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SOL (MSHA) V. OLD BEN COAL
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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 PROCEEDINGS
v.	Docket No. LAKE 91-15 A.C. No. 11-00590-03802
	Docket No. LAKE 91-16 A.C. No. 11-00590-03803
OLD BEN COAL COMPANY, RESPONDENT	Docket No. LAKE 91-58 A. C. No. 11-00590-03814
	Docket No. LAKE 91-59 A. C. No. 11-00590-03815
	Docket No. LAKE 91-70 A. C. No. 11-00590-03816
	Docket No. LAKE 91-109 A.C. No. 11-00590-03822
	Mine No. 26
	Docket No. LAKE 91-88 A. C. No. 11-02392-03822
	Docket No. LAKE 91-107 A. C. No. 11-02392-03824
	Mine No. 25
	Docket No. LAKE 91-57 A. C. No. 11-00589-03769
	Docket No. LAKE 91-87 A. C. No. 11-00589-03771
	Docket No. LAKE 91-99 A.C. No. 11-00589-03773
	Docket No. LAKE 91-112 A.C. No. 11-00589-03775

Docket No. LAKE 91-426
A.C. No. 11-00589-03781

Mine No. 24

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases were consolidated for purposes of hearing, and subsequent to notice, the cases were heard in St. Louis, Missouri, on October 16-17, 1991. At the hearing, Robert Stamm, James Holland, Arthur Wooten, and Mark Eslinger, testified for Petitioner; Jerry Lane Bennett, Roger Griffith, Jerry Conner, Alfred Lynch, Robert Allen McAtee, and George Dawe, testified for Respondent. The parties waived their right to submit post-hearing findings of fact and briefs, and in lieu thereof presented closing oral argument.

Docket No. LAKE 91-15

A. Citation No. 3220508

I.

On August 22, 1990, Robert Stamm an MSHA inspector asked the union escort who accompanied him on an inspection of the 12 CM2 working section to check the brakes of a battery powered vehicle (golf cart) used to transport miners to and from the working section. Stamm asked the escort to pull the brake handle and he said that there was no resistance on the handle. Stamm said that he observed that the parking brakes ". . . would not secure the vehicle for motion when parked" (Tr.16). Upon examination, he observed that the linkage for the parking brakes was not connected. He said that it did not appear that the golf cart was out of service, and no one told him that it was out of service. Also, Stamm indicated that there was nothing blocking the wheels of the golf cart. Stamm issued a Citation alleging a violation of 30 C.F.R. § 75.1725(a).

II.

Section 75.1725(a) supra provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately".

Respondent argues that section 75.1725(a) supra does not specifically require that vehicles be provided with parking brakes, and that, in either event, the vehicle in question was safe, inasmuch, as when observed by Stamm, it was parked in a crosscut that was "more or less close to being level" (Respondent's Exhibit R-A, Page 13), and was perpendicular to the ribs. Thus, Respondent argues that should the vehicle have rolled, it would have been stopped by one of the ribs.

Also, Jeffrey Lane Bennett, Respondent's safety inspector, indicated that with the exception of underpasses, the terrain of the mine is level. He indicated that there are not more than 6 or 8 underpasses where a parked vehicle can roll. In essence he opined that a vehicle parked in an area of an underpass would not roll excessively, as in each of these areas there is a 20 foot incline, a 20 foot level area, followed by another 20 foot incline. He further opined that a vehicle would not parked in such an area, as it would block the main travelway. I find Respondent's arguments without merit for the reasons that follow.

In essence, Section 75.1725(a), supra requires that equipment in "unsafe condition" be removed from service. There is no evidence in the record that the golf cart in question was not removed from service. Hence, in order to ascertain whether Section 75.1725(a) supra has been violated, it must be determined whether or not the golf cart was in an "unsafe condition".

In making this determination reference is made to the common usage of the term "safe". Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "free from" as "(a) lacking: without." "danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK. . . . " Since the parking brakes did not work due to the fact that the linkage was disconnected, the vehicle would immediately drift or roll if the operator of the vehicle would take his foot off the brake pedal when the vehicle is on an incline.

Although there was no immediate risk of injury inasmuch as the golf cart was parked in a level area, it is clear that should the golf cart be parked in an area of the mine that is not 100 percent level, it might roll by itself or be hit by another vehicle and then roll, possibly causing a ninjury to persons in the area. Hence, the golf cart being operated without parking brakes, was not free from risk, as its operation, in some

circumstances, could have led to an injury. Accordingly I find that Section 75.1725(a) supra has been violated by Respondent.

III.

