.F.R. Part 40, the authority to issue a modification is a power vested exclusively in the Assistant Secretary and the Administrator. Once a proposed decision and order becomes final, any further amendments, corrections and revisions by anyone, including the Assistant Secretary or the Administrator, is ended. (FOOTNOTE 5) As such, Mid-Continent contends that Mr. DeMichiei's substantive addition to the Proposed Decision and Order, Docket No. M-86-226-C would appear to be entirely ultra vires and unenforceable. (See Ex. R-7 wherein Mid-Continent in a letter to Mr. DeMichiei protests MSHA's actions.)

As a result of this action by MSHA, Mid-Continent found itself, going into the winter months of 1987-88, in the anomalous position of apparently being without a dry waterline modification for the RTP north-adit beltline where it was needed but with an effective modification for 1-Mine and 2-Mine where there was a lesser need (Tr. 1-241). Despite its opinion that MSHA's position was incorrect, management at Mid-Continent was hesitant to implement the dry waterlines modification under PDO Modification No. M-86-226-C. (FOOTNOTE 6)

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Instead, management attempted unsuccessfully to comply with 30 C.F.R. 75.1101-2(b) and maintain a charged or "wet" waterline in the RTP north adit beltline. (FOONOTE 7)

Order No. 3223207 was issued during this time period of attempted compliance.

On the date the instant order was issued the Coal Basin was in the midst of a severe cold snap. While reaching a recorded low of -14 degrees Fahrenheit, temperatures in the basin never exceeded 16 degrees Fahrenheit (Exhibit R-11). Faced with the certainty that the waterline in the north adit beltline would freeze, and most likely be damaged, and perhaps rendered useless, management at Mid-Continent had no choice but to drain the water from the line. (FOONOTE 8)

Care was taken to drain and maintain this waterline in a manner substantially in compliance with the petition incorporated in the PDO, Modification No. M-86-226-C (Tr. 1-133). At the time the order was issued, a heat-activated fire suppression system was in place and operational at the No. 2 belt-drive of the RTP. Additionally, a CO monitoring and early warning CO detection system was in place and operational along the entire length of the RTP beltline. Also, two workers trained and experienced in the operation of the beltline and the various fire detection and suppression systems and devices were assigned to and patrolled the beltline (Tr. 1-123, 1-162). Finally, as demonstrated during the abatement of this order, the waterline could be successfully charged in under five minutes (Tr. 1-119).

Mid-Continent argues the waterline was drained and maintained in the "dry" state under conditions which did not present

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a danger to the miners. With the safety devices then in place the possibility of an ignition or a fire occurring, much less propagating to the point creating a danger was infinitesimal.

There is nothing in the RTP north adit which could support or facilitate combustion. The RTP north adit is one of two entries driven through sedimentary rock formations, shale and sandstone, to points of interception with the Dutch Creek No. 1 and No. 2 Mines (Tr. 1-107). Nothing exists in this adit other than a fire-resistant synthetic conveyor belt, its supporting steel hardware and incombustible rock (Tr. 3-451). Mid-Continent argues that Inspector Gibson's testimony indirectly reflected these conditions. When asked what condition or conditions existed in this area which presented a source for combustion, the inspector limited his answer to the coal being transported on the conveyor belt (Tr. 1-30).

Mid-Continent contends that Inspector Gibson's analysis of the hazard presented by this coal does not adequately take into account the incombustible nature of Coal Basin's coal. Coal Basin coal is a medium volatile metallurgical coal used to make coke which is used in the manufacture of steel. This coal is not, as contrasted with other types of coal, susceptible to spontaneous combustion. In fact, Coal Basin coal will not burn without encouragement (Tr. 1-114). In his years as a resident field inspector in the Glenwood Springs office, Mr. Gibson has neither experienced nor heard of an instance in which Coal Basin coal has been ignited underground.

Further, Mid-Continent states that even if this coal was susceptible to combustion there is nothing in the RTP which could ignite it. In his hazard assessment, Gibson identified the electrical system as presenting a probable source of ignition (Tr. 1-28, 1-29). (FOONOTE 9)

Finally, in support of the proposition that no hazard existed, a carbon monoxide (CO) fire detection system was installed along the entire length of the beltline. Computer

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controlled, this system consisted of a series of CO sensors placed on approximated 2,000 foot intervals which monitor the ambient environment along the beltline on a continual basis (approximately 2 to 3 times per second). Upon measuring an ambient level of 18 parts per million carbon monoxide, an audible alarm sounds in the lamphouse located outside the line. Along with sounding an alarm, the system locates and informs lamphouse personnel of the area where the carbon monoxide was detected. Following this warning, lamphouse personnel notify the miners underground in the affected sections. They in turn take appropriate action (Tr. 1-163, 1-165).

#### Discussion

Several threshold issues are presented here: do the facts establish that Mid-Continent violated 30 C.F.R. 75.1100-3 and what was the affect of Mid-Continent's petition for modification filed in M-86-226-C.

I decline to rule on these issues since Mid-Continent admits the conditions described by the Secretary constituted violations of the applicate sections of 30 C.F.R. Part 75 (See Mid-Continent brief at page 3). As to the second issue: the company voluntarily withdrew its petition for modification. In view of these factors these violations should be affirmed.

Accordingly, it is now appropriate to consider the unwarrantable failure characterization here.

The issue of whether Mid-Continent unwarrantably failed to comply with a cited regulation is raised throughout the orders involved in these cases. In view of the sometimes elusive nature of what facts constitute an unwarrantable failure it is appropriate to review some leading cases on this subject.

In the leading decision concerning the interpretation and application of the term the Commission has concluded that the term in the statute means "aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation of the Act."

The underlying facts in some leading cases are these: In Emery Mining Corporation, 9 FMSHRC 1997 (December 1987) four roof bolts had popped on a bearing plate. Further, this violation had existed for at least a week in an area where the operator's safety personnel should have known of the condition.

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In viewing the factual situation the Commission stated that the popped bearing plate was a matter involving only ordinary negligence. As a result, in Emery the Commission vacated the finding of unwarrantable failure and modified the section 104(d)(1) order to a 104(a) citation.

In Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, issued the same day as Emery, the Commission upheld two unwarrantable failure findings. Specifically, the operator had been cited for a violation of its roof control plan (30 C.F.R. 75.200). Three days before the contested violation a similar order had been issued. Preshift examinations had been conducted but violative conditions had not been reported. The Commission concluded as follows:  
"Given the prior violation of section 75.200 in the same area . . . only days before the violation at issue occurred and the extent of the violative condition, we find that Y & O's conduct in relation to the violation was more than ordinary negligence and . . . resulted from Youghiogheny & Ohio's unwarrantable failure.

In Youghiogheny & Ohio the Commission further upheld an unwarrantable failure regarding a "hole through" violation. Specifically, the Commission observed that "even if the 'hole through' was accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan," 9 FMSHRC at 2011.

In Rushton Mining Company, 10 FMSHRC 249 (1988), the Commission reversed the judge's conclusion that the company's failure to detect the broken wires was due to its inadequate procedure for examining the rope. The procedures followed by the operator were extensive and they are recited in the decision. In short, the Commission found no aggravated conduct within the meaning of Emery.

In Quinland Coals, Inc., 10 FMSHRC 705 (1988), the Commission upheld an unwarrantable failure violation of a roof control plan. After reviewing the underlying facts the Commission concluded that "(g)iven the extensive and obvious nature of the condition, the history of similar roof conditions and [the operator's] admitted knowledge of the conditions, we find that [the operator's] failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from . . . unwarrantable failure," 10 FMSHRC at 709.

In The Helen Mining Company, 10 FMSHRC 1672 (1988), the Commission determined the operator's failure to comply was not due to the operator's unwarrantable conduct. In finding a lack of such evidence the Commission relied on evidence involving the design and function of the operator's shield system. Other factors supporting the operator included a lack of previous MSHA citations relating to the forepole pads of the shields. Further, even after the roof control plan was revised forepole pads were not required by MSHA. Finally, the operator reasonably believed that if cribbing was installed the miners involved in the installation would be placed at considerable risk.

In the case at bar, on the issue of unwarrantable failure, I credit Mid-Continent's uncontroverted evidence. The operator was seriously hampered by the freezing weather but nevertheless, and by several means, attempted to comply with the regulation and furnish firefighting capability as well as water in the lines. In fact, in Order No. 3223207 the waterlines had been frozen for 1,300 feet.

The allegations of unwarrantable failure should be stricken and both violations should be affirmed under section 104(a) of the Act.

Additional facts also impinge on an evaluation of civil penalties. I find the negligence of the operator to be low since it was faced with a freeze and break situation. On the other hand, the gravity is high: I credit the inspector's testimony and conclude there were combustibles along the conveyor lines. A fire, if it occurred, could spread and affect miners in the area.

In the two years ending January 19, 1988, Mid-Continent was assessed and paid 13 citations asserting a violation of 75.1100-3. In the period before January 20, 1986, Mid-Continent was assessed and paid 34 citations alleging a violation of the same standard (Ex. C-1 in WEST 88-231).

At the hearing Mid-Continent objected to any proof of history extending for a period greater than two years before any contested citation.

In other cases before the judge the Secretary has limited her proof of history to the two years before the citation or order in contest. However, the Act merely recites "prior history" shall be a criteria in assessing a penalty. Accordingly, any prior history is admissible. However, the Secretary has not articulated why Mid-Continent should be singled out from other operators and assessed for its history back to the enactment of the Act. In view of this factor, in assessing a

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civil penalty the judge will only consider evidence of prior history within the two-year period before the order in contest.

The parties stipulated that the violations here are significant and substantial (S&S) if the violations are established. Since I have found the facts to be as stated by the inspector the allegations of S&S should be affirmed.  
Weekly Examination of Seals

This portion of the decision addresses Order No. 2832627 issued on January 26, 1988.

The narrative portion of the order, which alleges a violation of 30 C.F.R. 75.305, (FOONOTE 10) reads as follows:

The weekly examination for hazardous conditions was not being conducted at the seals located on the No.'s 1 and 2 slopes of the mine. The last dates and initials placed at the Nos. 2, 3, 3 1/2, 4, and 5 South seals were 01-15-88 G.B. The times ranged from 7:32 A.M. to 8:47 A.M. This is a time period greater than seven days. According to the recorded results of the weekly examinations this exam was completed on 01-22-88 which would be within the required time frame.

The Evidence

LEE SMITH, an MSHA supervisor, wrote Order No. 2832627 when he, in the company of Mid-Continent's David Powell, inspected sealed areas numbered 2, 3, 3 1/2, 4 and 5 in the No. 1 and No. 2 slope at the Dutch Creek Mine (Exhibit R-1). The purpose of the wooden seals is to prohibit air from migrating out of the minedout sections. Mid-Continent uses squeezed seals. As the seals are squeezed they become more efficient.

The inspector looked at every entry that contained a seal. This was approximately 19 seals. Every seal was inspected where it was safe to travel to it.

