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SOL (MSHA) V. L & J ENERGY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-15
	:	A. C. No. 36-07270-03526
v.	:	
	:	L & J Energy Company
L & J ENERGY COMPANY, INC., Respondent	:	
	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Laurance B. Seaman, Esq., Gates & Seaman, Clearfield, Pennsylvania, and Henry Chajet, Esq., Jackson & Kelly, Washington, DC for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary" or "Petitioner") seeking civil penalties and alleging violations by L & J Energy Company, Inc. ("L & J" or "Respondent") of volume of the Code of Federal Regulations. The orders and citations for which penalties are sought were issued by MSHA inspectors subsequent to an investigation of a rock fall at Respondent's Garmantown Mine, (No. 3 Pit), in which one miner was killed, and another was seriously injured. An Answer was duly filed, and pursuant to notice, and subsequent to discovery engaged in by the parties, the case was heard in Johnstown, Pennsylvania on May 17 - 20, 1993, and August 24 and 25, 1993. The parties filed Post Hearing Briefs and Proposed Findings of Fact on November 19, 1993.

I. FINDINGS OF FACTS

A. Highwall Development and Auger Operation

1. On February 5, 1991, L & J operated the Garmantown Mine, (No. 3 Pit) in Cambria County, Pennsylvania. This mine consisted of a surface pit area and a highwall.

2. In developing the highwall, a bulldozer removed the surface trees, grass, and ground cover. As each layer of the highwall was developed by removal of ground cover, it was scaled by the teeth on the bucket of a front-end loader.(Footnote 1) John Woods, an employee of L & J at the No. 3 Pit in February 1991 and a certified highwall examiner, examined the highwall daily for loose material during its development.

3. On December 6, 1990, 60 holes were blasted into the highwall at the No. 3 Pit. At that location, the highwall was 34-40 feet high, plus two feet of coal seam. The highwall faced west and had a slope of 15 degrees.

4. L & J Energy completed strip mining at the No. 3 Pit on January 15, 1991.

5. On January 25, C.B. Holms, Inc. ("Holms") commenced, under contract with L & J, an auger operation to remove coal from the seam at the bottom of the highwall. In this process, holes were bored into the coal seam, and coal was extracted.

6. Shad Spencer, L & J's superintendent and a certified highwall examiner, examined the highwall at least two times a day, and sometimes three times a day, between January 25 and February 4. During this period, Spencer did not observe any hazards.

7. On January 28, John DeHaas and Ronald McCracken, Pennsylvania Department of Environmental Resources ("DER") Mine Inspectors, inspected the highwall and determined that it appeared to be safe.

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1 MSHA Inspectors Charles Lauver and John Kopsic testified that the highwall did not contain any scratches or teeth marks when observed on February 6, and opined that the highwall had not been scaled. I place more weight on the testimony of John Woods, an L&J employee certified to examine highwalls, who stated that L&J developed the highwall with a bulldozer and that, in fact, the highwall was scaled with a loader bucket as it was developed layer by layer.

8. On February 4, Donald Warner, L & J's head mechanic, was at the No. 3 Pit to repair some equipment. Warner did not make an examination, but he looked at the highwall to see if he could work under it. Warner testified that there was no loose material on the pit floor or loose rocks in the highwall.

9. Doug Todd, the auger operator for Holms, and supervisor of the auger crew, inspected the highwall regularly since January 25. Todd examined it hourly between his activity of loading trucks. He looked up to the top of the highwall for 25 feet on each side of the auger. While augering, Todd continued to observe the highwall in the area immediately above where he worked for 1 to 2 minutes at a time. Todd did not observe any hazardous conditions in the highwall prior to the incident that occurred on February 5.

B. February 5, 1991

10. On February 5, Spencer examined the highwall three times between 7:00 a.m. and 12:30 p.m., looking for loose material. Spencer did not see any loose material, nor did he see any rocks on the floor of the pit. Spencer, referring to 25 feet on each side of the auger up to the top of the wall, said that he "really looked it over good" (Tr. 100, May 19, 1993).

11. Todd made an examination in the afternoon of February 5. While standing on the platform of the auger. Todd did not see any hazardous conditions, and did not see any dribbling, i.e., falling of small stone and debris, warning that a heavy fall may be imminent.

12. At approximately 4:50 p.m., two rocks fell from the highwall--one, 28 inches by 30 inches by 11 inches, struck and killed Donald Lawton, and the other struck Lawrence Fulmer, seriously injuring him. The rocks hit the men simultaneously and then some additional rocks fell--one the size of a gallon paint can, another the size of a fist, and some that were the size of gravel.

13. None "DER" inspectors or any of the MSHA inspectors who arrived on the scene that evening were able to observe the condition of the highwall due to nightfall.

C. February 6, 1991

14. On February 6, MSHA Inspector Charles Lauver arrived at the site at 7:30 a.m., and he observed loose material along the entire length and height of the highwall. He testified that there were rocks in the highwall that did not have any support. He noted cracks, one of which was 2 to 3 feet long, over the auger hole and at other areas of the highwall. According to Lauver, there was an overburden to the left of the auger area leaving an undercut 5 feet deep and 20 feet long. He stated that at some point in time this overburden would fall. He also observed mud slips in several areas. Lauver observed rocks falling for the entire length of the highwall. He said there was a "constant rain of material," consisting of rocks, dirt, and shale. (Tr. 96, May 28, 1993) Photographs were taken of some of these conditions between 10:00 a.m. and noon.

15. MSHA Inspector John Kopsic testified that there was loose material in areas of the highwall not shown in these photographs. Kopsic observed dribbling, cracks, crevices, and some rock "hanging" near the auger (Tr. 63, May 18, 1993). He also noted dribbling, and opined that half of the highwall needed scaling. Ronald Gresh, an MSHA inspector and supervisor, observed "loosened" and "fractured" areas, and "broken pieces of rock" (Tr. 108, May 19, 1993). MSHA inspector Ronald Miller observed rock, dirt and loose material along the face and sides of the highwall.