According to Stamm, in essence, should the golf cart in question be parked in an area that is not level, it would be reasonably likely that a miner getting out of the vehicle would be injured by the vehicle rolling over him. Stamm stated, in essence, that, accordingly, should the parking brakes not be repaired, an injury could result with continued operation of the golf cart. Stamm said that he has read reports of investigations of accidents wherein injuries, including a fatality, have occurred when parking brakes have been inoperable in golf carts, and scoop cars. He indicated on cross-examination that, in evaluating the likelihood of an injury as a consequence of parking brakes not being operable, he was "speaking . . . in terms of possibilities". (Tr. 36)

In analyzing whether the facts herein establish that the violation was significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021

> (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

Petitioner has established a violation of Section 75.1725(a) supra as discussed above, II. infra. Also, it is clear that the violation herein i.e., the lack of an operative parking brake, did in some measure contribute to the hazard of a miner being injured by being hit or run over by the vehicle in question. However, the record fails to establish that the third element set forth in Mathies, supra i.e. a reasonable likelihood that the hazard contributed to will result in an injury, as it has not been established that there was a "reasonable likelihood that the hazard contributed to would result in an event in which there is injury", U.S. Steel Mining Co., 6 FMSHRC 1834-1836 (August 1984). In this connection I note that, when cited by a Stamm, the golf cart was parked perpendicular to the ribs in a dead-end cross-cut. Also the grade of the floor was level. Petitioner did not contradict the testimony of Bennett that in the mine in question, the floor is level except for 6 or 8 areas containing underpasses. There is no evidence that in the normal course of mining the vehicle in question would have been stopped or parked in terrain that would have allowed it to drift or roll. Hence I conclude that the violation herein was not significant and substantial.

IV.

Stamm opined that the violation herein resulted from Respondent's moderate negligence, as, had the brakes been checked before the golf was placed in operation, Respondent would have known that the brakes were not in safe operating condition. In essence, Stamm said that, in questioning management, "it did not come out" that the brakes were checked. (Tr. 20) Respondent did not rebut or impeach the testimony of Stamm in this regard, nor did it introduce in evidence the existence of any mitigating circumstances. I thus find that Respondent was negligent, in that it should have known of the lack of parking brakes and should have fixed them or taken the vehicle out of operation. Also, I find that should an injury have occurred as a result of the violation herein, it could have been of a reasonably serious nature. However taking into account the relatively level of terrain of the mine in question, I conlcude that the possibility of the vehicle rolling and causing injury was somewhat remote.

Considering the other statutory factor of Section 110(i) of the Act stipulated to by the parties, I conclude that a penalty herein of $75 warranted.

B. Citation Nos. 3220561, 3220562, 3220565

Petitioner indicated that it vacated No. 3220561, 3220562, and 3220525 on the ground that, upon review, it was determined that each of the vehicles in question, which had initially been cited in violation 75.1725(a) supra, did have a braking system. Based on Petitioner's representations, I find that the vacation of these citations is proper.

Docket Nos. LAKE 91-426, LAKE 91-59, and LAKE 91-16

A. Docket No. LAKE 91-426

I.

On February 11, 1991, James Holland an MSHA Inspector, conducted an inspection of the face of the first north entry, at Respondent's No. 24 mine. Holland indicated that he did not see any warning device after the last row of roof bolts, and that inby that point there was approximately 15 feet of unsupported roof. Holland also indicated that there were no physical barriers installed, and Respondent has not challenge this testimony. He issued a citation alleging a violation of 30 C.F.R. 75.208 which provides as follows: "Except during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support".

Roger Griffith, a safety inspector employed by Respondent accompanied Holland on February 11, 1991. He stated that as he was approaching the face, he saw a tag with a piece of reflecting tape attached to the last row of roof bolts on the right side, inby a curtain which had also been hung on the right side at the next to last row of bolts. He indicated that the height of the bolted roof was approximately 8 feet, and he observed the tag when he was approximately 6 to 10 feet away.

According to Respondent's counsel the whereabouts of specific tag in question, is not known. However, according to Griffith the words "unsupported top", the initials of an examiner, and a date had been placed on the specific tag in question, but otherwise it was the same as exhibit R-3. He also indicated that the specific tag in question had a piece of reflecting tape on it that was "somewhat similar" in size to that found on exhibit R-3. (Tr.125) However, he indicated that in the mine atmosphere a tag such as exhibit R-3, gets dirty and turns dark in color.

Griffith stated that, at the No. 24 Mine, tags such as exhibit R-3 are used to provide a warning of unsupported top or other hazardous conditions. He indicated that tags with reflective tape are "readily visible". (Tr.124) Griffith also indicated in this connection that a union walkaround who accompanied him and Holland on February 11, 1991, asked him "how can he (Holland) go ahead and issue a citation even though we had an examiner's tag hanging there" (Tr.102).