The regulation, 30 C.F.R. 75.305, requires that the person doing the examination on behalf of the operator place the date, the time and his initials, (D,T&I), on the seals. The D,T&I can be located in several places. The examiner usually tries to do this in a sequential order and it is entered on a metal pan some 12 inches by 8 foot long, or on the face of the seal itself. Any suitable surface is satisfactory and they are placed so that they can be readily found. Normally, the dates are entered in a straight line, grouped in chronological order. A fire boss would normally inspect the seals and the length of the examination depends upon the size of the mine. A fire boss has other duties.

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On January 26, the date of this inspection, the inspector found that the date of the last examination was 11 days prior to January 26. He did not find any notation within the seven days. The D,T&I in several locations have been in place for many years. The entries are usually made on a pan. When the pan is used the examiner returns to the top and starts over.

The inspector and the company's representatives in the inspection party looked and didn't see any timely D,T&I. This same condition existed at seals 3, 3 1/2, 4 and 5.

In the inspector's opinion the violation was established because he could not find the DT&I. If they were found at a later time this would be a basis to vacate the citation. Based on the inspector's experience the DT&I would be in close proximity to the seals and grouped in about the same location.

The inspector examined seals in 19 entries. The initials on most of the seals were "GB."

The purpose of the weekly examination is to be sure that the seals are performing their intended purpose; that is, to separate the abandoned areas from the active air.

If the areas are not separated, gasses from the other areas could enter the active workings. The hazard is that some of these gasses can displace oxygen and severely injure a miner.

At Mid-Continent seals are routinely inspected. The order was abated when David Powell began to conduct examinations as required and he placed his D,T&I on the seals.

When the inspector observed the seal the last date on it was January 15, 1988. The initials he saw were GB, which is Gary Bellington, a Mid-Continent fire boss.

Inspector Smith agreed there was no evidence the return aircourse was migrating into the gob area. The inspector further rated the seals as in good to fair condition. They were performing their function.

JIM KISER, Mid-Continent's safety director, testified that following the issuance of the present order, Mid-Continent conducted an in-house investigation to determine whether the

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fire boss responsible for the questioned examinations had been derelict in his duty (Tr. 1-140). (FOONOTE 11) The Mid-Continent safety director instructed a company safety inspector, Oviatt, to accompany mine examiner Billington on his subsequent examination of the permanent seals located at the 2, 3, 3 1/2 4 and 5 south sections. During this investigation, Oviatt went into the areas and Billington remained outby and described the locations in which he had placed his initials. During this investigation, all of the allegedly missing initials were found. According to Oviatt, the initials were located in random locations within the general area of the seals. (FOONOTE 12)

Given the conditions and procedures then used at these locations in the Dutch Creek No. 1 Mine it was not unusual that Smith could not find Billington's initials. At the time this order was issued, the general areas surrounding these seals, had, over the years, accumulated literally hundreds of mine examiner's times, dates and initials. Powell, who assisted Smith in his inspection testified that dates were found which went back to 1981 (Tr. 1-273). Furthermore, Mid-Continent had not, at that time, implemented a program providing specified locations at which mine examiners could place their times, dates and initials at the 2, 3, 3 1/2, 4 and 5 south seals (Tr. 1-148). Finally, as can be inferred from the above investigation, Billington was in the habit of scattering his times, dates and initials randomly around the area he was examining. (FOONOTE 13)

#### Discussion

In connection with this order Mid-Continent has clearly articulated that it does not believe that a violation occurred. (FOONOTE 14)

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The judge believes Mid-Continent's statement on page 3 of its post-trial brief addresses only the two orders involving the "freeze and break" of the waterlines. So, it is in order to proceed to the merits: Mid-Continent claims weekly examinations of the seals were in fact conducted and the mine examiner's (D,T&I) were placed in the general area in which this inspection was conducted. Mid-Continent further asserts that this examination was conducted properly and that Inspector Smith's inability to find these initials, standing alone, fails to constitute a violation of 30 C.F.R. 75.305. Finally, Mid-Continent asserts that Smith's inability to locate these initials is neither unusual nor extraordinary.

The regulation, 30 C.F.R. 75.305, in its relevant portion simply requires any seals examiner to place his D,T&I at the places examined.

There is no requirement that the DT&I be located in any specified location other than in the "area" examined. There are no limitations on the proximity of the "area."

I infer from the evidence here that company examiner Bellington marked his DT&I at the seals. I base this on the fact that at a number of seals the timely DT&I were observed by the inspector. Further, Bellington recorded his inspections in the operator's book.

The Secretary, by Inspector Smith, offered evidence that mine examiners generally group their DT&I in the general area of the examination and readily visible to a person following him.

I am not persuaded.

Mr. Smith's qualifications do not disclose that he possesses the requisite knowledge to properly describe an industry custom and practice. Inspector Smith, a supervisor, is a specialist in roof control (Tr. 1-52). On the other hand witness Kiser, a safety specialist for 15 years, has worked underground operations in Virginia, West Virginia and Colorado. It has not been his experience that mine examiners group their DT&I at all times in a chronological order at specified locations. In fact, he has found that the placement of DT&I varies from one mine examiner to another.

For the foregoing reasons Order No. 2832627 should be vacated.

Failure To Make Face-to-Face  
Examination of Inaccessible Seals

This portion of the decision considers two orders alleging violations of 30 C.F.R. 75.305, supra, page 15.

The narrative portion of Order No. 2832624 reads as follows:

The fourteen (14) seals (immediately inby the #7 slope entry), in the 3rd North section were not being examined. The seal in the east entry (up dip) was being examined as was other portions of 3rd North except the west entry along which the seals in question are located. This area was being evaluated rather than performing the required examinations of seals.

The narrative portion of Order No. 2832625 reads as follows:

The 6 North upper and lower seals were not being adequately examined. Caprock had fallen and the area adjacent to the two seals had heaved, making little, if any, of each of the seals visible to perform an adequate examination of their integrity.

The Evidence

WILLIAM CROCCO, an MSHA inspector experienced in mining, inspected Mid-Continent's mine in October 1987.

Due to unsafe ground conditions it was not possible to inspect the seals in the 3rd north section. The roof was loose, hanging and broken; it was unsafe to travel the area. These conditions in No. 1 entry involved 14 seals for a distance of 1100 to 1200 feet.

Mr. Crocco inquired about how the seals were being examined. Company representative Bishop stated that due to impassibility of traveling they made an evaluation of the air at the mouth of the entry. In Mr. Crocco's view such an evaluation was not equivalent to a physical examination of each seal. In this situation the company could support the roof or put up new seals at the mouth of the entry. It would take three such installations to isolate the 3rd North in this fashion.

~2476

The inspector determined the violation was unwarrantable as well as S&S. The company knew of the requirements of the regulation as other seals are dated and signed weekly. The company also indicated some of the seals had not been inspected for a number of years.

Order No. 2832624 was issued for the described conditions.

Order No. 2832625

In the 6th North area (Order No. 2832625) the inspector could neither examine nor see three seals. The entries were blocked due to heaving and roof control problems.

Mid-Continent's representatives Bishop and Wright confirmed that the seals were being evaluated at the mouth of the entry. In the inspector's opinion this was insufficient to comply with the regulation.

The inspector considered the condition unwarrantable because the conditions existed for many years and the company knew the requirements of the regulation.

If Mid-Continent had wished to inspect the seals they could have removed the obstruction and graded out the area. However, the inspector agreed that grading the area can cause bumps or bounces to occur.

The mine has both concrete block and wooden squeeze-type seals. If the floor heaves, the wooden seals have the best chance of surviving. The seals examined by the inspector were outby the active workings.

The witness has seen petitions for modification concerning section 75.305. The petitions are granted when there is no diminution of safety and when the alternative is safe. Modifications of inaccessible seals usually involve evaluation points.

Inspector Crocco felt there was a good possibility the seals had been breached and he thought they had detected a little leakage but he could not specifically identify any such leaking seals.

~2477

The operator installed wooden structures which were designed to address the rock burst and heaving (FOONOTE 15) conditions which are endemic to the mine (Tr. 2-61).

DAVID POWELL, Mid-Continent's engineer, testified that under the company program it is possible from an engineering standpoint to perform outby examinations compared to nose-to-nose examinations. This is done at the outby point by evaluating the air that had passed the sealed area (Tr. 3-754, 3-755). (FOONOTE 16)

The seals which isolate the old 3 North and 6 North mining sections are located in areas commonly termed barrier pillars. Such pillars separate a mined-out area from the active areas. They incur abatement pressures from the mine-out sections (Tr. 2-275).

The floor heave which prevented access to these seals is the natural result of the redistribution of overburden pressures as a mine area moves toward a re-stabilized configuration (Tr. 3-754). The grading described by Inspector Crocco would upset this restabilization. As the evidence indicates, workers have been injured by severe rock burst or outbursts in the past while performing such grading (Tr. 2-94, 3-753).

#### Discussion

The thrust of Mid-Continent's position is that the company may inspect its seals at an outby point. Such inspections were Mid-Continent's previous policy and MSHA has previously concurred in such procedures. In short, the issue is whether Mid-Continent may monitor the condition of its seals by testing the ventilating air.

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Mid-Continent argues that nothing in the regulation mandates face-to-face examinations of seals.

The regulation, 30 C.F.R. 75.305, in its relevant part provides that

[E]xaminations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas . . . [Emphasis added.]

The regulation simply requires examinations "at seals." I agree the words are not otherwise defined but the expression "at seals" is grouped with other words indicating specific locations in the mine.

I reject the concept urged by Mid-Continent. Compliance with 75.305 does not permit an examination of seals from some remot outby location.

I further reject witness Powell's opinion that a sealed area can be tested by checking its ventilating air at a point not in close proximity to the seal itself. One of the stated purposes of the regulation is to test for methane. If methane leaked from a sealed area it could be easily diluted with other air before reaching the point where the air was being monitored.

Mid-Continent raises a legitimate concern that grading the entries to gain access to the seals will disturb a stable area. Such disturbances could result in dangerous bounces, heaves and outbursts.

In effect, Mid-Continent is seeking a modification under section 101(c) of the Act. However, the Commission lacks jurisdiction to grant relief under that section.

As Inspector Crocco suggested, Mid-Continent has the option of erecting new seals. In fact, he testified three seals would isolate the 3rd North section.

The inspector also considered these violations to be significant and substantial.

The Commission has indicated a "significant and substantial" violation is 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).

Further, in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term 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 connection with these two orders the credible evidence establishes the seals were intact and not leaking. Such a finding precludes a finding under (3) and (4) of Mathis Coal. The S&S designation should be stricken.

The Secretary's evidence also fails to establish that the violation was a result of the operator's unwarrantable failure to comply. The evidence so often relied on by the Secretary is that the operator knew of the regulation and knew of the violative condition over a period of time. But more is required. In particular, the Secretary must show aggravated conduct, see Emery Mining Company, supra. Since the record fails to show aggravated conduct, it necessarily follows that the allegations of unwarrantability should be stricken from these two orders.