16. DER Inspector John DeHaas observed loose rocks and cracks in the highwall face, and DER Inspector Donald McCracken observed cracks. DeHaas and McCracken also observed falling rocks.

17. According to Lauver's observations, the loose material was scattered along the full length of the highwall; 30 percent of the highwall was comprised of loose material. He estimated that loose material covered 75 percent of the highwall, at a minimum. Lauver estimated that more than 100 pounds of material was sticking out on the highwall.

18. The inspectors also observed an undercut overhang. The overhang was not barricaded or dangered off. Lauver stated that if the overhang fell, rocks above it will fall out into the pit. Lauver testified that rocks which were unsupported by this overhang could likely bounce and hit a truck parked nearby.

19. Lauver, accompanied by Miller, took photographs of the pit between 10:00 a.m. and 12:00 p.m.on February 6. See Exhibits G-2a through G-2n and G-2aa through G-2nn.(Footnote 2) The photographs do not show all the loose material on the highwall.

20. According to Lauver, the photographs show unsupported rock (photographs 2aa, 2dd, circles "A" and "B"), and cracks developed behind the rocks and shale on the highwall. (Photographs 2A, circle D).

Lauver pointed out a large crack extending diagonally from left to right (Exhibits 2b, 2e, 2n, circle "J"), and loose rock (Exhibits 2, circles "M" and "N", Exhibits 2h, 2l, circle "0", circle "C", and circle "J"). He opined that photograph 2A shows non-scaled material pushed away from the highwall (circle A), and unsupported rock (circle C).

21. On February 6, 1991, issued a Section 107(a) Withdrawal Order citing an imminent danger covering the entire highwall, and also issued a Section 103(k) Order.

D. DID THE HIGHWALL DETERIORATE OVERNIGHT?

22. Respondents' witnesses were not present at the site on February 6 when it was examined and photographed by MSHA Inspectors, and observed by Pennsylvania Inspectors. However, they examined the photograph taken on February 5, (Exhibit G-2).

a. Testimony of Lay Witnesses

John Woods, who was employed by L & J on February 5, and who was certified to examine highwalls, and Todd, testified that the crack depicted was "A" in the photographs that comprise Exhibit G-2 as not present on February 5. With regard to the loose material that Lauver explained existed in the area marked "B", (Exhibit G-2), Woods and Todd opined that what is shown is not loose material.

23. Spencer testified that in his examination on February 5, he did not notice hazardous material in the area circled as "C" (Exhibit G-2).

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2 Exhibits G-2a through G-2n were enlarged for use at the continued hearing on August 24 and 25. The enlargements were admitted as Exhibits G-2aa through G-nn. Collectively, these photographs are referred to as Exhibit G-2.

24. Todd stated that this material is loose rock, but it was not present on February 5.

25. Woods stated that the material marked as "1" in "C" (Exhibit G-2) looked loose, but it was not present on February 5. Woods could not say if the gap "E" was in existence on February 5. Woods did not see any mud slip at "F". (Ex G-2) Woods opined that the material depicted at "H" (Exhibit G-2) and identified by Lauver as loose did not constitute a hazard. Woods conceded that the crack "G" was unsafe. (Ex. G-2) However, Todd explained that there was no intention to auger in that area due to the unsafe condition. He indicated that there were not any trucks or conveyor belts located under that point.

26. Todd stated that the crack depicted at "J" (Exhibit G-2) was not in existence on February 5. Also, Todd stated that the crack depicted at "K" (Exhibit G-2) was not present on February 5, and that he was certain that this crack (Exhibit G-2) was not present prior to the accident. He indicated that if the crack was present he would not have allowed miners to work until the condition was fixed or taken care of.

27. Woods opined that the rocks depicted at "L" (Exhibit G-2) were not loose as testified to by Lauver, but only were chipped. Both Woods and Todd agreed that the material depicted at "M" (Exhibit G-2) was loose rock, but maintained that this condition was not present prior to February 6.

28. Todd could not remember the existence of loose material as depicted at "N". (Exhibit G-2) Woods testified that the material depicted could be loose rock, but that he could not tell from looking at the photograph. He indicated that there were no loose rocks in the area of "N" and "O" (Exhibits G-2) when he made his examination on February 5.

29. Woods testified that those rocks marked in circle "C" noted by MSHA Inspector Ronald Miller, as being loose and looked loose, but "it wasn't there the day I inspected the high wall they were not there on February 5." (sic) (Tr. 219, May 18, 1993).

30. The undercut in G-2d "G" was in the far left side of the pit, and it was 30' to 35' from nearest piece of equipment. The auger crew never intended to mine under the overhang, and did not do so.

31. Dr. Kelvin Wu, a professional b expert testimony regarding the photographs (Exhibit G-2) engineer employed by MSHA, examined the photographs (Exhibit G-2), and opined that

loose material was depicted in 2aa, circles 1, 2, 3 and 4, which he termed unstable. He also opined that a crack was depicted in 2(g) as well as material without support depicted in 2ff.

32. Respondent's expert, Vincent Scovazzo, a professional engineer, opined that the material depicted in circles 1 and 2 in 2aa, when depicted from a different angle in 2cc appeared stable and well supported. He also opined that as depicted in 2cc there appeared to be sufficient material below the items within circle 4 to prevent these items from sliding. He indicated that he could not comment on the stability of the material within circle 3 in 2aa as the picture was hazy. However, he said that as depicted in 2ll the material appeared to be a loose rock. He also indicated that 2m depicted loose rock, and 2h showed a crack. He agreed that the pictures depicted more loose rocks than those that were circled.

E. Weather Conditions

33. In essence, the parties stipulated to accept the weather data compiled by J. Donald Krise with the exception of his data on precipitation.(Footnote 3) The data collected by Krise is based upon his contemporaneous readings of meteorological instruments located at a site 12 miles from the subject mine.

34. In summary, in the days immediately preceding January 25, 1991 and the start of auger mining in the No. 3 Pit, the temperature did not rise above the freezing mark. From January 26, 1991 to January 30, 1991, a period of freezing and thawing took place: the low temperatures were below freezing, while the high temperatures were above freezing. Then, 2 days of below-freezing temperatures on January 31, 1991 and February 1, 1991, were followed by temperatures which beginning on February 3, 1991, were consistently well above freezing.