It is clear that, in the area in question, these was no physical barrier installed to impede travel beyond permanent support. Hence the issue for resolution is whether the end of permanent supports were, as required by Section 75.208 supra, "posted with a readily visible warning". "Post" as a transitive verb including its use with the suffix ed is defined in "Webster's" as follows: (1) to affix (as a paper or bill) to a post, wall, or other usual place or public notices: PLACARD . . . [signs are _____ed throughout the state] . . . " The record indicates that there was some physical evidence present which would alert a miner to the presence of unsupported roof e.g., the curtain, the last row of volts, the contrast in color between areas that were hand rock dusted and the ribs and roof in the unsupported area that was not dusted, and the presence of gob material on the floor under the unsupported roof. However, these are insufficient to comply with section 75.208 supra, which requires that a warning be affixed to some portion of mine. This language clearly contemplates the use of some device, as opposed to the reliance on evidence of the physical conditions in the mine.

Further, Section 75.208 supra mandates that the warning device, must be "readily visible". Although Griffith saw the device in question from a distance 6 to 8 feet, Holland, who has approximately 16 years experience inspecting mines, and in addition, a total of approximately 6 years experience working in mines, testified that he did not see the tag in question. There is nothing in the record to impeach the credibility of Holland, or to question the veracity of his testimony that he did not see the device. Since the device was not seen by an inspector trained to observe conditions in a mine, I conclude that it was not "readily visible". In this connection I do not place much weight on Griffith's testimony that the walkaround asked him how Holland could issue a citation "even though we had an examiner's tag hanging there" (Tr. 102). Inasmuch, as the declarant did not testify in person, his demeanor could not be observed. Hence, this hearsay testimony is inherently unreliable.

For the above reasons I conclude that the Respondent herein

did violate Section 75.208 as alleged.1

II.

Holland indicated that in his opinion the violation herein was significant and substantial. In reaching this determination the only factor he considered was that he was aware of 6 injuries including a fatality that had occurred in face areas inby unsupported roof. He opined that in the absence of a readily visible warning, a miner by accident, either in a scoop, or on foot to take a methane reading at the face, could go beyond permanent support, and thus could get seriously injured. On cross-examination, he was asked to describe the analysis he went through in concluding that the violation was significant and substantial. He answered as follows: "The condition that exists where soembody could get seriously injured before it can be corrected". (Tr.80). [sic]

I do not place much weight on the opinion of Holland, inasmuch as it was not based on the proper evaluation to be used in determinating whether the violation was significant and substantial (See Mathies, supra). The absence of either a physical barrier, or a posted readily visible warning impeding travel beyond permanent support violated section 75.208 supra, and also contributed to the hazard of a person inadvertently going under unsupported roof, and thus being subject to the risk of becoming injured from a roof fall. However, due to the presence of various clues providing notice to a miner of the end of the supported roof area and commencement of unsupported roof e.g., the last row of roof bolts, the presence of the curtain, and the contrast between rock dusted and non rock dusted areas, I conclude that it has not been established that there was a reasonable likelihood that the hazard herein contributed to by the violation would have resulted in an injury producing event (U.S. Steel, supra) According I conclude that it has not been established that the violation herein was significant and substantial. (See Mathies, supra U. S. Steel supra).

III.

The gravity of the violation herein i.e. that as a consequence thereof a person might have been inadvertently subjected to a hazard of being injured by a roof fall, and the negligence of the Respondent in committing this violation are mitigated somewhat when taking into account the fact that a warning device had been posted that was visible at least to Griffith. Also there were other physical clues present to warn a person of the demarcation between the end of the supported roof and the commencement of unsupported area. I find that a penalty of $100 is appropriate for this violation.

B. Docket No. LAKE 91-59

1. Citation No. 3538629

On November 2, 1990 Inspector Stamm conducted an inspection of in Mine No. 26 and found that a visible warning or physical barrier was not posted at the end of permanent roof supports outby the working face of the 47th south entry of the 12CM-2(007-0) working section. A cut had been extracted 17 feet inby the last row of roof bolts. The inspector issued Citation No. 3538629 alleging a violation of 30 C.F.R. 75.208.

Respondent does not contest the violation. Also taking into account the facts concerning this citation as set forth in the parties' stipulations (paragraph 9-A, Joint Exhibit 1), and the facts testified to by Stamm in a deposition taken September 25, 1991, (Exhibit R-E), I conclude that Respondent did violate section 75.208 supra.

According to Stamm, in essence, the violation is to be considered significant and substantial inasmuch as a person "may possibly" go inby the last row of bolts and thus be subject to unsupported roof (Exhibit R-E page 9). He indicated that once a person is under unsupported roof, there is a reasonable likelihood of a serious injury in the event of a roof fall.