These orders should be affirmed as 104(a) citations.

In considering a civil penalty I conclude the negligence of the operator as moderate. Mid-Continent could have erected additional seals outby the inaccessible seals. Such outby seals could have effectively sealed off the areas in question. Since the credible evidence indicates the seals were intact and not leaking I consider the gravity of the violations to be low. Mid-Continent's prior history is favorable to the operator. It was assessed and paid for one violation of 75.305 in the two years ending January 19, 1988. Before January 20, 1986, it was assessed and paid for seven violations of the same regulation.

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Aluminum Overcasts, Sufficiency of Pyrochem Applications

This portion of the decision reviews Order No. 3076190 which alleges a violation of 30 C.F.R. 75.316. (FOOTNOTE 17)

The narrative portion of the order reads as follows:

The operator failed to comply with his approved ventilation plan at the overcasts between 6 slope and crosscut No. 48, 5 slope and crosscut No. 48, 4 slope and crosscut 48 and 3 slope and crosscut 48 in that aluminum overcasts had been installed at the above locations which do not meet the requirements of substantial incombustible material [sic] testing has shown that in case of a fire, aluminum has been shown to fail rapidly. The operator was required to have the overcasts fireproofed by November 30, 1987.

The Evidence

DOUGLAS ELSWICK, an electrical specialist for MSHA, issued Order No. 2076190 because four aluminum overcasts had not been installed at certain locations in the Mid-Continent mine (Tr. 2-165, Ex. P-4). The aluminum overcasts were the subject of the order issued December 11, 1987. The company agreed the overcasts would be coated by November 30, 1987, (Tr. 2-174). The work was in progress on some of the overcasts at the time the order was issued (Tr. 2-175).

A brief review of certain historical facts is appropriate: Aluminum ventilation controls, including overcasts, have been used in the coal industry for more than 10 years. In western mines, aluminum overcasts, the type presently at issue, had been the standard for years (Tr. 2-345).

As a result of the Wilburg Mine fire disaster (FOONOTE 18) MSHA instituted a policy change concerning the acceptability of aluminum overcasts in mines (Tr. 2-349). Under the new policy all aluminum devices had to either be replaced with devices of incombustible construction or coated with a layer of incombustible material. Operators of mines possessing aluminum ventilation controls had to submit, under this new policy, detailed plans which included a timetable with specific completion dates showing how these devices would be either coated with a fire-proofing material or replaced (Exhibit P-4(a)).

On November 6, 1987, Mid-Continent submitted for final approval its plan for the coating of aluminum overcasts then present in the Dutch Creek No. 1 and No. 2 mines with a fireproofing material termed Pyrochem (Exhibit P-4(e)).

On November 20, 1987, MSHA Inspector James B. Denning issued an order under the authority of section 103(k) of the 1977 Mine Act which took all diesel equipment in the Dutch Creek Mines out of service (FOONOTE 19) (Tr. 2-328, 329). Under the 103(k) order, no diesel equipment could be operated until thoroughly inspected

~2482

by MSHA. During these subsequent inspections, Mid-Continent received a total of 19 orders and citations involving the Eimco fire (Exhibit R-16).

The aluminum overcasts, the subject matter of the present order, were located in older sections of the Dutch Creek No. 1 Mine commonly referred to as the slope section or slopes entries. With the completion of the Rock Tunnels Project this area of the mine, while not abandoned, was limited to minimal miner activity. At the time the present order was issued, there were no facilities in the area by which electrical equipment could be operated (Tr. 3-605). As a result, diesel-powered Eimcos were the only machines which could provide the required power for the sprayer unit to coat the overcasts.

Following the period of the Eimco fire inspection and abatement, Mid-Continent was left with approximately three days in which to finish the required spraying on its original schedule (Tr. 3-587).

Given the difficulties experienced during this application process, compliance with the MSHA timetable was simply not possible. MSHA, however, was not inclined to enlarge its timetable for the aluminum overcast coating although the policy target-date was another six months away. (See Exhibit R-24.)

Because there was no need to maintain roadways in the area, Mid-Continent had to grade significant amounts of roadway to reach the overcasts with its diesel machinery (Tr. 3-572). (FOOTNOTE 20)

Upon reaching these overcasts, Mid-Continent's efforts for timely completion were further hindered by the spraying process itself. In order for the Pyrochem to properly adhere, only thin layers could be applied to the overcasts at one time (Tr. 3-561). According to foreman STARZEL, in order to reach the required one-inch thickness, more than five applications of Pyrochem had to be applied (Tr. 3-606).

Discussion

Mid-Continent contends that the company's conduct was not aggravated as defined in Emery (Brief at 29).

I agree. It is uncontroverted that Mid-Continent had started to treat the overcasts with fireproofing material when Order No. 3076190 was issued. The company's attempts to comply, complicated by the withdrawal of the diesel equipment, negate any finding of aggravated conduct as defined by the Commission.

For these reasons the allegations of unwarrantability should be stricken and the order should be affirmed as a 104(a) citation.

Based on the uncontroverted evidence and in assessing a civil penalty I conclude that Mid-Continent's negligence was low. The circumstances simply precluded the operator from completing the work.

On the other hand the gravity was moderate. Given these circumstances here a mine fire could adversely affect the safety of the miners.

The operator's prior history indicates it was assessed and paid for 79 violations of 75.316 for the two-year period ending January 19, 1988. For the period before January 20, 1986, the operator was assessed and paid for 125 violations of that section. I consider this history to be moderately adverse especially when a ventilation plan can involve a myriad of agreed regulations.

Eimco Emergency Fuel Cut-Off Blocked in  
While Pyrocheming Slope Section Overcasts

This portion of the decision deals with Order No. 3076182. The order originally alleged a violation of 30 C.F.R. 75.316, cited, supra. During the hearing the Secretary was granted leave to allege a violation of 30 C.F.R. 75.1725(a), (FOONOTE 21) (Tr. 2-112).

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The narrative portion of the order reads as follows:

The operator failed to comply with his approved ventilation and dust control plan on the 915-0923 Eimco (no approval plate) between slopes 4 & 5 at crosscut 48 in that the fuel (emergency cut off) on the machine was blocked in with a paper rag. The temp. gage [sic] indicated about 215 degrees. The anti-freeze was boiling in the machine with machine running.

#### The Evidence

MSHA Inspector DOUGLAS ELSWICK, a person experienced in mining, observed a 915-0923 Eimco loader on December 10, 1989.

The loader has an emergency shut-down device if the machine overheats. A paper rag prevented the shut-down device from functioning. This defeated the low level water capabilities of the machine. The temperature gauge read between 210 F. and 215 F. The temperature should not exceed 185 F.

The exhaust of this diesel equipment at times emits red-hot particles. These particles are eliminated by passing them through water. By defeating the safety device the temperature of the Eimco could reach 800 to 1000 F.

The inspector considered this was a safety hazard. The condition could cause a mine fire with possible fatalities.

Inspector Elswick considered the violation was due to the unwarrantable failure of the operator. The rag was in plain view and Stargel, Mid-Continent's foreman, was ten feet from the machine.

JOHN REEVES, assistant superintendent at the Dutch Creek Mine, testified that when the order was issued the Eimco was being used as a power source to apply Pyrochem to the surfaces of an aluminum overcast (Tr. 2-126). During this application process, the Eimco's engine reached a temperature at which the Eimco engine would shutdown. A shut down of the engine automatically shuts off the sprayer.

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LOUIS STARZEL, Mid-Continent's crew foreman, testified that during the application both the sprayer and approximately 75 feet of hoses contained Pyrochem. Had the Eimco been given the time required to cool off before being restarted, the Pyrochem would have solidified and this equipment would have been, for all intents and purposes, ruined. Once overheated, it takes approximately 1 to 1 1/2 hours for a diesel Eimco of this type to cool to the point where it can be restarted (Tr. 3-602). To prevent ruining the machine and equipment, Starzel overrode the automatic fuel shut-off so the system could be purged with water (Tr. 3-563, 3-564).

Before restarting the Eimco, however, Starzel had rock dust and a fire extinguisher brought into the area where this machine was parked. During the time the Eimco was running in this blocked-in condition, it remained stationary. Starzel and members of his crew were present at all times with firefighting equipment (Tr. 3-564).

#### Discussion

Mid-Continent does not dispute the facts as alleged by MSHA Inspector Elswick in the narrative portion of Order No. 3076182. At the time this order was issued, the emergency fuel shutoff was blocked in or bypassed and the Eimco was running at a temperature above that allowed under manufacturer specifications for normal operations. (FOOTNOTE 22) However, Mid-Continent contends the present facts do not justify the aggravated conduct established by the Commission in Emery. In support of its position the operator relies on the action of the crew in obtaining firefighting equipment, the lack of combustibility of Coal Basin coal, and the likelihood that a shut-down of the Eimco would cause the Pyrochem to solidify and thereby ruin the equipment.

I am not persuaded by Mid-Continent's arguments. In the instant case the foreman's actions were neither justifiable nor excusable. In the course of his activities the foreman plugged a shut-off safety device with a rag. This permitted the equipment to operate at highly excessive temperatures. In fact, the antifreeze was boiling in the Eimco. The foreman's acts of bringing firefighting equipment into the area shows he recognized the possibility of a fire. In addition, he was within ten feet of the Eimco. The assertion the equipment could have been ruined if the Eimco was shut off indicates the Eimco itself was inadequate for the job.

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The issue of lack of combustibility of coal in the coal basin does not reduce the hazard. Other sources of combustibility were in this area of the mine.(FOOTNOTE 23)

The acts of Mid-Continent's foreman were clearly aggravated. Starzel deliberately overrode the automatic fuel shutoff and the regulation, 30 C.F.R. 75.1725, was violated. As foreman, he is responsible for complying with the regulation and he cannot ignore it by bringing in firefighting equipment.

I conclude the deliberate disregard of a safety regulation by a foreman constitutes aggravated conduct within the meaning of Emery. The facts here are akin to those in Youghioghney & Ohio Coal Company, supra, 9 FMSHRC at 2011.

For the foregoing reasons the allegations of unwarrantable failure should be sustained.

On the issue of assessing a civil penalty: both the negligence and gravity of the operator are high. The high negligence was determined by the deliberate decision of a supervisor to disregard a safety regulation. The high gravity is apparent since an overheated machine can easily cause a mine fire.

Mid-Continent's prior history is quite favorable to the operator. There were no assessments in the two-year period ending January 19, 1988. In the period before January 20, 1986, there was only a single assessment for a violation of 75.1725.

Accumulations, Roadway Compaction During  
Overcast Spraying Operations

This portion of the decision involves three orders. The first two orders allege violations of 30 C.F.R. 75.400(FOOTNOTE 24)

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The narrative allegations of Order No. 3076185 are as follows:

The operator allowed combustible material in the form of coal to accumulate in crosscut 47 between 5 and 4 slope. The accumulation of coal were [sic] about 30 feet long 10 feet wide and 4 feet deep. In addition to coal accumulations there was [sic] wooden pallets, plastic lids, rock dust bags and glue boxes in the crosscut.

