

JUNE 1988

COMMISSION DECISIONS

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JUNE

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. VA 87-27. (Judge Broderick, April 22, 1988)

Secretary of Labor, MSHA v. Missouri Rock, Inc., Docket No. CENT 87-65-M. (Judge Broderick, April 29, 1988)

Secretary of Labor, on behalf of Jerry Dale Aleshire and others v. Westmoreland Coal Company, Docket No. WEVA 84-344-D. (Judge Broderick, May 10, 1988)

No cases were filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 6, 1988

RIVCO DREDGING CORPORATION	:	
	:	
	:	
v.	:	Docket Nos. KENT 88-23-R
	:	88-24-R
	:	88-25-R
	:	88-26-R
SECRETARY OF LABOR,	:	88-27-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Ford, Chairman; Doyle, Lastowka and Nelson,
Commissioners

AMENDED ORDER

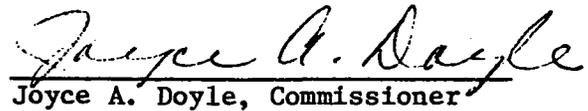
BY THE COMMISSION:

These five cases had been the subject of a Petition for Discretionary Review filed by RIVCO Dredging Corporation on May 9, 1988. On May 25, 1988, the Secretary filed a response to the same five docket numbers. On May 26, 1988 this Commission issued an order remanding the cases.

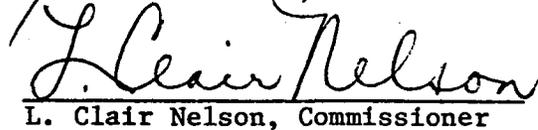
Upon remand, the administrative law judge noted that Docket No. KENT 88-27-R had become moot because the Secretary had previously vacated the citation associated with that docket; Citation No. 2985270. The judge submitted an inquiry to the Commission asking if his dismissal of KENT 88-27-R was appropriate.

In view of the previous vacation of Citation No. 2985270, inclusion of KENT 88-27-R in the Commission's remand order was an administrative error. Therefore the May 26, 1988 Order is amended to delete KENT 88-27-R from the matters to be considered by the judge.


Ford B. Ford, Chairman


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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conditions constituted a violation of 30 C.F.R. § 75.200, in that the roof was not adequately supported to protect persons from falls. 2/ The inspector also found that the violation resulted from Quinland's unwarrantable failure to comply with section 75.200. Accordingly, he cited the violation in a withdrawal order issued pursuant to section 104(d)(1) of the Act. 3/ Quinland abated the violation by installing

2/ Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

3/ Section 104(d)(1) of the Mine Act states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the

approximately 20 roof support posts in the entry.

Subsequently, the Secretary proposed a civil penalty for the violation of section 75.200 and Quinland requested a hearing, denying that it had violated the standard and denying, in the alternative, that it was guilty of an unwarrantable failure to comply in the event a violation should be found. Following an evidentiary hearing, the judge issued a decision in which he found a violation of section 75.200 but made no finding as to whether the violation resulted from Quinland's unwarrantable failure to comply with the standard. 8 FMSHRC 1175, 1178 (ALJ). Reviewing this decision, we concluded that the judge erred in failing to consider Quinland's challenge to the unwarrantable failure finding associated with the violation of section 75.200, and we remanded the matter to the judge. 9 FMSHRC at 1619-23.

In his decision on remand, the judge briefly reviewed the meaning of the phrase "unwarrantable failure." He noted the discussions of unwarrantable failure in the pertinent legislative history and in United States Steel Corp., 6 FMSHRC 1423 (June 1984). The judge opined that whether the "legislative history definition" of unwarrantable failure or the United States Steel explanation of unwarrantable failure was applied, Quinland unwarrantably failed to comply with the standard. 9 FMSHRC at 2160. The judge found that the roof conditions were highly dangerous and were known or should have been known to mine management prior to the inspector's issuance of the order. Id. The judge also found that the mine foreman was aware that the roof control plan required broken timbers to be replaced and that some timbers had not been replaced. 9 FMSHRC at 2160. The judge stated, "the ... evidence shows that the violative roof condition was known by [Quinland] or should have been known by [Quinland] before [the violation was cited], and the failure to correct this condition was due to an unwarrantable failure to comply with [section] 75.200." Id.