35. The detailed temperature data compiled by J. Donald Krise, is as follows:

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3 The parties did not stipulate to be bound of Krise's data regarding precipitation. However, I accept Krise's records regarding precipitation, as they are based upon contemporaneous empirically based data. In contrast, the testimony proffered by the witnesses for both parties is not accorded much weight as the testimony was subjective, not based upon empirical data, and related to events that occurred two years prior to the hearing.

Date	Temperature	Date	Temperature
1/21	low: 6 hi: 32	1/26	low: 2 hi: 33
1/22	low: -1 hi: 22	1/27	low: 13 hi: 35
1/23	low: -1 hi: 34	1/28	low: 27 hi: 37
1/24	low: 9 hi: 26	1/29	low: 12 hi: 44
1/25	low: 0 hi: 20	1/30	low: 32 hi: 45
1/31	low: 15 hi: 32	2/4	low: 37 hi: 56
2/1	low: 13 hi: 28	2/5	low: 34 hi: 58
2/2	low: 28 hi: 46	2/6	low: 44 hi: 48
2/3	low: 37 hi: 50		

36. As compiled by Krise, the rainfall for February 5 was .01, and for February 6, up to 8:00 a.m. the rainfall was .03.

F. Expert testimony

37. The parties stipulated that in analyzing the issue of whether the conditions that were observed on February 6 had existed the day before and the testimony of the expert witnesses, Wu and Scovazzo, is to be relied on exclusively.

38. Kelvin Wu testified as an expert witness for MSHA. Wu holds a doctorate in mine engineering from the University of Wisconsin, awarded in 1971.

Wu taught mining, geology, advanced strata control, longwall mining, mine evaluation, surface mining equipment, and safety and health laws. To university undergraduates and graduate students, Dr. Wu has published articles on slope stability analysis and material instability hazards.

39. Vincent Scovazzo testified as an expert witness for respondent. Scovazzo is a professional engineer. He estimated that 25 percent of his billings involve highwall work. He has completed his course work towards his doctorate, but has not completed his dissertation.

40. Wu and Scovazzo agreed that a freeze/thaw effect could lead to a rapid deterioration of a highwall. A freeze/thaw occurs when either rain or ground water is present in the cracks and crevices of a highwall and freezing temperatures transform the liquid water to ice. As the water hardens into ice, it expands, pushing particles and rocks in the highwall away from each and away from the highwall. While the highwall remains frozen, the ice holds loosened particles and rocks in place However, once the temperatures have been above freezing long enough to melt the ice holding a rock to the highwall, the rock will fall.

41. Wu identified in Exhibit 2aa loose material which he circled 1, 2, 3 and 4. He opined that these materials were unstable and constituted a safety hazard. He opined that these conditions could not have developed in a 24 hours time period based upon his review of Krise's temperature and precipitation data. He explained that cracks and loose materials develop naturally and continuously during the mining operation. In addition, removal of the overburden and blasting can cause these conditions. He indicated, however, that although the depicted conditions "probably" could not have been produced by one day of freezing and thawing temperatures, their production was "possible" depending of how extreme the change were between thawing and freezing. (Tr. 61, August 24, 1993).

42. Wu stated that the rock that struck the miners could not have fallen without being preceded by fall of other materials. He indicated that it was possible, but not probable that the supporting materials came out only a few seconds before.

43. The inability to predict when rock or loose material is going to come down makes dealing with this kind of material uncertain and dangerous. Not all readjustment in the strata is visible on the highwall; a great deal of deterioration would not be immediately visible.

44. Dr. Wu opined that the eroded conditions were visible on the day of the accident, because the thawing in the two to three days prior to the accident impacted the highwall.

Dr. Wu testified that under such conditions, "All those loose material on the face have much higher chance to become loose." (sic) (Tr. at 89, August 24, 1993). As Wu explained, the gradual thawing of the ice in the highwall contributed to its dangerous state. "When you have water . . . it loosens anything ready to fall down. The [highwall] is already cracked and when gets in there, they expand and freeze. They push the material out a little bit, but the ice will be holding the material together. Once the ice melted, there was nothing to hold them, gravity takes over . . . [they] fall." (sic) (Tr. 89-90, August 24, 1993).

45. Wu testified that augering causes the rock strata to readjust itself continuously to reach equilibrium. As a result, these loose materials are developed. Once these materials lose support, they will fall from the face.

46. Wu described the highwall depicted in exhibits G-2 as a very "jagged" and "rugged" (Tr. 67, August 24, 1993)." He testified that even more precaution is necessary with such loose material than during normal mining operations.

47. Wu opined that, from his review of the photographs, the area had not been adequately scaled.

48. Wu testified that the highest reach of a front-end loader is twenty feet. He opined that a front-end loader could not have reached the top of a highwall in the 30 to 50 foot range for scaling purposes.

49. According to Scovazzo, the amount of precipitation recorded in Krise's weather logs would have had a negligible effect on highwall erosion. Only "heavy" rain would have substantially added to the erosion caused by thawing. (Tr. at 166, August 24, 1993).

50. Scovazzo also agreed that, in general, it was probable that a highwall which was 75 percent covered with loose materials, did not develop that condition in 24 hours.

51. According to Scovazzo "[f]or a highwall to deteriorate quickly, you would have to have a weather event that would thaw the highwall after deep freezing". (Tr. 148, August 24, 1993). He opined that two or three days of high temperature are needed to significantly thaw the highwall. He testified that the night of February 5, 1991, was a very warm night which could have caused dramatic thawing.

52. According to Scovazzo, for the deterioration of the highwall to have occurred between February 5, and February 6, the highwall would have to have been partially frozen followed by a increase in temperature above freezing. He explained that for overnight deterioration to have occurred, the highwall had to have been partially frozen on February 5, 1992, along with thawing after the accident and before the photographs were taken.