Order No. 3223125 reads as follows:

The operator allowed loose dry coal, paper, plastic and wood to accumulate in the #49 crosscut between 4 and 5 slope. The dry loose coal was about 20 feet long, 8 feet wide and four feet deep.

Order No. 3223159 alleges a violation of 30 C.F.R. 75.316, cited supra, page 25.

Order No. 3223159 reads as follows:

The operator's approved ventilation system and methane and dust control plan was not being followed in No. 5 slope, intake aircourse and haulage-way. The floor, from No. 55 crosscut to No. 62 crosscut - about 700 feet, in the haulageway was not maintained compacted with calcium chloride or water. The dust on the mine floor ranged from one inch to 4 inches in depth.

#### The Evidence

Order No. 3076185

On December 11, 1987, MSHA Inspector DOUGLAS ELSWICK observed loose coal at crosscut 47 between slopes 4 and 5. The coal was 30 feet by 10 feet and 4 feet deep. There were plastic lids and dust bags on top of the coal. Upon inquiry a company representative stated he didn't know why this was stored in the area.

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The inspector did not observe any effort being made to clean up the area.

Unwarrantability, in the inspector's opinion, was the proper designation of this violation because a foreman was working 100 feet above this area. Also, the area must have been pre-shifted as miners were working on the overcasts. The fire boss and management should also have been aware of this condition. Inspector Elswick identified a letter dated December 1, 1987, which discusses the operator's clean-up plan.

If a mine fire occurred, injuries could be serious. In the inspector's opinion it was reasonably likely that a fire could occur.

Diesel equipment and power lines were within five to six feet of the accumulation.

Order No. 3223125

On December 13, 1987, MSHA Inspector Elswick inspected crosscut 49 between 4 and 5 slopes. At this point he observed a quite visible accumulation of loose coal and plastic material. The loose coal was 20 feet long by 8 feet wide and 4 feet deep. The inspector thought the accumulation had been there three or four days.

If the coal caught fire in this intake air entry the smoke would spread to the working area. This area was not normally pre-shifted.

The inspector expressed the view that this violation was due to the unwarrantable failure of the operator since equipment cannot move this amount of coal without a foreman knowing about it. Also, there was a foreman 100 feet away.

Order No. 3223159

PHILLIP R. GIBSON, JR., an MSHA inspector, considered the lack of calcium chloride and water on the roadway to be a violation of the ventilation plan.

The inspector considered the violation to be unwarrantable because the area had to be pre-shifted. It was also outby a working section. In addition, the operator had been cited a number of times for this condition.

The inspector agreed the diesel equipment was hauling in gear to be used in coating the overcasts.

GEORGE PREWITT, a member of Mid-Continent's safety department, testified that after the interception of the Rock Tunnels Project with the Dutch Creek No. 1 Mine (B-seam, or lower of the two coal seams, see Exhibit R-2), all material haulage, coal haulage and personnel transportation which had been conducted in the slope section were transferred to the twin adits of the Rock Tunnels Project. Since the RTP interception of the coal seams, worker activity in the slope entries has been reduced to a minimum (Tr. 3-618, 3-619). In fact, at the time these orders were issued, mine examiners (commonly called "fire bosses") were the only personnel regularly present in the slope-section of the mine (Tr. 3-566).

The accumulations which were the subject matter of two of Inspector Elswick's orders were a by-product of the aluminum overcast coating operation. Similarly, the roadway conditions which were the subject of Inspector Gibson's order were caused by equipment traveling in the area due to the overcast coating operation.

In order to reach the overcasts with the needed equipment, a significant amount of road grading had to be performed. When the grading was being done there were no facilities for the removal of the graded material (Tr. 3-572). The nearest beltline was approximately 1500 feet away from the area where the grading was being done. Because of recent inspections which had taken the majority of its diesel equipment out of service, Mid-Continent was in a position where it was extremely difficult to perform the required fire-proofing of overcasts within the schedule deadline mandated by MSHA (Tr. 3-573, 3-582). As such, Mid-Continent had neither the time nor the equipment required to haul all the graded material to a point where it could be taken out of the mine. Instead, this graded material had to be stored in inactive crosscuts. This was the focus of Inspector Elswick's Orders Nos. 3076185 and 3223125 (Tr. 3-572).

To reach these particular aluminum overcasts, all machinery travel had to be routed up-dip via the No. 5 entry (Tr. 3-421). Because of the soft nature of Mid-Continent coal and the coal floors, the Eimco equipment tore and ground up the No. 5 entry floor and formed the accumulations which are the subject matter of Order No. 3223159 (Tr. 3-620). Because of the winter's dryness of the mine air, Mid-Continent's attempts to control this problem with the application of calcium chloride were largely frustrated. (FOOTNOTE 25)

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A conflict in the evidence exists as to whether the accumulations were located near or on a roadway well traveled by diesel machinery. In this conflict Mid-Continent's witness STARZEL (Tr. 3-574) would be in a better position than Inspector Elswick to know the extent of the travel on the roadway. In short, at the time these orders were issued, the only equipment which traveled on this road was the single Eimco used in the application of Pyrochem (Tr. 3-574). Under this operation, the Eimco was required to pass the ordered accumulations only twice -- upon entering the area at the start of shift and upon leaving that area at the end of the shift. In the interim, this machine would remain in a stationary position away from the accumulations (Tr. 3-574).

Inspector Elswick identified an ignition source as a 7200-volt cable which fed power to the section and which ran across the accumulations (Tr. 2-141). I credit Elswick's testimony over Starzel's contrary view (Tr. 3-574). A 7200-volt cable is a large and obvious object. Further, Starzel admits the Eimco used to spray the aluminum overcasts was a source of ignition (Tr. 3-574).

#### Discussion

Mid-Continent does not dispute the existence of the accumulations or the fact that the 5 slope roadway was dry and dusty. (FOOTNOTE 26) But Mid-Continent argues its conduct did not constitute an unwarrantable failure to comply with the regulation. Further, the operator was attempting to cope with a mandate created by MSHA. In short, Mid-Continent argues it should have been granted additional time to complete the coating of the aluminum overcasts and to complete the attendant house-keeping as well.

Emery, discussed supra, requires aggravated conduct more than ordinary negligence. The evidence fails to show such aggravated conduct in connection with these three orders. Accordingly, allegations of unwarrantable failure should be stricken.

The failure of MSHA to grant Mid-Continent additional time to abate these violative conditions could form a basis to vacate the violation. However, I am not persuaded by Mid-Continent's argument, particularly where a 104(d)(2) order is involved.

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In assessing civil penalties for the initial two violations I believe the operator was moderately negligent in permitting combustibles to accumulate. The pressure of other work does not excuse an operator from complying with mandatory standards. Concerning the lack of calcium chloride on the mine floor I consider the operator's negligence was low. A certain amount of coal dust on the mine floor can be anticipated. An accumulation of one to five inches appears to be minimal. Further, Mid-Continent's efforts to control the problem was, to a degree, frustrated by the winter's dry air.

As to all three orders I consider the gravity to be high. Accumulations of coal and coal dust can readily contribute to a coal mine fire. It is commonly acknowledged that an underground fire can easily lead to a mine disaster.

Mid-Continent's prior history appears to be moderate. In the two years ending January 19, 1988, the company was assessed and paid 48 violations of 75.400. Prior to January 20, 1986, the company was assessed and paid 111 violations of the regulation.

As to 75.316 (ventilation plan), in the two years ending January 19, 1988, the company was assessed and paid for 79 violations. Prior to January 20, 1986, the company was assessed and paid for 125 violations.

Eimco Examinations  
Place of Maintaining Records

This portion of the decision addresses Order No. 3076189 alleging a violation of 30 C.F.R. 75.316, supra, page 25.

Mid-Continent denies(FOOTNOTE 27) it violated its ventilation plan, and the related regulation.

The narrative portion of the order reads as follows:

The operator failed to comply with his approved ventilation and dust control on the 935-0031 being operated at crosscut 47 between 4 and 5 slope in that the last date recorded was 11/3/87.

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Section 21.5 of the approved ventilation plan (Exhibit P-2) provides:

A record of all diesel examinations will be kept in a book for that purpose, which will include the date and results of the examination.

Section 21.4 of the approved ventilation plan further provides:

All diesel equipment used for coal haulage, or any other diesel equipment used in or inby the last open crosscut on a regular basis, will be examined at least once every twenty-four hours of service to insure the equipment is in proper operating condition. Other diesel equipment, such as supply and mantrip vehicles will be examined once every seven (7) days of operation to insure the equipment is in proper operating condition.

#### The Evidence

MSHA Inspector Douglas Elswick issued this order on December 11, 1987.

There was no notation "on board" the Eimco indicating the date of its last inspection. There had been previous problems as the inspection books were lost when the machines were washed. Generally, the books for weekly checks are now maintained on the surface.

In the inspector's opinion the ventilation plan requires that diesel equipment be examined every seven days.

Mid-Continent's bull gang supervisor STARZEL testified that due to the repeated destruction of these inspection records during the operation and cleaning of these machines, the storage location had been changed in the approved ventilation plan (Tr. 3-579).

At the time the present order was issued, the storage of all required diesel examination records had been moved to a location at the 1 Mine intercept in the outside lamphouse (Tr. 3-580). On the date of the present order, Starzel had conducted the required CO and NO<sub>2</sub> examinations and had entered the results in a record located in the lamphouse (Tr. 3-590, 3-591).

Discussion

It appears Inspector Elswick issued this order because the record book was not located on the diesel equipment. It is understandable how such an error could be made particularly in view of the previous custom of storing the books on the machines themselves. In view of the un rebutted testimony of STARZEL that the inspections were in fact made and entered elsewhere, I conclude Mid-Continent did not violate its ventilation plan. The plan itself does not require the inspection books to be maintained "on board" the diesel equipment.

Mid-Continent also argues that Inspector Elswick erroneously concluded that the examinations must be weekly regardless of the number of days the machine is in operation.(FOOTNOTE 28) Since the order is to be vacated it is not necessary to consider this secondary issue.

For the reasons stated herein, Order No. 3076189 should be vacated.

Powercenter Crosscut No. 27 RTP  
Failure to Record Weekly Notations

This portion of the decision involves three related orders. The orders, all non-S&S and written on December 12, 1987, allege violations of 30 C.F.R. 75.1105. (FOOTNOTE 29)

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The narrative portion of Order No. 3076193 reads as follows:

The operator failed to comply with petition for modification Docket #M-86-182-C dated Sep. 1, 1987, stipulation #4 in that the last date recorded for the required examination of the fire suppression system was 11/28/87.

The narrative portion of Order No. 3076194 reads as follows:

The operator failed to comply with petition for modification Docket # M-86-182-C dated Sep. 1, 1987, stipulation #7 in that the last date recorded in the book for required electrical examination was 11/28/87.