I find that Stamm did not use the proper standard in evaluating whether the violative condition herein was significant and substantial. Consistent with my decision in Docket No. LAKE 91-46 infra A., I find the violation was not significant and substantial. Also consistent with the decision in LAKE 91-426, infra A., I find a penalty of $100 appropriate for this violation.

2. Citation No. 3538761

I.

On November 2, 1990, Arthur Wooten, an MSHA inspector, conducted an inspection at Mine No. 26, and found that a readily visible warning device or a physical barrier was not installed to impede travel beyond permanent roof support at the 53 north 0 point face area of the 12-8 working section. According to Wooten, an area of approximately 10 feet by 15 feet containing 4-6 inches of loose cap coal was unsupported. The inspector issued Citation No. 3538761 alleging a violation of 30 C.F.R. 75.208.

Respondent's does not contest this violation. Based on the testimony of Wooten, who indicated that when he examined the area in question there was no visible warning to impede travel beyond permanent roof support, I find that Respondent herein did violate section 75.208 supra.

II.

Wooten opined that the violation herein was significant and substantial. He indicated in his deposition, of September 25, 1991, in essence, that in order for a violation to be significant and substantial the violation must be one that "could cause" serious injury if it isn't corrected, people have to be in the area, and there has to be a reasonable likelihood an injury. (Exhibit R-C, Page 14). According to Wooten, the situation presented herein will cause an injury of a reasonably serious nature. He indicated that these was a possiblity that someone could go into the area of unsupported roof and thus be exposed to cap coal, and an injury of a reasonably serious nature. He indicated that there were 6 to 8 people in the area.

Jerry Conner, a safety inspector employed by Respondent, accompanied Wooten. Conner indicated that the entry in question was rock dusted 2 feet outby the last row bolts, and there was a curtain on the right side on the last bolt. On cross-examination he indicated that the purpose of rock dusting is not to warn miners of the last open crosscut but rather to seal coal from air. He also indicated that the purpose of a curtain is to blow air to the face, and that it is not used as a warning device to keep miners away from the face.

Alfred Linch, Respondent's manager of safety, indicated that prior to 1988 when section 75.208 supra was promulgated, he trained employees to recognize unsupported face by the presence of gob on the floor, and by the end of ventilation controls. He said that rock dusting is not normally done inby the last set of roof bolts. Accoringly, a clue is this provided as to where the unsupported portion of the roof begins. He said that the last definite indicator of supported roof is the last row of bolts,

and that beyond that point it is dangerous. He also indicated that miners were taught that the face is inby the last open crosscut.

The presence of significant amounts of cap coal in the unsupported roof increased the hazard of a person being seriously injured should he go under this unsupported roof. However, in evaluating whether the violation herein was significant and substantial, it must be determined whether there was a reasonably likelihood that this hazard contributed to by the violation would have resulted in an injury i.e. whether there was a reasonable likelihood that, as a consequence of the lack of a barrier or posted visible warning, that a miner would have entered the unsupported area. My determination in this regard is the same as I set forth above in Docket No. LAKE 91-426, infra A., for the reasons stated there.

Consistent with my Decision in LAKE 91-426 infra A., I find that a penalty of $100 is appropriate for the violation found herein.

C. Docket No. LAKE 91-16

The parties stipulated as follows:

> On August 31, 1990 Inspector Wolfgang Kaak conducted an inspection in Mine No. 26 and found the face of the 9th W entry of working section 12cm-8, I.D. 005, was not posted with a readily visible warning device. The last row of permanent supports, roof bolts, was about 15 feet inby the 5815 survey tag and the face was then an additional 10-12 feet without any permanent supports. The section was idle at this time but, two repairmen and one examiner were on the section. The inspector issued Citation No. 3538909 for a violation of 30 C.F.R. 75.208. (Joint Exhibit 1, Par.10)

Based on the facts set forth in paragraph 10 of the parties' stipulations (Joint Exhibit 1), and based on the fact that Respondent does not contest Citation No. 3538909, I find that Respondent did violate Section 75.208 A, supra. I find, consistent with my decision in LAKE 91-426, infra, A., and find that the violation was not significant and substantial, and that a penalty of $100 is appropriate.