53. According to Scovazzo, the whether conditions could have caused the deterioration between February 5, and February 6. He explained that prior to February 3, there was a period of freezing and thawing. Between January 21 and January 27, since temperatures were below freezing, the highwall was deeply frozen. After January 28 and before February 3, since daytime temperatures were about freezing, but nighttime temperatures were below freezing, a thaw occurred that extended only a few inches into the highwall, but whatever melted was refrozen at night. He said that commencing February 3, the daily high and low temperatures were above freezing during the day and night. He said that during that time the few inches of thaw did not refreeze and the highwall continued to thaw. Scovazzo opined that by February 5, the partially frozen wall had thawed approximately a few inches to a foot depending upon how much ground water was delivered to the face, the amount of rainfall, the amount of sun on the face, and the roughness of the surface of the face. He explained that if material sticks out of the face it thaws faster. He said that the night of February 5, was warm and as a result there was a deeper thaw i.e., to a greater depth of the highwall. He said that all these conditions led him to the conclusion that possibly during the night of February 5, there was enough of a thaw to explain the difference between the observations of the highwall on February 5, and the observations on February 6, of the highwall by the MSHA inspectors. In reaching this conclusion, Scovazzo, also took into account Krise's notation for the date of February 6, as follows: "snow 99% gone." (Exhibit G-22) Scovazzo concluded, based upon this notation, that there had been no substantial ground thaw until February 6, and therefore there could have been a substantial thaw the night of February 5. He said that, in general, snow thaws easier than the ice in a highwall, as snow is usually only a few inches deep whereas ice penetrates a highwall to a greater depth. He opined that contributing to the thaw, the night of February 5 was the constant drizzle in the evening. However, he said that the effect on the thawing of the amount of precipitation reported by Krise is insignificant.

54. According to Scovazzo, since the temperature was above freezing from February 3, until February 7, significant thawing occurred in that period.

55. Scovazzo opined that on February 5, the wall was partially frozen. He said that it takes a long time for a thaw to penetrate and unfreeze the wall. Hence, a deep thaw is needed to cause deterioration.

G. Ground Control Plan

56. The ground control plan in effect for the No. 3 Pit at the time of the accident states as follows: "Any loose material observed is taken down. If unable to remove loose material, the area next to the highwall is barricaded to protect the workmen." (Exhibit G-32, p. 2).

H. Training and Examinations

57. C.B. Holms, Inc., ("Holms") had performed auger mining at the Garmantown Mine for both the current and former owners of L & J, during the four years prior to the accident at issue.

58. Holms'employees who were in the No. 3 Pit on the day of the accident were Don Lawton, an auger miner with 16 years experience; Doug Todd, a coal auger operator with 14 years experience and the son-in-law of Lawton; Larry Fulmer, an auger miner with 14 to 15 years experience; Alan Cessna, an auger miner employed on a part-time basis by Holms during the prior two years; and Gary Pershing, who was working his first day with Holms.

59. Todd told Lauver that he did not have a card authorizing him to perform pre-shift examinations. Lauver testified that Todd admitted, "no he did not [perform exams]; because he did not have the certification for it." (Tr. 149, May 17, 1993). Lauver testified that Todd told him that he depended on the company to perform the examinations. id.

60. The Holms auger crew worked eight to eleven hour days during auger operations. The crew with the exception of Cessna, worked in the No. 3 Pit for at least five consecutive days prior to the accident, that is, on January 25, 28, 29, 30, 31, and February 1, 1991. Holms and its employees had performed auger mining at the L & J Garmantown Mine for at least 4 years prior to the day of the accident.

61. Lauver reviewed Respondents' record books for records of hazard training. According to Lauver, both Spencer and Woods stated that they were aware of the requirements of hazard training.

62. Spencer admitted that he knew MSHA's training requirements, but "I assumed they [the auger employees] had their training." (Tr. at 101, May 19, 1993).

63. None of the auger crew members had received valid MSHA refresher training and the new auger crew member had no training. According to Todd, the auger crew knew that they needed training, but Lawton instructed them to wait until after the job was finished.

64. Spencer did not record his examinations, because he did not know the results were to be recorded. However, he told Inspector Lauver that he had inspected the highwall three times before 12:30 p.m. on February 5, 1991, and found it to be safe.

I. Citations and Orders

65. Lauver issued imminent danger Order No. 3490035, under Section 107(a) of the Mine Safety and Health Act ("the Act") and accompanying Citation No. 3490036, under Section 104(a) of the Act. He issued the order based on the dangerous condition of the highwall at the No. 3 Pit on February 6, 1991. He issued the citation for violations of 30 C.F.R. 77.1005.

66. Inspector issued Citation No. 2892100, under Section 104(a) of the Act, on February 13, 1991, citing a violation of 30 C.F.R. 77.1000. He issued this citation for the operator's failure to follow the ground control plan.

67. Lauver issued Citation No. 3490202, under Section 104(a) supra, on February 13, 1991 citing a violation of 30 C.F.R. 77.1000-1. He issued the citation for the operator's failure to note hazardous conditions on the highwall during its pre-shift inspection.

68. Lauver issued Citation No. 3490201, under Section 104(d)(1) supra on February 13, 1991 for violations of 30 C.F.R. 48.31(a). He issued the citation for the operator's failur to provide hazard training to the employee of C.B. Holms.

69. Miller issued Citation No. 3486001, under Section 104(a) supra, on February 13, 1991 for violations of 30 C.F.R. 77.1000-1. He issued the citation for failure to file ground control plan with MSHA showing auger mining taking place. Lauver issued Citation No. 3490203, under Section 104(a) supra,

on February 13, 1991, for violations of 30 C.F.R. 77.1501(a). He issued the citation for a lack of records showing examination of the highwall for a distance of 25 feet where augering was taking place.

70. Lauver issued Citation No. 3490204, under Section 104(a) supra, on February 13, 1991, for violations of 30 C.F.R. 77.1501(b). He issued the citation for a lack of records showing frequent examinations of the highwall during periods of freezing and thawing.

71. Douglas C. Shimmel, a licensed CPA prepared a pro forma review of L & J's financial statements, based on L & J's cash receipts and distributions. He did not review the actual bills, nor did he determine if there statements given to him by L & J employees were accurate nor did he test L & J internal control.