The narrative portion of Order No. 3076195 reads as follows:

The operator failed to comply with petition for modification Docket # M-86-182-C dated Sept. 1, 1987, stipulation #8 in that there is no record of daily examinations as required.

#### The Evidence

#### Order No. 3076193

MSHA Inspector Douglas Elswick testified a petition for modification had been issued to Mid-Continent involving the ventilation of a power center (Ex. P-5). The company was required to inspect and record weekly notations of the inspections. In fact, 14 days had elapsed and no entry appeared in the books. After an examination and entry of that fact in the book, the books are countersigned by the chief electrician or maintenance foreman. Inspector Elswick didn't recall if the books had been countersigned.

The hazard presented here is that if the recording is not done then other persons are not aware of hazards that might be involved.

Inspector Elswick considered this violation to be unwarrantable because the examinations must be done by a certified person.

~2495

MSHA has issued 10 or 12 record-keeping citations against Mid-Continent.

The power center in crosscut 26 was between the intake entry and the beltline drive. It was identified in the surface book as "No. 2 drive or center."

Order No. 3076194

This order involved the power center in crosscut 26. There had been no record made for 14 days.

The petition for modification had been posted so everyone should have been aware of the recording requirements.

Inspector Elswick considered this violation was due to Mid-Continent's unwarrantable failure to comply because the operator knew it was required to record the inspection. In addition, the company had been cited for 10 or 12 record-keeping violations.

It is important to examine the power center to see if anything is wrong with the equipment. The high voltage transformer reduces incoming power of 4,160 volts to 480 volts. This equipment was located in a rock room off the beltline.

Order No. 3076195

This order was written because Mid-Continent failed to comply with stipulation 8 in M-86-182-C. The stipulation requires the equipment be examined daily and recorded in a record book. The power center is located in a cinder block structure. The equipment must be examined daily and the examination recorded in a book.

If a fire occurs in the power center the door automatically closes and the incoming power is deenergized.

The inspector asked for the records but the mine superintendent offered no excuses and he could not find the records. Under paragraph 8 an examination must be made daily. The inspector did not know when the last examination had taken place.

Such examinations are important because fire and smoke can enter the working face.

Inspector Elswick agreed that he was aware the required examination had indeed been made, but not recorded, when Orders Nos. 3076193 and 3076194 were issued (Tr. 2-350, 2-356).

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The facility which is the subject matter of the present orders is located at crosscut 27 of the north-adit beltline entry of the Rock Tunnels Project. This facility is a part of the new RTP conveyor belt system which had replaced the former mainline coal haulage facilities located in the slope sections of the Dutch Creek No. 1 and No. 2 Mines.

#### Discussion

Mid-Continent does not deny the violations described by Inspector Elswick.(FOOTNOTE 30) Specifically, the recorded entries were not made but the inspections had been made at least as to Orders Nos. 3076193 and 3076194.

But Mid-Continent disputes the unwarrantable feature of the orders. In this situation Mid-Continent asserts its personnel were adjusting to the new facility and the examination procedures.

All of the examinations were not required under electrical regulations but were required under the Proposed Decision and Order in modification Docket No. M-86-182-C which became effective on November 19, 1987 (Ex. P-5).

These three orders merely show ordinary negligence and not aggravated conduct as required by Emery. Accordingly, the allegations that the violations were due to the unwarrantable failure of the operator to comply should be stricken. Otherwise the three orders should be affirmed under section 104(a) of the Act.

Concerning the assessment of civil penalties I consider the negligence in recording violations to be low since the PDO became effective less than a month before the orders were written.

Likewise, I consider the gravity to be low since these recording violations would not likely contribute to a serious injury. I note the examination in connection with Orders No. 3076193 and No. 3076194 had, in fact, been made but not recorded.

The record reflects a favorable prior history. In the two-year period ending January 19, 1988, Mid-Continent was assessed and paid 12 violations of 75.1105. Prior to January 20, 1986, the company was assessed and paid 13 violations of the same regulation.

~2497

103 Longwall Return Escapeway  
Whether Passable

This portion of the decision reviews Order No. 3223122 alleging a violation of 30 C.F.R. 75.1704.(FOOTNOTE 31)

The narrative portion of the order reads as follows:

The operator failed to maintain the return escapeway from the 103LW in safe condition in that a water hole about 75 feet outby the shields blocked the escapeway. The water hole was about 20 feet long, 12 feet wide and from 8 to 19 inches deep.

The Evidence

MSHA Inspector DOUGLAS ELSWICK issued this order. At a point 75 feet outby the shields he observed a water hole 20 feet long. Its depth, measured by a ruler, varied from 8 to 19 inches. A drop-off of 8 to 19 inches was hidden by the murky water. These conditions would hinder anyone evacuating any persons.

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This particular escapeway was in return air; as such, one would expect it to become filled with smoke if a fire occurred. Any miner attempting to crawl out would get water in his self-rescuer which is worn on a miner's chest. The inspector felt a miner could die if his self-rescuer became inoperable.

Inspector Elswick considered this violation was due to the unwarrantable failure of the operator to comply. This escapeway was in a working section and the area must be examined every four hours.

On his way out of the area a company mine examiner stated a waterline had broken and drained into the area about a week before. The area must be pre-shifted; also, as an escapeway, the area must be inspected weekly.

#### Discussion

Mid-Continent does not deny prior knowledge of the described condition(FOOTNOTE 32) but the operator denies it violated the regulation.

In support of its motion to vacate this order, Mid-Continent contends 75.1704 consists of three distinct and separate sentences. Each sentence deals with a separate aspect of mine escape. The first sentence deals with the maintenance of passageways, the second with the protection of mine entrances and the third with the approval and maintenance of escape facilities. Of these three portions, only the third sentence, which addresses "escape facilities," requires "quick escape." Under the regulation Mid-Continent states that passageways such as the 103 tailgate return are subject only to the requirements that they be properly marked and maintained, be in a condition which is safe and which will insure passage of all persons including disabled persons.

Mid-Continent also asserts that no evidence was presented indicating the 103 return air escapeway was improperly marked, impassible or unsafe. At no time in his inspection did Inspector Elswick conduct any test to determine the actual passability of this escapeway. Judging from the description of his inspection, it did not appear the inspector was prevented from safely traveling through this escapeway. Finally, Mid-Continent argues that, as developed from Inspector Elswick's description of the area, there was a three-foot walkway on the up-dip side of the water hole which would have allowed passage through the area by miners or miners carrying a stretcher, without coming into contact with the water hole (Tr. 2-290).

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Mid-Continent further points out that on direct examination Inspector Elswick testified that, "An escapeway is designed for safe, quick exit of persons from the section in case of emergency . . . .", (Tr. 2-291). Later on cross-examination, he stated that he interpreted 30 C.F.R. 75.1704 to require escapeways to be maintained in such condition as to facilitate quick escapes (Tr. 2-378). In describing the hazard presented by the allegedly violative condition, Mr. Elswick stated that the water present in the 103 return entry escapeway would hinder such a quick escape (Tr. 2-299). Contrary to this interpretation, however, nothing in the first sentence of this regulation section requires that an escapeway be maintained in a condition to facilitate a "quick" escape.

Mid-Continent's threshold arguments were considered and denied in *Mid-Continent Resources, Inc.*, 11 FMSHRC 1015 (1989). I reaffirm that decision for the reasons stated therein: "[T]he plain words of 75.1704 require that travelways be maintained to "insure" passage. "Insure," according to Webster, (FOOTNOTE 33) means "to make certain esp. by taking necessary measures and precautions," 11 FMSHRC at 1052.

The testimony of Inspector Elswick is unrebutted. Such unrebutted evidence establishes that the passageway was not maintained to "insure passage".

Mid-Continent states that miners or miners carrying a stretcher could pass through a three-foot walkway on the up-dip side of the water hole without coming into the contact with the water hole. I reject the operator's views: escapeways can often be filled with smoke and involve confused miners. And what of a miner crawling the escapeway. Is he to somehow find a three-foot walkway on the up-dip side?

On the issue of escapeways generally Mid-Continent is invited to read the recent Commission decision entitled *Utah Power & Light Company*, WEST 87-211-R (October 1989).

Mid-Continent further states that the violative condition was not due to its unwarrantable failure to comply.

~2500

I agree. At best, the evidence indicates this condition existed for a week because of water seepage. Such evidence is similar to the situation found in Emery. In short, the record fails to disclose any aggravated conduct. In view of this conclusion the allegations of unwarrantable failure should be stricken and the violation affirmed under section 104(a) of the Act.

In considering a civil penalty for this violation I conclude the operator was moderately negligent in that it failed to remedy this condition after a week. However, the gravity is moderate since the described condition was for a distance of only 75 feet.

I consider Mid-Continent's prior history to be moderately adverse. In the two years ending January 19, 1988, the company was assessed and paid for 12 violations of 75.1704. In the period before January 20, 1986, the operator was assessed and paid for 46 such violations.

Maintenance of Robert Shaw Valve on  
Diesel Eimco

This portion of the decision involves Order No. 3223185, which alleges a violation of 30 C.F.R. 75.316, supra, page 25.

The narrative portion of the order reads as follows:

The operators approved ventilation system and methane and dust control plan was not being followed for the 913-0368, approved machine, diesel-powered load-haul-scoop. The low water level float switch did not shut off the machine when the water was drained from the cooling box. Two loads of muck had been transported by this vehicle from the 103 longwall return entry on this dayshift. This machine was observed being operated in the return entry of the 103 long-wall section.

The Evidence

PHILLIP R. GIBSON, JR., an MSHA inspector, issued Order No. 3223185 on December 29, 1987.

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On that occasion he observed a diesel-powered scoop in the return-air tailgate entry. The scoop, being used to pickup debris, was beyond the last open crosscut. In such a location it is a permissible type machine, equipped with a 2 percent methane monitor.

The exhaust gases from the scoop are quenched by passing them through a water reservoir. In his investigation Inspector Gibson discussed the low water float with the equipment operator. He also drained the water level to four or five inches. But the equipment did not automatically shut off as it is required to do. The valve was disassembled and repaired within the time allowed by the inspector.

If the water level is not functioning then the hot gasses can enter the atmosphere (See para. 21.1 of Ex. P-9).

This Eimco must be examined every 24 hours. The records indicated it had, in fact, been examined the previous day.

Inspector Gibson considered this an S&S violation because the switch would not shut off the power automatically. As a result a fire could occur outby the equipment.

Prior to issuing this citation and in the two prior years, Inspector Gibson had written citations to Mid-Continent concerning diesel equipment. Other inspectors had also written similar citations regarding the maintenance of diesel equipment.

Concerning violations relating to diesel equipment, the inspector had checked the records. There were some 35 violations for two years prior to the time this citation was issued.

Inspector Gibson believed the violation of this order was unwarrantable because of the repetitious nature of the violation.