Docket Nos. LAKE 91-57 (Citation Nos. 2819363, and 2819364), LAKE 91-99, LAKE 91-107, and LAKE 91-109

A. Docket No. LAKE 91-57, (Citation Nos. 2819363 and 2819364)

The parties stipulated as follows:

> On October 16, 1990, Inspector Mark Eslinger conducted an inspection in Mine No. 24 and found that a golf cart was being charged at the 12CM3 intake escapeway. Two repairmen were working on the section and Steve Vercellina, (Marcilleno) Underground mine manager, was also present on the section (sic). The golf cart was located in the 7th west entry off the 1-10 main north. The inspector issued Citation No. 2819363 for an alleged violation of 30 C.F.R. 75.1105. (Joint Exhibit 1, Par. 17)

B. Docket No. LAKE 91-99

> The parties stipulated as follows:
>
> On December 12, 1990 Inspector Robert Cross conducted an inspection in Mine No. 24 and found that battery powered golf cart No. 18 was being charged at no. 43 crosscut into the no.2 north belt drive transformer. The inspector issued Citation no. 3536795 for an alleged violation of 30 C.F.R. 75.1105.

C. Docket No. LAKE 91-109

The parties stipulated as follows: "On January 3, 1991 Inspector Michael Pike conducted an inspection on mine no. 25 and found that battery powered gofer located in proximity to "E" shaft was being charged. The inspector issued Citation No. 3537125 for an alleged violation of 30 C.F.R. 75.1105." (Joint Exhibit 1, Par. 15)

D. Docket No. LAKE 91-107

> The parties stipulated as follows:
>
> On January 3, 1991 Inspector Michael Pike conducted an inspection on mine no. 25 and found that golf cart no. 1 located at no. 26 crosscut on the 14th east travelway of the longwall no. 4 (ID 004) was being charged. The inspector of the longwall no. 3538804 for an alleged violation of 30 C.F.R. 75.1105. (Joint Exhibit 1, Par. 16)

Respondent and Petitioner further stipulated that the only issue to be decided in Docket Nos. LAKE 91-99, 91-109, 91-107 and 91-57 (Citation Nos. 2819363 and 2819364), is whether 30 C.F.R. 75.1105 is applicable, and further whether the vehicles involved in these citations were charging stations. The parties do not contest the facts that arose during the conduct of the inspection.

The parties, in addition, stipulated as follows:

> Petitioner and Respondent stipulate that Citation No. 2819363, LAKE 91-57, is representative of the cases before this court and the parties are bound by the courts decision on LAKE 91-57 for LAKE 91-99, LAKE 91-109, LAKE 91-107 and LAKE 91-57. The parties do not waive their right to appeal the courts decision on whether 30 C.F.R. 75.1105 is applicable. (Joint Exhibit 1, Par.20).

E. Citation No. 2819363 (Docket No. LAKE 91-57)

1. Introduction

Mark Eslinger, a supervisory engineer for MSHA, testified that when he observed the golf cart in question on October 16, 1990, a charger located on the golf cart and "enclosed in metal" (Tr. 218), was plugged into an outlet which was located in a crosscut off the intake escapeway. The golf cart's batteries, located under the seat of the cart, were plugged into the charger. Eslinger tested the air current, and it was revealed that air was flowing down the intake, and was not being vented directly to the return.

According to Eslinger, hydrogen gas which it was released in the charging process is "very explosive" (Tr.207). Thus, according to Eslinger, if the air in the area where batteries are being charged is not vented to the return, in the event of an electrical short, a fire could result endangering persons inby.

The mine in question has designated battery charging station where batteries, removed from equipment, are charged by chargers located at the station. Batteries that are charged at the station and the chargers at the station are larger than the chargers and batteries located on the golf cart.

Eslinger issued Citation No. 2819363 alleging a violation of 30 C.F.R. 75.1105.

2. Regulation

30 C.F.R. 75.1105, as petinent, provdes as follows:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fire-proof structures or area. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return.

3. The golf cart as a battery charging station.

In essence, according to Robert Allen McAtee, Respondent's safety manager for the Old Ben Division, and not contradicted by Eslinger, the installations referred to in the first sentence of Section 75.1105 supra are primarily permanent in nature. Hence, Respondent argues that accordingly the term "battery charging stations", is limited to those that are permanent in nature. However, there is no indication in the legislative history of Section 311(c)2 of the Federal Mine Safety and Health Act of 1977 (the 1977 Act) of any intent to limit the term "battery charging station" to only those that are permanent.

The wording of Section 311(c) of the 1977 Act is identical to that found in Section 311(c) of the Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Act"). The Report on the Committee on Labor and Public Welfare which accompanied S.2917, the Senate version of the bill that subsequently became the 1969 Act, in the section by section analysis of the bill's provisions, evidences congressional intent with regard to section 212(c)3 to ". . . reduce the possible fire hazards with accompanying inherent dangers to human life and property." (S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), reprinted in Legislative History Federal Coal Mine Health and Safety Act at 78). ("Legislative History")) Further, the explicit Congressional concern with regard to the specific hazard section 311(c) supra is to guard against is expressed as follows: "In the event a fire should occur in one of these installations the type of equipment enclosed is of such a nature that considerable smoke and fumes are emitted and therefore should be coursed directly into the return aircourse before endangering human life." (Legislative History, supra at 78).