J. L & J ability to continue in business

72. L & J Energy has assets of over $1,600,000.00 in mining equipment. These assets have risen by $200,000.00 in the past two years.

73. The pro forma statement prepared by Shimmel shows, as of December 31, 1992, current liabilities of $417,812.00, and current assets of $89,408. Also shown is net income of $161,063.00, and net cash provided by operating activities of $366,435.00.

74. L & J showed total income on its IRS return for 1992 of $687,421.00 and $595,696.00 for 1991.

75. L & J had sales of nearly 2 million dollars in 1992. L & J's sales increased by $100,000.00 from 1991 to 1992.

76. L & J incurred notes payable of $195,000.00 in 1992.

77. L & J incurred nearly $400,000.00 of loans to purchase new equipment in 1992.

78. L & J has at least two affiliates - Cloe Mining and Hepburne Mining - owned by shareholder Robert Spencer. Respondent has provided no information on the financial condition of these companies.

79. L & J is owned by one shareholder, Robert Spencer. Respondent supplied no information on the financial status of Spencer and has not established that it will be a personal hardship for Spencer to pay a civil penalty.

80. Robert Spencer received $300,000.00 in distributions in 1991, and $260,000.00 in distributions in 1992. These distributions are used to pay the former shareholder for L & J.

81. According to Shimmel of the reclamation liabilities of L & J are taken to account, along with current liabilities, current liabilities would exceed assets by $1,028,422.00(Footnote 4)

II. DISCUSSION

A. Order No. 3490035

On February 6, 1991, MSHA Inspector Charles Lauver issued a withdrawal order under Section 107(a) of the Act. This withdrawal order prohibited persons from entering L & J Energy No. 3 Pit due to an imminent danger posed by erosion of the highwall.

No witness seriously contests the state of the highwall on this date.(Footnote 5) All the witnesses who saw the highwall of February 6 - the MSHA inspectors and the Pennsylvania DER inspectors - said that loose rocks covered the highwall, cracks and "slips" ran throughout the highwall, and an unbarricaded overhang existed in the highwall. The testimony of MSHA

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4 According to William E. Maines, a professional engineer, who prepared an estimate of reclamation liability, (Respondent's Exhibit No. 4) as of December 31, 1992, some reclamation costs are incurred when mining starts. However, the costs that he calculated were based upon the reclamation costs to all Respondent's mines, assuming they would be shut down. However, as of December 31, 1992, only at the Garmantown No. 2 was mining completed, Respondents other mines, including an active pit at Garmantown No. 2 were still considered active. Hence, it has not been established that the figures set forth by Maines for reclamation, are obligations in full for L & J in the category of current liabilities as there is no proof that the full amount of the reclamation or indeed of any specific amount is to be satisfied within the next year of December 31, 1992.

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5 As counsel for MSHA stated in the conference call, the imminent danger order was issued for February 6, 1991. All other citations concern the state of the highwall prior to the accident on February 5, 1991.

Inspectors Lauver, Miller, and Kopsic that they saw rocks and stones falling from the highwall on that date was uncontradicted. Lauver's, Miller's and Kopsic's testimony that on February 6, 1993, the entire highwall face was covered with loose materials, and that 75 percent of the highwall face on February 6, 1993 was covered by loose rocks is uncontradicted.

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

As the Commission has recently stated:

> [A]n inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger.

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statue is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. [Citation omitted.] Wyoming Fuel Co., 14 FMSHRC 1282, 1291.

The conditions observed on February 6 constituted an imminent danger to persons entering the pit. Rocks and stones were falling from the highwall. Loose materials covered the highwall. Inspector Lauver had Inspector Miller watch the wall while he entered the pit to make sure rocks did not fall on him, and Lauver stayed at least 15 feet away from the highwall. The day before, falling rocks had already killed one miner, and seriously injured a second miner. I find that the threat of serious injury was clear at the time this order was issued. Accordingly, it is concluded Lauver did not abuse his discretion, and the withdrawal order under Section 107(a) was properly issued.

B. Citation Numbers 3490036, 2892100, 3490202, 3490203

Citation No. 3490036 alleges a violation of 30 C.F.R. 105(a) which, as pertinent, requires that hazardous areas of highwall shall be scaled before work is performed. Citation No. 2892100 alleges a violation of 30 C.F.R. 77.1000 in that the operator failed to follow at its ground control plan ("Plan"). The plan requires the operator to remove loose material, or to barricade the area next to the highwall if unable to remove loose material. Citation No. 3490202 alleges a violation of 30 C.F.R. 77.1713 which, in essence, requires the examination of th highwall for hazardous conditions. Section 77.1713, supra, further provides that any hazardous condition noted shall be reported and corrected. Citation No. 3490203 alleges a violation of 30 C.F.R. 77.1501, which, as pertinent, requires the inspection of a highwall 25 feet on both sides of each the drilling site, at least once a shift, and the removal of loose material. Hence, in deciding whether these violations have been established, it must first be evaluated whether, on February 5, 1991, the highwall contained a hazardous area or loose material.

In essence, the testimony of MSHA and DER inspectors that on February 6, 1991, there were numerous loose materials on the highwall, materials were falling from the highwall, and the

highwall contained cracks and mud slips, was not contradicted or impeached.(Footnote 6) Specifically, Lauver estimated that loose material
covered, at a minimum, 75 percent of the highwall. He estimated that more than an 100 pounds of material was sticking out of the highwall. I conclude, based upon this uncontradicted testimony that on the morning of February 6, the highwall contained loose material, and was hazardous.

In order for Citation Numbers 3490036, 2892100, 34906202, 3490203 to be sustained, it must be initially determined whether it is more likely than not that these conditions existed the previous day. In analyzing this issue, pursuant to the parties' stipulation, I rely exclusively on an analysis of the opinions proffered by Wu and Scovazzo.