GEORGE FAGUNDES, Mid-Continent's master mechanic of diesel machinery, explained that the Robert Shaw valve is part of a safety device fitted on diesel Eimcos, in this case, a 913 Eimco scoop serial number 0368. The purpose of the Robert Shaw valve is to assure that such machinery is not operated with an inadequate level of water in its scrubber tank.(FOOTNOTE 34) In performing its safety function, the Robert Shaw valve has absolutely no relationship to the actual operation of the scrubber tank (Tr. 3-531).

~2502

Up to the time when Inspector Gibson halted work to test the Robert Shaw valve, the Eimco scoop was operating with water in the scrubber tank (Tr. 3-341). Also, this Eimco was equipped with an methanometer which shuts down power to the machine upon encountering a methane percentage of 2.0 percent or more (Tr. 3-433).

A brief description of the Robert Shaw valve is necessary: the valve operates much in the same manner as a float system in a bathroom commode. In the diesel system a metallic float is in a cylindrical metal tube which extends into the scrubber tank. This captive float rides up and down in its tube according to the water level in the scrubber tank. Upon reaching a set low water level, the float activates a magnetic shunt device which disconnects power to the machine (Tr. 3-532).

Mid-Continent, in accordance with schedule 31 requirements, has been required over the years to equip all diesel-powered equipment operated in by the last open crosscut with Robert Shaw valves. Diesel Superintendent Fagundes has, over the years, had the opportunity of working on hundreds of such valves. During the course of his experience, Fagundes has come to consider the Robert Shaw valve, "a big nuisance item" (Tr. 3-540).

The problem presented by this valve results from the operation of the float device within its confining cylinder on the steep slope conditions of the Dutch Creek Mines. According to Fagundes, the approximate 13 degree pitch of these coal seams causes the float valve to bind within its confining cylinder even when the machine is in a stationary position (Tr. 3-534, 3-535). Fagundes has found that this problem can usually be alleviated simply by moving the machine and this "unsticks" the float in its cylinder. In short, the movement or vibration of the machine while being moved is enough to overcome the binding effect on the float valve (Tr. 3-534, 3-535).

#### Discussion

Mid-Continent states its valves involve a common occurring problem:(FOOTNOTE 35) when the machine was operating it had water in the

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scrubber tank. After the water was drained the machine was not equipped to determine whether or not the float valve had temporarily bound up. Because of the nature of the safety device it is quite probable that the valve was in an operable condition when the required weekly examination had been performed the day before the order was issued by Inspector Gibson.

Mid-Continent's argument is misdirected. The violation exists here because the low level water float switch did not shut off the Eimco when the water was drained. Mid-Continent's evidence does not rebut that issue.

Concerning the issue of unwarrantable failure: The inspector's testimony of violations relating to diesel equipment and the issuance of similar citations is simply too broad to clearly establish unwarrantable failure by repetitious conduct. In short, in the absence of more specific and detailed evidence as to this equipment, I conclude Mid-Continent's conduct only constituted ordinary negligence and not aggravated conduct as required by Emery.

For the foregoing reasons, the allegations of unwarrantable failure should be stricken. Further, Order No. 3223185, as amended, should be affirmed under section 104(a).

In assessing a civil penalty I consider both the operator's negligence and the gravity of the violation to be low. Concerning negligence, it appears some water was in the reservoir. Further, the equipment had been checked the previous day. The presence of some water in the reservoir also essentially negates a probability of a fire. In view of this factor I also deem the gravity to be low.

Mid-Continent's prior history indicates the company was assessed and paid 79 violations of 75.316 in the two years ending January 19, 1988. In the period before January 30, 1986, the company was assessed and paid 125 violations of the regulation. I consider the operator's prior history to be only moderately adverse inasmuch as ventilation plans can involve a myriad of circumstances.

Rock Dusting in 103 Longwall on  
Non-Producing Shift

This portion of the decision considers Order No. 3223220 alleging a violation of 30 C.F.R. 75.403.(FOOTNOTE 36)

The narrative of the order reads as follows:

The rock dust applied to the lower rib and the floor of the lower tail gate entry of the active 103 longwall section was not maintained in such quantity that the combined mine dusts was at least 80 percent. The substandard rock dust began at survey station 7250 and extended outby (toward the face) for 40 feet. Water was not squeezed from a handful of the combined mine dusts. One spot mine dust sample was collected to substantiate this condition.

The Evidence

MSHA Inspector PHILLIP R. GIBSON, JR. issued this order in the return air entry of the longwall section on January 15, 1988. At the time there was a mining crew of eight to ten miners in the area.

The inspector observed float coal dust in the air, on the coal ribs as well as on the mine floor. The area he observed appeared to be dark. Generally operators use rock dust when working. There were small amounts of rock dust on the ribs and floor.

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The purpose of rock dust is to render coal dust inert. The rock dust can be applied by hand or by using a high pressure hose and a water mix.

Upon entering the area, Inspector Gibson concluded that the activities being conducted in the longwall were preparatory to mining. The mining process itself generates coal dust (Tr. 3-367).

Inspector Gibson further agrees the cited location was directly inby the 103 longwall tailgate (Tr. 3-456). (FOOTNOTE 37) The inspector also indicated that the 40 foot area located in this entry was not maintained to an incombustible level of 80 percent. This condition presented a reasonably likely hazard in the event of a mine fire or explosion. According to the inspector, if incombustibility of coal is not maintained it can contribute to the propagation of a fire and/or explosion (Tr. 3-381).

GEORGE PREWITT, a member of Mid-Continent's safety department, testified that when the order was issued the company was conducting a stress-relief program on the 103 longwall face (Tr. 3-634, 3-635). By this program, areas of stress are identified by drilling holes into the face and in the tailgate area. Upon detection of such stress, the holes are loaded with permissible explosives and detonated. Because of the severity of past outbursts, no mining is performed in the 103 longwall section until all stress-relief operations are completed (FOOTNOTE 38) (Tr. 3-692, 3-695).

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The 40 foot area described in Inspector Gibson's order as not properly maintained was the by-product of the approved stress-relief program. This area had been created as a result of coal detonated from the rib by the explosive de-stressing of the area on a preceding shift (Tr. 3-501).

#### Discussion

Mid-Continent states(FOOTNOTE 39) the Secretary interprets her regulation to mean that at no time can any area of a mine, no matter how small, be allowed to exceed the incombustibility requirements of the regulation.

This argument overstates the facts. The record shows only a three-foot area was without rock dust but a violation of 30 C.F.R. 75.403 nevertheless existed.

I agree with Mid-Continent that the situations involved here do not support the finding of unwarrantable failure as defined by the Commission in Emery. The order was written between the stress-relief detonation and the next scheduled production shift. The allegation of unwarrantable failure should be stricken.

In assessing a civil penalty the operator's negligence is low since the small area lacking rock dust was the by-product of the stress-relief program. I consider the gravity to be moderate. Mid-Continent's evidence shows its coal is not readily combustible. However, float coal dust can clearly and quickly propagate a fire.

The operator's prior history is favorable. In the two years ending January 19, 1988, the company was assessed and paid 15 violations of 75.403. In the period before January 20, 1986, the company was assessed and paid for 27 violations of the regulation.

#### Accumulations in and Compaction of 103 Longwall Headgate Roadway During Non-Producing Shift

This portion of the decision considers three orders issued on January 20, 1988.

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Order No. 3223445 alleges a violation of 30 C.F.R. 75.400 (accumulations, cited supra), page 31.

The narrative portion of the order reads as follows:

Fine, dry coal dust was not cleaned up but allowed to accumulate on the floor of the intake roadway of the 103 longwall section. Beginning at the startline and extending inby for 57 feet, 10 feet in width, and ranging from 1 inch to .5 inches in depth [sic] the accumulation lay on the mine floor.

Order No. 3223446 alleges a violation of 30 C.F.R. 75.403 (rock dust, cited supra, page 49).

The narrative portion of the order reads as follows:

The rock dust applied to the mine floor of the intake roadway of 103 longwall section, beginning at the startline and extending inby for 57 feet, was not maintained in such quantity that the incombustible content of the combined dry mine dusts was [sic] at least 65 percent.

One spot mine dust sample was collected to substantiate this condition.

Order No. 3223447 alleges a violation of 30 C.F.R. 75.316, (ventilation plan), cited supra, page 25.

The narrative portion of the order reads as follows:

The operator's approved ventilation system and methane and dust control plan was not being followed in the active intake roadway for 103 longwall section. Beginning at No. 7 slope and extending inby to the startline of 103 longwall, the roadway was not dampened with water or calcium chloride so as to promote compacting of the mine dusts.

The Evidence

Order No. 3223445

PHILLIP R. GIBSON, JR., an MSHA inspector, issued this order on January 20, 1988. As he stated in his order he observed dry, finely pulverized coal dust on the coal floor.

The readily visible dust was one to five inches deep, 57 feet long and 10 feet in width.

Rubber-tired diesel equipment had used the roadway. In addition, there was foot traffic from the six to twelve-man crew entering the 103 working section. There was dust in the air. The left rib had fallen to the mine floor.

The hazard here: accumulated coal dust could become airborne and enter the working section. If an explosion occurred at the face it would propagate as well as add fuel to the fire.

The inspector agreed that this violation involved the unwarrantable failure of the operator to comply because of the dryness, the fineness and the location of the coal dust. Also, the area was subject to a pre-shift examination. The pre-shift examiner stated no hazardous conditions were observed. The examiner should have seen the conditions and taken corrective action.

Mr. Gibson argued there was no mining in progress but there were jacketed power cables in the area. There was no other source that could have caused an explosion.

Exhibit R-16 shows all mine floor violations for 1987 involving accumulations. For the two-year period before Order No. 3223445 was issued the inspector found 104 violations of these orders, 33 related to this mine, so the remaining 77 must have related to the Dutch Creek Mine. Inspector Gibson interprets section 75.400 to the effect that there can never be an accumulation of coal on the mine floor.

Order No. 3223446

This order, a violation of 75.403, involves a failure to apply rock dust. It encompasses the exact location of the previous order (No. 3223445).

The area in the intake air did not appear to be 65 percent rock dust. A sample was taken and sent to the lab at Mt. Hope, Virginia.

The purpose of the rock dust requirement is to inert combustibility of coal dust on the coal floor. The hazard: coal dust can help propagate a mine fire.

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This particular roadway on an intake escapeway is used by diesel-powered equipment and miners traveling on foot.

Electrical power cables in the area could be a source of ignition. The area has 80,000 CFM moving across the face.  
Order No. 3223447

This order constitutes a violation of the company's ventilation plan as contained in paragraph 3.10 on Exhibit P-14, involved an un-dampened roadway. The cited area involved 250 feet of roadway ending in the areas involved in the two previous orders.

On January 20, 1988, this area was dry, dusty and there was no calcium chloride on it.(FOOTNOTE 40) Calcium chloride causes dust particles to become compacted. When applied the mine dust is less likely to become airborne and that reduces the possibility of an explosion.

Cold weather inhibits the action of calcium chloride.

The inspector has issued previous citations concerning the lack of calcium chloride on the operator's roadways.

This area is subject to a pre-shift examination. But no violation had been noted by the pre-shifter.