The judge issued his decision on December 10, 1987. On December 11, 1987, the Commission issued decisions in two cases addressing in detail the proper interpretation of the term "unwarrantable failure" as used in section 104(d)(1) of the Mine Act. Based upon the ordinary meaning of the term, the purpose of unwarrantable failure sanctions under the Mine Act, the legislative history, and judicial precedent, we held that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). On review, Quinland notes that in analyzing the issue of unwarrantable failure, the judge did not apply the aggravated conduct standard enunciated in these subsequently issued decisions. Further, Quinland asserts that in failing to comply with section 75.200, it was "guilty of no more than ordinary negligence." Q. Br. 6. We do not agree.

Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

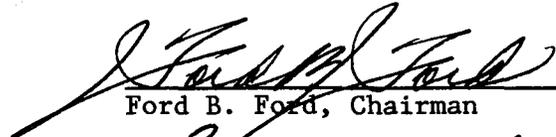
Even though the judge did not literally anticipate and apply the aggravated conduct standard of unwarrantable failure enunciated in Emery, his treatment of the question of unwarrantable failure in this case is in accord substantively with that decision. The judge relied upon the statement in the legislative history that unwarrantable failure to comply means "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Senate Committee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id. at 1602. The judge also relied on United States Steel, supra, 6 FMSHRC at 1437, wherein we stated that unwarrantable failure may be proved by showing that a violative condition or practice resulted from an operator's "indifference, willful intent or serious lack of reasonable care."

In concluding in Emery that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence," we looked to the same legislative history. 9 FMSHRC at 2002. We further noted that in Zeigler Coal Co., 7 IBMA 280, 295-96 (March 1977), the Interior Board of Mine Operations Appeals had interpreted unwarrantable failure to mean the failure to abate conditions or practices the operator "knew or should have known existed or which it failed to abate because of [a lack of] due diligence, or because of indifference or a lack of reasonable care" and that in drafting the Mine Act, the Senate Committee report cited Zeigler with approval. Emery, supra, 9 FMSHRC at 2002 (citing S. Rep. 181, 95th Cong., 1st Sess. at 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978)). We concluded that the terms used in the legislative history and in Zeigler, including the formulation used by the judge in this case, in large measure describe aggravated forms of operator conduct constituting more than ordinary negligence. 9 FMSHRC at 2003-04. Thus, we hold that the judge's approach to resolving the unwarrantable failure issue is sufficiently congruent with the subsequently announced "aggravated conduct" test to allow us to proceed to an examination of the evidence supporting the judge's finding.

The next question, therefore, is whether substantial evidence supports the judge's finding that the violation of section 75.200 was the result of Quinland's unwarrantable failure. Applying the principles enunciated in Emery to the case at hand, we hold that it does. Substantial evidence reveals that the violation was the result of Quinland's serious lack of reasonable care. The conditions indicating that the roof was not adequately supported were extensive and visually obvious. The judge credited the inspector's testimony that, in addition to the broken posts that had not been replaced and were lying on the floor of the entry, there was a large roof fall near the intersection of the entry and the crosscut, there were cracks in the roof running from the intersection to and over the seal, and one side of the seal was being crushed by the weight of the roof. 8 FMSHRC at 1178. We have accepted these findings previously. 9 FMSHRC at 1618.

The mine foreman testified without dispute that the mine had a history of bad roof conditions similar to those involved in this violation. Tr. 124; 9 FMSHRC at 1618. In addition, the judge concluded that the roof conditions were highly dangerous, and we agree. 9 FMSHRC at 2160. Further, Quinland itself acknowledges that the roof conditions existed "for a considerable length of time and were repeatedly observed by ... the operator." Q. Br. 7. Given the extensive and obvious nature of the conditions, the history of similar roof conditions, and Quinland's admitted knowledge of the conditions, we find that Quinland's failure to adequately support the roof was the result of more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from Quinland's unwarrantable failure. 4/

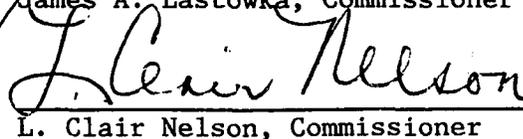
One final aspect of the case requires comment. In his decision the judge affirmed his "previous assessment of a civil penalty for \$800" for the violation. 9 FMSHRC at 2160. The Secretary correctly notes that the civil penalty previously assessed by the judge was \$850, not \$800. S. Br. 8 n.3; 8 FMSHRC at 1180. The Secretary requests that we correct that inadvertent error. Quinland has not objected. Accordingly, we affirm the judge's unwarrantable failure finding for the violation of section 75.200, and we amend the penalty assessment to \$850.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