1. Freeze/Thaw Effect

Both Wu and Scovazzo agreed, in essence, that hazardous conditions are created by a freeze/thaw effect. Essentially, they explained that as result of a freeze the water present in the cracks and crevices of a highwall is transformed to ice. As the water changes into ice, it expands, and rocks in the highwall are pushed away from each other, and from the highwall. While the highwall remains frozen, the ice holds these particles and rocks in place. However, once the temperatures have been above freezing long enough melt the ice holding the rocks to the highwall, the rocks then lose their support and will fall. Wu and Scovazzo also agreed that 2 to 3 days of temperatures above freezing would be unnecessary to cause rapid deterioration of a highwall that had been previously been frozen. They also agreed that there is no linear relationship between changes in temperatures from below to above freezing, and changes in the conditions of a highwall.

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6 None of Respondent's witnesses observed the conditions of the highwall on February 6. Although Respondent's witnesses Scovazzo, Todd and Woods, opined that, in essence some of the materials depicted in the photographs (Exhibit G2) were not hazardous or loose, it is significant to note that Scovazzo conceded that circle, "3" in photograph Exhibits 2ll, and 2mm depicts loose rock, and Exhibit 2h depicts a crack. He also admitted that the pictures contain more loose rock than those that are circled. Todd recognized the existence of cracks, and opined that the material circled as "C" was loose rock. In the same fashion, Woods indicated that the item depicted as "1" within circle "C" looked loose. Both Todd and Woods conceded that the material depicted as "M" looked loose.

2. Scovazzo's Analysis

In essence, according to Scovazzo, based on the weather data recorded by Krise, it is probable that the conditions observed on February 6 had developed overnight. In this connection Scovazzo noted the period between January 21 and January 27, in which the temperature remained below freezing, followed by a five day period between January 28 and February 2 when the temperature fluctuated between above and below freezing. He opined that by February 5, the highwall had only thawed from a few inches to a foot depending upon exposure to sun and the roughness of the surface. He said that the night of February 5 was "very warm" (Tr. 162, August 24, 1993) which could have caused a dramatic thaw on the highwall. He noted that by the morning of February 6, the temperatures had been above freezing for at least 3 days.

In reaching his conclusion that there was no substantial thaw on the highwall until February 6, Scovazzo took into account the following notation by Krise relating to February 6: "snow 99 percent gone." (Ex G-22). Scovazzo indicated that, in general, if loose material covered 75 percent of a highwall it is probable that these conditions developed in 24 hours. However, he indicated that, assuming the observers were truthful regarding the lack of any hazardous conditions February 5, on the highwall at issue, he could not say that it was not probable that these conditions developed in 24 hours.

3. Wu's Analysis

Wu explained that cracks in rocks develop naturally, and are revealed when the highwall is developed. He also said that exposure to weather elements causes deterioration of materials on the highwall. Also, with the development of a highwall, additional cracks are developed as a consequences of the auger mining which causes the strata to readjust itself. Wu also said that it impossible to predict when a loose rock will fall out of the highwall. None of this testimony has been impeached or contradicted, and I accept it.

Wu opined that a 2 to 3 day thaw made visible erosion that had previously occurred. In essence, he further opined that the conditions depicted in Exhibit 2 possibly developed in one day, depending upon how extreme the change was between a thaw and freeze, but that it was not probable. In this connection, Wu reviewed the weather data recorded by Krise. He opined that the data did not indicate a sudden frost or dramatic rise in temperatures prior to February 6.

4. Evaluation of the Experts' Analyses

Scovazzo's opinion that the conditions observed on February 6 developed overnight, is predicated, inter alia, upon the presence of a significant thaw resulting from a 2 to 3 days of high temperatures prior to February 6, "a very warm" night on February 5, (Tr. 162, August 24, 1993) and a notation by Krise on February 6 as follows: "snow 99% gone." (Ex. G-22) This latter notation led him to conclude that there was no substantial thaw until February 6. However, Krises' records do not indicate how much snow had melted during the day of February 2, or on February 3, 4 and 5 all of which days the temperatures were above freezing.(Footnote 7) Thus, in the absence of such data, Scovazzo's reliance upon the notation of February 6 that the snow was 99 percent gone, to establish that a significant thaw had occurred overnight on February 5 is not well founded. Thus the probative weight of his conclusions are diminished. Further, the weather data does not specifically, convincingly, establish any dramatic change in the 24 hours preceding February 6. Indeed, on February 5, the temperature remained above freezing, and fluctuated between 34 and 58 degrees. Also, Krises' weather data does not indicate any dramatic rainfall on February 5. The measured rainfall of .01 inches was described by Scovazzo as having an insignificant effect on the highwall conditions.(Footnote 8)

Since Scovazzo's testimony has some diminished probative value, I assign more weight to the analysis and opinions of Wu.

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7 On February 5 the temperature had reached an high of 58 degrees. However, the day before it had reached 56 degrees, and the day before that it was 50 degrees. Also, Krises' data indicated that although in the 24 hour period of February 2, the low was 28 degrees, at 8:00 a.m. the temperature was 33 degrees and it reached a high of 46 degrees at 6:20 p.m. At 11:03 p.m. the temperature was 38 degrees. The temperatures on February 3, 4 and 5 were all above freezing. Thus, by the morning of February 5 the temperature had been above freezing for at least two 24 hour periods, i.e. February 3, and 4. In addition, it is likely the thaw had extended back to 8:00 a.m., February 2.

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8 In this connection, I accord considerable weight to the precipitation data recorded by Krise, as it is based upon contemporaneous measurements. I accord not much probative value to the subjective recollection of various witnesses of the quality or quantity of rainfall that occurred more than two years prior to their testimony.

5. The physical condition of the highwall on February 5.

The testimony of the inspectors that, on February 6, at a minimum, loose materials covered 75 percent of the highwall, was not contradicted or impeached. The photographs in evidence (Exhibit G-2) do not depict all of the loose material. Scovazzo agreed that the two of the items noted by Wu in the photographs depict loose rock. He also recognized a crack. In the same connection, Todd recognized the existence of loose material in the area circled "C". Woods indicated that the area marked "1" in circle "C" looked loose. Both Woods and Todd recognized loose rock in area marked "M" in the photographs. Also recognized were cracks. Todd and Woods both maintained to indicated that the loose rocks and cracks that they saw depicted on the photographs were not in existence on February 5.