RICHARD REEVES and GEORGE PREWITT testified for Mid-Continent and indicated the attempted removal of the accumulations with equipment resulted in further tearing up and deterioration of the mine floor. In order to abate the order to the satisfaction of the inspector, the accumulations had to be removed by hand (Tr. 3-640, 3-641).

To reduce any hazard Mid-Continent was in fact in the process of applying calcium chloride to the accumulations(FOOTNOTE 41) but they were having a difficult time getting it to compact (Tr. 3-707).

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Under the conditions at the Dutch Creek mines, treatment with calcium chloride is the only feasible course of action available to deal with accumulations such as these. At the time of this order there was, in the Rock Tunnels Project and the Dutch Creek No. 1 and No. 2 mines, approximately 33,000 feet of roadway (Tr. 3-719, 3-720). All of the roadways located in the Dutch Creek No. 1 Mine consist of a coal floor.(FOOTNOTE 42) In the course of transporting men and material through these entries with rubber-tired equipment, areas of the soft coal floor will be pulverized and accumulations will form (Tr. 3-620).(FOOTNOTE 43) To require Mid-Continent in addition to their regularly scheduled clean-up program, to remove all such accumulations by hand would, as testified by Reeves, require that all miners be continuously assigned to accumulation removal (Tr. 3-719).

At this time, however, the Coal Basin was experiencing a cold weather snap(FOOTNOTE 44) which further reduced the already low relative humidity of the mine air. With lower humidity, the low temperatures adversely affected the effectiveness of the calcium chloride by reducing the amount of moisture which the chemical will absorb and by increasing the evaporative effect the mine ventilation has on a roadway.

Under the activity schedule, material haulage is not usually performed on the same shift as the de-stress drilling (Tr. 3-483). At the time when these orders were issued there was no reason for diesel machinery to be traveling on the 103 intake entry roadway. During this time, the only diesel equipment observed by Gibson was the machines subsequently brought into the section to attempt to abate the orders (Tr. 3-644).

There were no power cables in the 103 intake. All electrical power cables entering the 103 longwall section were located in the lower, conveyor belt entry (Tr. 3-646).

Discussion

Mid-Continent argues the inspector's first two orders were an unreasonable multiplication of charges.

It is clear from the record that the only aspect which can be seen as differentiating Order No. 3223445 from No. 3223446 is the regulatory sections under which they were written.

However, I reject Mid-Continent's position: the purpose of the Act is to provide for the safety of the miners. It would be contrary to the intent of the Act if an operator could avoid a citation on the basis that it violated a different mandatory standard.

The Commission has previously ruled that the Mine Act does not permit an operator to shield itself from liability because it violated a different, but related, mandatory standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981).

The company's view that the accumulations were de minimus is rejected. The inspector's testimony indicates such accumulations were, in fact, not minimal. The coal dust was one to five inches deep for 57 feet.

Inspector Gibson believed these accumulations presented a respirable dust hazard. Witness Prewitt, trained in respirable dust, expressed a contrary view (Tr. 3-652). It is clear no respirable dust tests were taken. Since Mid-Continent was not cited for violating the respirable dust regulation, it is unnecessary to explore this issue.

Concerning the allegations of unwarrantable failure: the evidence as to the initial two orders fails to indicate any aggravated conduct as required by Emery. As to the third order Mid-Continent was attempting to apply calcium chloride but the operator was largely frustrated by the cold temperature. All allegations of unwarrantable failure should be stricken since Mid-Continent's attempt to comply negates a finding of unwarrantability.

Mid-Continent's remaining views(FOOTNOTE 45) relate to assessing a civil penalty. In short, Mid-Continent claims there are no significant health or other hazards in these orders. But I reject Mid-Continent's position. The foregoing summary of the evidence indicate the violative conditions existed.

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The negligence involved in each order is low since relatively small areas of the violative condition existed. But I further consider the gravity high since the accumulations of dry coal dust can readily propagate a mine fire. It necessarily follows that I am not persuaded by Mid-Continent's evidence seeking to establish that its coal "needs help" to burn. This may be true of the coal itself but coal dust is certainly a more volatile product.

The operator's prior history as to violations of 75.400, 75.403 and 75.316 have been previously discussed.

For the foregoing reasons Order Nos. 3223445, 3223446 and 3223447 should be affirmed under section 104(a) of the Act.

#### Exposed Electrical Wiring in Lamphouse

This portion of the decision addresses Order No. 3223124 alleging a violation of 30 C.F.R. 77.502(FOOTNOTE 46)

The narrative portion of the order reads as follows:

The energized 110VAC [sic] circuits located in the wall about 4 1/2 feet about the floor in hallway at old #1 mine lamp house was [sic] not properly maintained in that the recording gage had been removed creating an opening about 14 x 14 inches with the energized parts exposed.

### The Evidence

On December 18, 1987, Douglas Elswick, an MSHA electrical specialist, inspected the old lamphouse. Someone had removed an amperage meter and left some of its energized parts exposed in the hallway. There were two bare wires 4 1/2 feet off the ground. The hallway was in use and the wires had been exposed for three and one-half weeks.

The 110 volts are hazardous and can cause a fatality. The circuit should have been removed with the fixture.

The inspector concluded the violation was due to the unwarrantable failure of the operator to comply because of the location of the bare wires.

On cross-examination, the inspector agreed only a few miners would go into the area of the exposed wires (Tr. 2-369). The wires were in a hallway to the old maintenance and super-intendent's office (Tr. 2-368). In addition, the Breeden(FOOTNOTE 47) House operator would have no reason to go in this hallway even though he used the shop which was a part of the overall, old 1 - Mine lamphouse (Tr. 2-368).

### Discussion

Mid-Continent states(FOOTNOTE 48) this is an example of poor workmanship but the operator argues the severity was misjudged by the inspector. In particular, as the inspector stated, the energized 110-volt wiring was almost flush with the wall (Tr. 2-302).

I am not persuaded by Mid-Continent's argument. Whether the energized wires are "almost" flush or completely flush with a wall does not reduce the hazard.

Mid-Continent further states the inspector misjudged the Emery criteria relating to unwarrantable failure.

I agree. The record establishes only ordinarily negligence on the part of Mid-Continent. In the absence of aggravated conduct the allegations of unwarrantable failure should be stricken. The violation should be affirmed under section 104(a) of the Act.

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In assessing a civil penalty I consider the operator's negligence to be high. The operator removed part of a fixture but left exposed wires. This condition was permitted to exist for three and one-half weeks. Electrical wiring that is "almost" flush with the wall is still a potentially dangerous condition within the meaning of 77.502.

I further consider the gravity of the violation to be high since energized wires of this type could cause a fatality or severe burns to a miner.

Mid-Continent's prior history is favorable. In the two years ending January 19, 1988, the company was assessed and paid for six violations of 77.502. Before January 20, 1986, the company was assessed and paid for five such violations.

Distance Between 103 Longwall Face Shields  
and No. 2 Headgate Packwall

This portion of the decision addresses Order No. 3223121 alleging a violation of 30 C.F.R. 75.200.

In its brief, Mid-Continent states(FOOTNOTE 49) this order was contested because of an erroneous belief that the inspector had incorrectly measured the distance between the packwall and the face shields. However, the evidence at the hearing established that the inspector correctly measured such distance. Accordingly, Mid-Continent has withdrawn its request for a hearing.

For good cause shown, Mid-Continent's motion should be granted. The order and proposed civil penalty should be affirmed.

Further Discussion of Civil Penalties

The criteria not heretofore discussed in connection with the assessment of civil penalties involve the size of Mid-Continent, the effect of penalties on the operator's ability to continue in business and whether the operator demonstrated good faith in attempting to achieve prompt abatement.

At the hearing the parties stipulated that Mid-Continent's size is evidenced by the production tons contained in the Secretary's proposed assessment (Exhibit A attached to petition).

~2515

Based on the stipulation it appears the company is small since it produces 666,582 tons of coal; the mine involved here produces 277,194 tons.

The record here indicates Mid-Continent demonstrated statutory good faith by promptly abating the violative conditions.

Whether the penalties assessed here would affect the operator's ability to continue in business was an issue presented in the case.(FOOTNOTE 50)

Mid-Continent's witness DAVID POWELL, financial planner and engineer, testified the company had incurred an eleven and one-half million dollar shortfall. As a result of this shortfall the company couldn't pay a \$2500 penalty to MSHA but it could shift funds within its operating accounts. However, the company had no money in the bank (Tr. 17, 18, 37, In Camera, December 1, 1988), Witness Powell's limited testimony also indicated other indicia to the effect that the company was financially strapped.

#### Discussion

Mid-Continent's evidence does not persuade me that the penalties assessed herein would affect the company's ability to continue in business. As a threshold matter Powell's opinion is based on a financial business plan and various coal contracts (Tr. 4 - 8, In Camera (not sealed)).

I am not persuaded. As a threshold matter the financial plan itself and its underlying documents were not offered in evidence. In addition, more persuasive evidence of inability to continue in business would consist of such basic accounting documents as income tax returns and profit and loss statements.

In sum, Mid-Continent's proof failed on this issue.

~2516

The Secretary's proposed penalties for each of the violations range between a low of \$1100 and a high of \$1500.

In considering all of the statutory criteria herein I deem the penalties as assessed in the order of this decision are proper.

#### Brief

Mid-Continent has filed a detailed post-trial brief which has been most helpful in analyzing and defining the issues. I have reviewed and considered this excellent brief. However, to the extent it is inconsistent with this decision, it is rejected.

#### ORDER

Based on the findings of fact and conclusions of law as stated herein I enter the following order:

WEST 88-231

1. Order No. 3223449 (Frozen waterlines during winter): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$300 is assessed.

2. Order No. 2832627 (Weekly examination of seals and placing date, time and initials): this order and all proposed penalties therefor are vacated.

WEST 88-230

3. Order No. 2832624 (Failure to examine inaccessible seals): the allegations of S&S as well as unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$225 is assessed.

4. Order No. 2832625 (Failure to examine inaccessible seals): the allegations of S&S as well as unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$225 is assessed.

~2517

5. Order No. 3076182 (Eimco emergency full cut-off blocked with a paper rag): this order, as amended, is affirmed and a civil penalty of \$1,500 is assessed.

6. Order No. 3076185 (Accumulations of coal in crosscut 47): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) of the Act and a civil penalty of \$200 is assessed.

7. Order No. 3076189 (Eimco examinations, place of maintaining records): this order and all proposed penalties therefor are vacated.

8. Order No. 3076190 (Aluminum overcasts): the allegations of unwarrantable failure are stricken.

This order is affirmed under section 104(a) and a civil penalty of \$175 is assessed.

9. Order No. 3076193: (Power-center, failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$50 is assessed.

10. Order No. 3076194: (Power-center, failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$50 is assessed.

11. Order No. 3076195: (Power-center failure to record weekly notations): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$75 is assessed.

12. Order No. 3223121 (Distance between longwall face shields and headgate packwall): respondent has withdrawn its request for a hearing.