Hence, the gravamen of congressional concern was not for the hazards encountered in permanent installations, but rather the need to vent air directly into the return from the type of equipment whose nature is such that "considerable smoke and fumes are emitted." This concern would clearly encompass the situation presented herein, i.e., a battery being charged on a mobile vehicle. According to Eslinger, such a procedure emits hydrogen, an explosive gas, in the same fashion that such gas is released when batteries are charged at a "permanent station". There is insufficient evidence in the record to permit a conclusion that the hazard of such an emission is less when batteries are charged on a vehicle, than when batteries are charged at a permanent station.

Further, the Conference Report on the 1969 Act in its section by section analysis, states with regard to Section 311(c) that it ". . . provides for fire-proof structures or areas that house certain underground equipment. It also requires that all other underground structures be of a fire-proof construction. Also, air current use to ventilate these structures or areas shall be coursed directly into the return." (Legislative History supra at 1134). Hence the expressed Congressional concern is for those structures or areas that house certain equipment. Webster's defines "house" as follows: ". . . 3: to serve as a shelter, 4: CONTAIN". Hence the common meaning of the term house does not have any connotation of permenance. Thus, I conclude that there is an absence of any Congressional intent to limit the scope of Section 311(c) to only permanent installations.

The first sentence of Section 75.1105 supra requires as pertinent, that "battery-charging stations" be housed in fire proof structures or areas. Neither the 1977 Act, nor the 1969 Act, nor the regulations set forth in volume 30 of the Code of Federal Regulations, define any of the relevant terms of section 75.1105 supra such as "battery charging stations", or "electrical installations". Hence, reliance is placed on the common meaning of these terms. Websters defines "station" as . . . 2: the place or position in which something or someone stands or is assigned to stand or remain." "Stand" is defined as: ". . . (9b) to occupy a place or location." Webster's defines "occupy" as . . . 2a: to fill up (a place or extent)." Hence the common usage of the term "station" does not include a connotation of permanence. Thus, I conclude that a golf cart, when parked, i.e., standing in a certain place and having its battery charged, is considered a "station", and as such is within the purview of the first sentence of Section 75.1105 supra.

4. The golf cart was an area enclosing an electrical installation.

The second sentence of Section 75.1105 supra requires, that "air currents used to ventilate structures or areas enclosing

electrical installations shall be coursed directly into the return."

The Senate Report, Legislative History supra at 78, in its analysis of 212(c) of the Senate bill which became Section 311(c) of the 1969 Act states as follows:

> This section provides for certain underground equipment that could cause fires if not functioning properly to be placed in fireproof structures. Air that is used to ventilate the structure and which might contain noxious fumes must be passed directly to the return air. Experience has shown that such a requirement will reduce the possible mine fire hazards with accompanying inherent dangers to human life and property. In the event a fire should occur in one of these installations the type of equipment enclosed is of such a nature that considerable smoke and fumes are emitted and therefore should be coursed directly into the return aircourse before endangering human life.

Thus, as explained in the Senate Report, Legislative History, supra, at 78, the "installations" that were of a concern to Congress are those that enclose the type of equipment that are of "such a nature that considerable smoke and fumes are emitted. . . " Hence, since hydrogen, an explosive gas, is released when batteries are hooked up to a charger on the golf cart, it is consistent with Congressional concern to hold that the smoke and fumes thus produced should be coursed directly to the return.

It next must be analyzed whether the golf cart in question, when parked for the purpose of having its batteries charged by the charger on the cart, is considered an "electrical installation" within the purview of the second sentence of Section 75.1105, supra. Reliance is placed on the common usage of the term "installation". "Installation" is defined in Webster's as follows: ". . . 2(a): something that is installed for use". "Install" is defined in Webster's as follows: ". . . 3: to set up for use or service". "Set up" is defined in Webster's as follows: ". . . 5(b): to assemble the parts of an erect position for use or for operation." Hence, once the golf cart in question is set up to be used to facilitate the charging of batteries i.e., the cart is parked and the on-board charger, is hooked-up to and charging the batteries, it is clearly an installation.