Based upon all the above, I conclude that it is more likely than not, that at least some of the hazardous and loose material observed on the highwall on February 6 were in existence and evident the day before on February 5.

6. Citation Number 3490036 (violation Section 77.1005(a) supra Citation Number 2892100 (violation of Section 77.1000 supra). (Footnote 9)

I accept the testimony of Respondents' witnesses, based upon observations of their demeanor, that the highwall had been scaled as it was being developed. Essentially, it appears to be the position of Respondent that the highwall had been scaled when needed, and that scaling was not required if no loose or hazardous materials were observed in the days prior to accident. In this connection, it is Respondent's position that the highwall was stable prior to the accident. Inasmuch, as I have concluded that, prior to the fall of the rock at issue on February 5, the highwall did contain loose and hazardous materials, and since there is no evidence that these materials had been scaled, or that the area in question had been barricaded, I conclude that Respondent herein did violate it's ground control plan, Section 77.1000 supra, and Section 77.1005(a) supra.

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9 Section 77.1000 supra, provides, in essence, that the operator shall follow its Ground Control Plan ("Plan"). Respondent's Plan provides, as pertinent, that any loose observed material is to be taken down. If it is unable to remove loose material the area next to the highwall is to be barricaded.

a. Significant and Substantial

The Commission has set forth the elements required to establish a significant and substantial violation in Cement Division, National Gypsum Co., 3 FMSHRC 822, (April, 1981). 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." Id. at 825. 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 mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed 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)).

Some rocks fell from the highwall at issue on February 5, 1991, killing one miner and permanently disabling a second miner. These injuries occurred as result of loose material falling from the highwall. An auger crew worked eight hours a day underneath this highwall. If the area had been adequately scaled, such loose material would have been removed in the scaling process. If the area had been barricaded, no miner would have been standing below the highwall when loose materials fell. The failure to scale the highwall left loose materials, cracks and other unstable features on the highwall. The failure to barricade allowed persons to work near these unstable features. The violation allowed the exposure of miners to the discrete

safety hazard of falling materials. Miners were exposed to these hazards for an entire working shift. Since a fatal accident occurred, I conclude that the reasonable likelihood of an injury from these falling materials, and a resulting serious injury have been demonstrated.

For essentially the same reasons, the violation of the ground control plan is also to be found to be significant and substantial.

7. Citation No. 3490202 (violation of Section 77.1713(a))

Section 77.1713(a) requires that a certified person inspect a surface coal mine daily, and that hazardous conditions be reported and corrected as a result of this inspection.

John Woods, a machine operator, was the certified examiner for L & J. He was the only certified person examining the mine, as no certified person worked for C.B. Holms. Woods had the responsibility to report hazardous violations at this highwall, and to correct them. Woods and Spencer testified that they examined the area in question.

The credible evidence established that hazardous loose unconsolidated materials existed on the highwall on the morning when Woods made his examination (II(B), infra). Woods did not note these hazardous conditions in the examination book, and did not have them corrected. Instead, his entry in the examination book states the highwall was "OK". Therefore, the operator violated Section 17.1713.

Significant and Substantial

Essentially for the reasons set forth above (II(B)(b)(a) infra)), I conclude that the violation was significant and substantial. Specifically, I find that failure to note and correct the loose materials contributed to the hazards caused by presence of these materials in an area where persons were permitted to work, and in the ordinary course of mining would continue to work.

8. Citation Numbers 3490203 (violation of Section 77.1501(a) and Citation 3490204 (violation of Section 77.1501(b)).

Lauver issued Citation Number 3490203 alleging a violation of Section 77.1501(a) supra, which requires that a certified person shall inspect a surface coal mine for an distance of 25

feet on both sides of each drilling site, at least once during each coal producing shift, and all loose material shall be removed, and the results recorded.

Woods testified that he made an examination of the highwall on February 5. He was not certain of the time of the day when he made his inspection. He said that in his opinion the condition of the highwall was safe, and he did not see any dangerous loose material, or cracks. Woods said that he recorded the examination in the "job book." (Tr. 208, May 18, 1993).

Spencer testified that he examined the highwall "at least two times, sometimes three times, maybe even more than that." (Tr. 95, May 19, 1993). He indicated that on February 5, he examined the highwall where the accident occurred at least three times. He said that his examination would have been from 7:00 a.m. to 12:30 p.m. He said that he did not observe loose material or rocks, and did not record his examination.

As set forth above, (II(B) infra)), I have found that it was more likely than not that the hazardous conditions observed on February 6 existed on February 5. I also have found these should have been noted in an examination. Also, as discussed above, II(B) infra, the weather records show a period of thawing and freezing for a week prior to February 5, 1991. Section 77.1501(b) supra requires in essence that a certified person "frequently" inspect the face of the highwall in a period of freezing and thawing. Neither Woods nor Spencer testified to any examination made on the basis of the thawing and freezing that occurred a week prior to February 5, 1991. Nor was any such examination entered and recorded during this time period.

For these reasons, I conclude that Respondent did violate Section 77.1501(a) and Section 77.1501(b).

9. Citation No. 38406001.

Citation No. 3846001 alleges a violation of 30 C.F.R. 77.1001-1 which requires that an operator shall file revision to its ground control plan. The last ground control plan that the operator filed with MSHA did not indicate any auger mining taking place at the No. 3 Pit at issue. There is no evidence that any revised plan was filed with MSHA. I, therefore, conclude that Respondent did violate Section 77.1000-1 as alleged.

10. Order No. 38490201

None of the auger crew who had been employed by Holms prior to February 5, had received any hazard training within the immediate preceding 12 month period. Gary Pershing, who had started to work for Holms on February 5, was spoken to only by Todd, who was not an MSHA certified trainer, for about 15 to 20 minutes, and was told to watch the highwall and specific equipment. Pershing did not receive any training from any MSHA certified trainer. Lauver issued an order alleging a violation of 30 C.F.R. 48.31. Section 48.31(a) provides, as pertinent, as follows: "Operators shall provide to those miners, as defined in 48.22(a)(2). (Definition of miner) of this subpart B, a training program, before such miners commence their work duties." The training program includes hazard recognition and avoidance.