This order is affirmed and the proposed civil penalty of \$1,100 is affirmed.

~2518

13. Order No. 3223122 (Longwall return escapeway, whether passable): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$275 is assessed.

14. Order No. 3223124 (Exposed electrical wiring in lamp-house): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$250 is assessed.

15. Order No. 3223125 (Accumulations of loose dry coal in Crosscut 49): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$200 is assessed.

16. Order No. 3223159 (Lack of calcium chloride and water on mine floor): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a penalty of \$150 is assessed.

17. Order No. 3223185 (Maintenance of Robert Shaw valve): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$125 is assessed.

18. Order No. 3223207 (Frozen waterlines during winter): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$125 is assessed.

19. Order No. 3223220 (Rock dusting in longwall on nonproducing shift): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$150 is assessed.

~2519

20. Order No. 3223445 (Accumulations in and compaction of 103 longwall headgate roadway): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$275 is assessed.

21. Order No. 3223446 (Failure to apply rock dust on in-take roadway): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$275 is assessed.

22. Order No. 3223447 (Roadway not dampened with water or calcium chloride): the allegations of unwarrantable failure are stricken.

This order is affirmed under Section 104(a) and a civil penalty of \$275 is assessed.

John J. Morris  
Administrative Law Judge

AA

FOOTNOTES START HERE

~FOOTNOTE\_ONE

1. All of the orders in these cases were issued under section 104(d)(2) of the Act. The parties further stipulated the orders were written while the (d) series was in effect.

~FOOTNOTE\_TWO

2. Post-trial Brief at 3.

~FOOTNOTE\_THREE

3. The cited regulation provides as follows:

75.1100-3 Conditions and examination of firefighting equipment.

All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

~FOOTNOTE\_FOUR

4. A valve, protected from freezing, was located near the pump that can put water into the system (Tr. 1-242).

~FOOTNOTE\_FIVE

5. See section 101(c) of the 1977 Mine Act, and 30 C.F.R. 44.13 which expressly states, "The proposed decision shall become final upon the 30th day after service thereof unless a request for hearing has been filed . . . ." [Emphasis added].

~FOOTNOTE\_SIX

6. Management felt that such an implementation would further agitate what was then already perceived as a hostile and

adversary relationship with MSHA. (Tr. 1-247, 1-267).

~FOOTNOTE\_SEVEN

7. Various methods were attempted by management to achieve compliance with 30 C.F.R. 75.1101-2(b). In this time period, the water in the line was left running. When that proved to be unsuccessful, an antifreeze solution was added to the running water. Although these measures helped, portions of the waterline still froze during the colder weather (Tr. 1-267, 1-268).

~FOOTNOTE\_EIGHT

8. Permitting the water to be left running works as long as there is an underground supply of water. After the water supply is exhausted there is a very pragmatic question of what do you do for water to put into the firefighting line and for respirable dust suppression on the mining machinery.

~FOOTNOTE\_NINE

9. This system consists of a power center (transformer) and belt-drive (electrical motor) located at crosscut No. 27. A high voltage cable extending from 1-Mine for an approximate distance of 2,000 feet supplies power to this electrical system (Tr. 1-111).

~FOOTNOTE\_TEN

10. The cited regulation provides as follows:

75.305 Weekly examinations for hazardous conditions.  
[Statutory Provisions]

In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

~FOOTNOTE\_ELEVEN

11. Mid-Continent urges that this investigation was not, as it could appear, conducted in preparation for litigation. Instead, this investigation was conducted by the Mid-Continent Safety Department in performance of its duty to ensure compliance with the 1977 Mine Act. Had this investigation revealed that the required examinations had not in fact been made, the examiner, Billington, would have been discharged (Tr. 1-143).

~FOOTNOTE\_TWELVE

12. The results of this investigation were later telephoned to Smith by Mid-Continent Manager, David A. Powell (Tr. 1-88).

~FOOTNOTE\_THIRTEEN

13. While conducting the joint search with Smith, neither Powell nor Smith (neither of whom had a day-to-day familiarity with this mine area) could discern any regular pattern or sequence from Billington's prior examination times, dates and initials (Tr. 1-244).

~FOOTNOTE\_FOURTEEN

14. Mid-Continent's brief at 20.

~FOOTNOTE\_FIFTEEN

15. Floor "heave" or "heaving" is a mining term which refers to the convergence of the mine roof and floor. Rock and/or coal bursts are incidents of sudden and large scale convergence between the roof and floor as a result of overburden pressures on the mined seam. Heaving is normally incident to deep mines such as the Dutch Creek mines of Mid-Continent.

~FOOTNOTE\_SIXTEEN

16. In making an examination from a remote location the inspector can rely on a number of things. These include 1) the smell from the gob area, 2) whistling sounds, 3) line brattice flapping, 4) flame resistant devices, 5) rattling members, 6) floor heave possibly causing buckling in the seal, 7) methane methometer and flame detector.

~FOOTNOTE\_SEVENTEEN

17. The cited regulation reads as follows:

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, 1970. 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.

~FOOTNOTE\_EIGHTEEN

18. An underground coal mine fire that occurred on December 19, 1984, in Emery County, Utah. Investigation at Wilberg revealed the fire propagated due to the lower heat tolerance of aluminum ventilation controls as contrasted to other controls such as steel or block and mortar (Tr. 2-180).

~FOOTNOTE\_NINETEEN

19. The diesel Eimco matter is discussed, infra, in connection with Order Nos. 3076185, 3223125 and 3223159.

~FOOTNOTE\_TWENTY

20. The grading of the roadway resulted in the issuance of Orders Nos. 3076185 and 3223125, infra.

~FOOTNOTE\_TWENTYONE

21. This standard reads as follows:

75.1725 Machinery and equipment; operation and maintenance

(a) Mobile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

~FOOTNOTE\_TWENTYTWO

22. Brief at 30.

~FOOTNOTE\_TWENTYTHREE

23. See the orders re accumulations, this page, et seq.

~FOOTNOTE\_TWENTYFOUR

24. The cited standard reads:

75.400 Accumulation of combustible materials  
[Statutory Provision]

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.

~FOOTNOTE\_TWENTYFIVE

25. For a discussion of the effect of ambient humidity upon calcium chloride see the discussion concerning Orders Nos. 3223445, 3223446 and 3223447.

~FOOTNOTE\_TWENTYSIX

26. Post-trial brief at 37.

~FOOTNOTE\_TWENTYSEVEN

27. Brief at 38.

~FOOTNOTE\_TWENTYEIGHT

28. The Eimco 935 was not a machine operated in by the last open crosscut (Tr. 2-341).

~FOOTNOTE\_TWENTYNINE

29. The cited regulation reads as follows:

Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.

[Statutory Provisions]

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

~FOOTNOTE\_THIRTY

30. Brief at 43.

~FOOTNOTE\_THIRTYONE

31. The cited regulation provides as follows:

75.1704 Escapeways

[Statutory Provisions]

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passage-ways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance to the underground area of the mine of surface fires, fumes, smoke and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

~FOOTNOTE\_THIRTYTWO

32. Brief at 44, 45.

~FOOTNOTE\_THIRTYTHREE

33. Webster's New Collegiate Dictionary at 595.

~FOOTNOTE\_THIRTYFOUR

34. A scrubber tank is a stainless steel water tank affixed to the machine. The engine exhaust of the machine is routed through this water tank to cool the exhaust fumes to the point where they will not present the hazard of a possible coal and/or

methane ignition (Tr. 3-338).

~FOOTNOTE\_THIRTYFIVE

35. Brief at 49.

~FOOTNOTE\_THIRTYSIX

36. The cited regulation, in its relevant part, provides as follows:

75.403 Maintenance of incombustible content of rock dust.

[Statutory Provision]

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum . . . .

~FOOTNOTE\_THIRTYSEVEN

37. The 103 mining section consists of an advancing longwall panel. Under this unique system of mining no room and pillar development is required. Instead, the mechanized machinery constituting the longwall equipment set advances directly into the virgin coal creating, by packwalls in the headgate and tailgate entries, ventilation, beltline and roadway entries as the panel advances into the virgin block of coal (Tr. 3-633).

Because the 103 longwall utilizes the former 102 longwall headgate as the 103 longwall tailgate, this "Zed" configuration, uniquely, has areas inby the working face. This inby area is a de-stress drilling area, and the stress-relief work caused the area complained of by the inspection (See, Ex. R-22).

~FOOTNOTE\_THIRTYEIGHT

38. Because of the time requirements required in the stress-relief program, actual mining is conducted on only one shift. In the present case, this shift was the C-shift or graveyard shift (approximately 2300 to 0700 hours the next calendar day) (Tr. 3-692).

~FOOTNOTE\_THIRTYNINE

39. Brief at 51.

~FOOTNOTE\_FOURTY

40. Calcium chloride looks like large chunks of salt.

~FOOTNOTE\_FOURTYONE

41. Calcium chloride is a hygroscopic chemical which absorbs water from the surrounding mine atmosphere. When applied to the mine floor, this absorbed water bonds with the floor material creating a more compact surface which is less likely to generate dust which can become airborne in ventilating currents (Tr. 3-649).

~FOOTNOTE\_FOURTYTWO

42. The Dutch Creek No. 1 Mine is located in a coal seam approximately 10 feet thick. Generally, entries in this mine are developed to a height of 8 feet. In order to take advantage of the predominately good roof conditions in this seam, the remaining coal is left on the floor rather than on the roof (Tr. 3-700).

~FOOTNOTE\_FOURTYTHREE

43. Contrary to the testimony of Inspector Gibson, Mid-Continent Coal Basin coal is not a hard coal. In fact, this coal is one of the softest in the world; under normal conditions, it is possible to crush Coal Basin with the human hand.

~FOOTNOTE\_FOURTYFOUR

44. On the date the present orders were issued, temperatures in the Coal Basin, while reaching a low of -14 degrees Fahrenheit, never exceeded a high of 16 degrees Fahrenheit (Exhibit R-11).

FOURTY~FOOTNOTE\_FIVE

45. Brief at 57.

~FOOTNOTE\_FOURTYSIX

46. The cited regulation reads as follows:

77.502 Electric equipment; examination, testing, and maintenance.

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

~FOOTNOTE\_FOURTYSEVEN

47. The Breeden House is part of the aggregate handling system which furnishes the cement material for the 103 longwall's packwalls.

~FOOTNOTE\_FOURTYEIGHT

48. Brief at 58.

~FOOTNOTE\_FOURTYNINE

49. Brief at 60.

~FOOTNOTE\_FIFTY

50. This issue arose in two In Camera Proceedings held respectively on December 1, 1988 and January 19, 1989. Due to the sensitive, proprietary and confidential evidence presented on December 1, 1988, the Presiding Judge sealed certain portions of the transcript (See order of March 22, 1989). Said evidence remains sealed subject to further order of the Presiding Judge or the Commission.

The In Camera aspect of the proceedings of January 19, 1989, was dissolved by order of the Presiding Judge on November 20, 1989.