An alternative analysis, is that the second sentence of Section 75.1105, supra is to be read in connection with first sentence (See, Clinchfield Coal Co., 4 FMSHRC 465, at 467 (Judge Melick, 1982), and that the term "electrical installations" in the second sentence refers to those set out in the first sentence. Hence, air currents ventilating an area enclosing an

electrical installation i.e., a battery charging station, shall be coursed directly into the return. (See U.S. Steel, 5 FMSHRC 1577, at 1579 (Judge Broderick) (1983). Thus, since the golf cart in question was being used as a battery charging station (See E, (2) infra), the air currents in the area in which it is located shall be coursed directly to the return (Section 75.1105, supra). Since it is not contested that the air in the air currents in the area where the golf cart was parked was not being coursed to the return it is clear that section 75.1105 has been violated.

I find that a penalty of $20 is appropriate for each of the two citations in Docket No. LAKE 91-57, and for each of the violative conditions cited in Docket Nos. LAKE 91-99, LAKE 91-107, and LAKE 91-109.

Docket Nos. LAKE 91-57 (Citation No. 3538517), LAKE 91-70, (Citation No. 3220619) and LAKE 91-87 (Citation 3220799)

A. Docket No. LAKE 91-57

The parties stipulated as follows:

> On October 2, 1990 Inspector Robert Montgomery conducted an inspection in mine No. 24 and found that the oxygen content in the No. 1 West Bleeder entry from the No. 3 crosscut inby to the upper corner was less than 19.5 volume per centum. The lowest measurement 18.2 volume per centum at the No. 9 crosscut an air sample bottle was collected. There are air operated pumps in this entry. This is the active bleeders for the long wall P 16 off the North entries. The inspector issued Citation No. 3538517 for an alleged violation of 30 C.F.R. 301. (sic) (Joint Exhibit 1, Par.21)

B. Docket No. LAKE 91-87

The parties stipulated as follows:

> On November 27, 1990 Inspector Robert Cross conducted an inspection in the No. 24 Mine and found that the 1st west bleeder off the 2 main north entry was not being ventilated by a direct current of air containing not less than 19.5 per centum of oxygen. At No.6 crosscut the oxygen content measured 18.8 per centum. An air samples was collected to substantiate this citation. The inspector issued Citation No. 3220799 for an alleged violation of 30 C.F.R. 75.301. (Joint Exhibit 1, Par.22)

C. Docket No. LAKE 91-70

I.

The parties stipulated as follows:

> On September 14, 1990 Inspector Robert Stamm conducted an inspection in Mine No. 26 and found that the 16 north active longwall 2 bleeder entry was not being ventilated by a direct current of air containing not less than 19.5 per centum of oxygen. At a location 60 feet outby survey station 710 feet the oxygen content measured 18.6 per centum. The inspector issued Citation No. 3220619 for an alleged violation of 30 C.F.R. 301. (Joint Exhibit 1, Par.23)

The cited standard, 30 C.F.R. 75.301, provides in part as follows:

> All active workings shall be ventilated by a current of air containing not less than 19. volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases. . . .

Essentially, it is not contested that the various oxygen readings cited in the citations at issue, were obtained in bleeder entries which are part of the bleeder system. The readings obtained are not at issue, and the only issue for resolution is whether the area in which readings were taken i.e. within a bleeder entry is to be considered, "active workings".

The parties further stipulated as follows:

> Petitioner and Respondent stipulate that LAKE 91-87 and 91-70 are representative of all the cases involving whether 30 C.F.R. 75.301 is applicable. The parties further stipulate that the courts decision shall be applicable to LAKE 91-57, Citation No. 3538517, LAKE 91-87 and LAKE 91-70. The parties reserve the right to appeal the courts decision on whether 30 C.F.R. 75.301 is applicable.

II.

Testimony adduced by petitioner's witness Robert Stamm, and Respondent's witness Jeffrey Bennet tends to establish that, once a week, at least one of the bleeder entries is traversed by a miner in order to obtain methane readings at an evaluation point located in bleeder entry. Also, one of the bleeder entries in question contained water pumps. Eslinger indicated that one of

Respondent's pumpers had told him that he went into the entry daily to check the pumps. Thus, it is Petitioner's position that the entries in question should be considered active workings, as miners are required, on a regular basis, to traverse them in order to work. Petitioner further argues that, accordingly, if these entries are not to be considered active workings, and the quality of the air is not to be checked, then the miners traversing these entries would be subject to the hazards of exposure to inadequate oxygen or, harmful gases. Also, Petitioner argues that if miners do not go into these entries to maintain water pumps, then accumulated water might not be pumped out. Accordingly, there is a risk that water in the entries might accumulate to the point where the water would be of such a quantity as to prevent methane gas from escaping from the gob, thus creating a potentially explosive atmosphere.