The obligation of an operator to train under Section 48.31 supra, pertains to the limited class of miners "as defined in Section 48.22(a)(2)." Section 48.22(a)(2) provides, as pertinent, that the term "miner", for purposes of Section 48.31 supra means a person working in a surface mine ". . . excluding a person covered under paragraph (a)(1) of this section . . . ." Hence, the obligation of an operator to train a miner under Section 48.31 excludes the class of persons covered under paragraph (a)(1) of Section 48.22. Section 48.22(a)(1), after stating that a "miner" means "for purposes of Section 48.22 through Section 48.30" a person working in a surface mine who is engaged in the extraction and production process provides as follows "short-term specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process . . . may in lieu of subsequent training for each new employment, receive-training under Section 48.31 (Hazard training.)" Since all members of the auger crew were working in a surface mine, and were engaged in the extraction and production process, they fell within the meaning of the term "miner" as forth in Section 48.22(a)(1), for purposes of training as provided in Section 48.23-48.30. As such, they were "covered" under paragraph (a)(1) of Section 48.22 and hence, pursuant to Section 48.22(a)(2), were excluded from the class of miners for whom Section 48.31 hazard training is required to be provided by operator.

Petitioner argues, in essence, that since the auger members crew were short-term specialized contractors, they were "eligible" for hazard training under Section 48.31. However, applying the clear language of Section 48.22, since these individuals were engaged in the extraction and production process, they were within the class of miners to whom, training should be provided in Section 48.23-48.30, but they "may in lieu

of subsequent training for each new employment receive retraining under hazard training." (Emphasis added.) As such, an option is provided for these individuals, to "receive" training under Section 48.31 "in lieu of" training under Section 48.23-48.30. There is no obligation for operators to train these persons under Section 48.31. Hence, since the auger crew members were not in the class of miners to whom L & J was required under Section 48.31 to train regarding hazards, L & J did not violate Section 48.31, and accordingly Order No. 3490201 shall be dismissed.

11. Penalty

1. The effect of a penalty on the L & J's ability to continue in business.

Douglas Shimmel, a licensed, CPA, prepared a review of L & Js financial statements based on L & Js cash receipts, and distributions. This report is not an audit, and it is not based upon a review of L & Js actual bills. Nor did Shimmel probe the accuracy of statements provided him by L & J employees, nor did he test L & Js internal control. Shimmel indicated that, in general his report is substantially less in scope than an examination in accordance with generally accepted accounting standards.

Shimmel noted that, as of December 1992, the difference between current liabilities and current assess was $328,000.00. He said that this constituted an increase over the difference that had resulted in 1991. This led him to conclude that the company may be unable to continue as a going concern.

Shimmel indicated that in 1992 the net cash flow from operating expenses was $366,435.00. He was concerned that this amount does not reflect the decreasing working capital based on the difference between current liabilities and current asset which is based in part, on a increase in accounts payable in 1992, compared to 1991, and a correspondent decrease in accounts receivable in those years. (Footnote 10)

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10 According to Shimmel, L & J's financial condition would be even worse if the liability for land reclamation is taken into account, and included its current liabilities. I do not consider this obligation to be a part of L & J financial picture. According to William Maines, a professional engineer who prepared an estimate of reclamation liability, (Exhibit R4), some reclamation cost are incurred when mining starts. The costs that he calculated were based on the cost to all of L & Js mines, assuming that they would be shut down. As of December 31, 1992,

In general, the operator bears the burden of establishing that payment of civil penalty would adversely effect its ability to continue in business (See, Sellerburg Stone Company v. FMSHRC 736 F2d 1147, 1153, n.14 (7th Cir. 1984) citing, Buffalo Mining Company, 2 IBMA 226, 247-48-251-252 (1973)). In the instant case, it significant to note that the evidence adduced by L & J consists of a report prepared by its' accountant. The report is not an audit, and does not comply with general accounting principles. Further, this report indicates that income and net profit have risen in the last two years. Also, the tax returns filed by L & J show a profit. Further, L & J's revenue is in excess of a million dollars. In view of these facts, I conclude that it has not been established that the imposition of penalties would significantly impair L & J ability to continue in business.

2. Other Factors set forth in Section 110(i) of the Act.

I find that the violations herein contributed to a fatality, and to serious injuries suffered by another miner. Hence, I conclude that the violations were of a very high level of gravity. Also, above I have concluded that it is more likely than not that some of the conditions that were observed as being hazardous on February 6, had existed on February 5. Hence, they should have been observed and reported. As such, I conclude that Respondent's negligence was of more than a moderate degree. Taking all of these factors into account, I conclude that the

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only at the Garmantown No. 2 Mine was mining completed. L & J's other mines, were considered active. Hence, it has not been established that the figures set forth by Maines for reclamation are obligations in full in the category of a current liability, as there is not adequate evidence of the full amount of a reclamation, or indeed any specific amount, to be satisfied within the year after December 31, 1992.

following penalties for the following citations and orders are appropriate: Number 3490036-$50,000; Number 2892100-$25,000; Number 3486001-$500; Number 3490202-$11,000; Number 3490203-$500; and 3490204-$500.(Footnote 11)

ORDER

It is ORDERED as follows:

1. Order No. 3490035 be sustained.

2. Order No. 3490201 be dismissed.

3. Respondent shall within 30 days of this Decision, pay a civil penalty of $87,500.00.

Avram Weisberger
Administrative Law Judge

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11 The facts supporting these violations, Citation Numbers 3490203 and 3490204, are the same as those that support the violations cited in Citation Numbers 3490036 and 2892100. The high level of gravity, and Respondents negligence have been considered by me in finding a significant penalty to be appropriate for the violations set forth in citation numbers 3490036 and 2892100. Accordingly, I find that, to avoid imposing a double penalty for essentially the same violations, it is appropriate to set a substantially lower penalty for the violations alleged in citation numbers 3490203 and 3490204.