The issue raised in this case has already been litigated before three of the Commission judges. In U.S. Steel Corp., 6 FMSHRC 291 (1984), Judge Koutras was presented with the issue as to whether carbon dioxide readings an excess 0.5 percent taken at a bleeder evaluation point were violative of of Section 75.301, supra. Judge Koutras, concluded that the Operator's argument was sound and logical that ". . . when read together with the other standards found in part 75, a bleeder entry is not active workings . . . . " (6 FMSHRC, supra at 307) Further, Judge Koutras found, in essence, that the fact that a certified examiner must travel to the bleeder evaluation points once a week to make an inspection, does not place these point within the purview of Section 75.301 supra. In Rochester and Pittsburgh Coal Co., 11 FMSHRC 1318 (1989), I was presented with the same issue and concluded that Judge Koutras' decision was well founded, and chose to follow it, concluding that a bleeder system is not a part of the active workings of a mine. In Rusthon Mining Co., 11 FMSHRC 1506 (1989), this same issue was presented to Judge Melick who decided to follow U.S. Steel, supra, and Rochester and Pittsburgh Coal Co., supra and found that ". . . bleeder evaluation point No. 9 here cited is not within the [active workings] of the subject mine". (Rusthon, supra at 1507).

I choose to follow my previous decision in Rochester and Pittsburgh Coal Co., supra, inasmuch as it was based on the well founded decision of Judge Koutras in U.S. Steel Corp., supra and was followed by Judge Melick in Rusthon, supra. I do not find Southern Ohio Coal Co. v. FMSHRC, (Civ. No. 90-1827, unpublished decision, August 14, 1991, 4th Cir.) cited by Petitioner to be relevant to a disposition of the issues at bar. In Southern Ohio Coal Co., supra the issue presented was whether the operator violated 30 C.F.R. 75.400 which precludes an accumulation of coal in "active workings". The Court, in Southern Ohio, supra, analyzed the evidence of record, and found that there was substantial evidence to support the finding of the Commission

that the area cited was one where miners regularly work or travel, and was thus in an "active working". In Southern Ohio, supra the Court was not presented with the specific issue herein i.e. whether a bleeder entry is to be considered within the purview of "active workings." Hence it is not relevant to a disposition of the issues presented herein.

Inasmuch as areas cited for non-compliance with section 75.301 supra, were in bleeder entries and not within active workings, Respondent herein did not violate Section 75.301 as charged. Therefore, in Docket No. LAKE 91-57, Citation No. 3538517 is to be VACATED, in Docket No. LAKE 91-70, Citation No. 3220619 is to be VACATED, and in Docket No. LAKE 91-87, Citation No. 3220799 is to be VACATED.

Docket No. LAKE 91-58 (Citation Nos. 3538568 and 3538569)

At the hearing Petitioner moved for approval of the parties' agreement to settle the issues raised by the issuance of these citations by having them amended to cite a violation of 30 C.F.R. 75.1714-3(a), and affirming the proposed penalty of $20 fo each violations cited in these citations. The motion is granted based on the representations made by counsel at the hearing on the motion. It is concluded that the parties' settlement and the penalties agreed upon are appropriate under the Act.

Docket No. LAKE 91-88

At the hearing, Petitioner indicated that Citation Nos. 3539422 and 3539428 were VACATED. Based upon the representations of counsel, I conclude that the vacation of these citations was proper, and accordingly Docket No. LAKE 91-88 is to be DISMISSED.

Docket No. LAKE 91-112

At the hearing, Petitioner indicated that the parties had agreed to settle this case by reducing the proposed penalty from $345 to $75. Based on the representations and documentation submitted at the hearing, and considering the specifics of the violation set forth in the issued citation, I conclude that the proffered settlement is appropriate under the terms of the Act. Accordingly the motion to approve settlement is GRANTED.

ORDER

It is ORDERED that Citation Nos. 3220508, 3539435, 3538629, and 3538761, be amended to reflect that the violations alleged therein were not significant and substantial. It further ORDERED Citation Nos. 3538517, 3220619, 3220799, 3539422, and 3539428 be VACATED. It is further ORDERED that Docket Nos. LAKE 91-70, LAKE 91-87, LAKE 91-88 be DISMISSED. It is further ORDERED that Citation No. 3538909 be amended to reflect the fact that the violation alleged therein was not significant and substantial. It is further ORDERED that Respondent pay $690 within 30 days of this decision as civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. I ascribe no merit to Respondent's argument that section 75.208 supra does not require certain dimensions of a warning device, nor does it require that such a device contain or be made of reflectable material. I find that the basis of the violation herein was not that the device was not of a sufficient size nor that it was not reflectable, but rather that the device that was used was not "readily visible".

2. Section 75.1105 supra contains the same language as section 311(c) of the 1977 Act

3. Section 212(c) contains language identical to that found at section 311(c) of the the 1969 Act.