4/ Quinland also asserts that prior to October 11, 1984, the conditions were "repeatedly observed" by MSHA's inspectors but not cited as a violation of section 75.200. Quinland argues that MSHA's failure to previously cite a violation is "compelling evidence that [Quinland's] conduct [was] not negligent." Q. Br. 11. Our review of the record does not reveal that MSHA's inspectors previously observed the conditions that were cited as a violation on the date at issue.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 3, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-40-M
Petitioner	:	A. C. No. 23-00708-05502
v.	:	
	:	Meramec Aggregates, Inc.
MERAMEC AGGREGATES, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On December 11, 1987, the operator's request for a hearing was received by this Commission. Commission rules require a proposal for a penalty to be filed within 45 days of the date the Secretary receives a timely notice of contest. 29 C.F.R. § 2700.27. The Solicitor failed to file a penalty petition. Therefore, on March 17, 1988, an order was issued directing the Solicitor to show cause why this case should not be dismissed. The order was mailed to the Solicitor by certified mail, return receipt requested, and the file contains the receipt card from the Solicitor.

The file indicates that on April 27 my law clerk spoke to the Solicitor, Mr. Charles Mangum, who stated he would file the penalty petition or a response to the Show Cause Order on April 28. But he did not do so. The Commission does not have the resources to keep reminding Solicitors to do what the Act and regulations require.

Due to the Solicitor's failure to file a penalty petition and to comply with the show cause order, this case must be and is hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 6 1988

RUSHTON MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 88-99-R
: Citation No. 2883649; 12/8/87
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Rushton Mine
ADMINISTRATION (MSHA), : Mine ID 36-00856
Respondent :
:

DECISION

Appearances: Joseph Yuhas, Esq., Joseph T. Kosek, Esq., Rushton Mining Company, Ebensburg, Pennsylvania, for the Contestant;
B. Anne Gwynn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

On December 21, 1987, Rushton Mining Company (Contestant) filed a Notice of Contest contesting Citation No. 2883649 which had been issued on December 8, 1987. The Secretary (Respondent) filed its Answer on January 11, 1988, along with a Motion for Continuance. On January 21, 1988, a Prehearing Order was issued directing the Parties to inform the undersigned on or before February 1, 1988, if the Notice Contest will be withdrawn in view of the Commission's decision in Secretary v. Quinland Coals, Inc., 9 FMSHRC 1614 (Sept. 1987). It further directed the Parties, if the Notice of Contest will not be withdrawn, to confer on or before February 1, 1988, to attempt to settle this matter, and, in the alternative, to stipulate as to facts and issues concerning which there is no agreement, and complete discovery on or before February 1, 1988. On February 2, 1988, Respondent filed a Motion for Relief to File Interrogatories. On February 8, 1988, in a telephone conference call initiated by the undersigned, with attorneys for both Parties, Contestant indicated it did not have any objection to Respondent's Motion for Relief to File Interrogatories. The Attorneys indicated that they would be available the week of February 22, for trial of this matter.

Pursuant to notice, the case was heard on February 24, 1988, in Hollidaysburg, Pennsylvania. Donald J. Klemick and Albert G. Gobert testified for the Respondent. Raymond J. Roeder, Horace C. Pysher, Jerome F. Hewitt, and Chester Switala testified for the Contestant.

Contestant filed its Proposed Findings of Fact and Conclusions of Law and Brief on April 20, 1988. The Respondent filed its Post Trial Findings of Fact, Conclusions of Law and Memorandum on April 25, 1988. Contestant filed a Reply Brief on April 29, 1988. Respondent did not file any Reply Brief.

Regulation

30 C.F.R. § 75.1704-2(a) provides as follows:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with § 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts. (Emphasis added.)

Citation

Citation 2883649 contains the following language:

The designated intake escapeway from the 2N-3 002 section to the intake shaft escape facility was not located to follow the safest, direct practical route. The escapeway was designated outby from the section to station 7737, through crosscuts to station 7792, then inby to the shaft a distance of about 2100 feet. The safest, direct practical route would be from the section traveling in a direct route to the shaft of about 500 feet.

Stipulations

At the hearing the following stipulations were entered into:

1. This Administrative Law Judge has jurisdiction over this proceeding. Both the Rushton Mine and Rushton Mining Company are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. Pennsylvania Mines Corporation is the parent corporation of Rushton Mining Company. Rushton Mining Company operates one mine, Rushton Mine.

3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Contestant at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

4. The assessment of a civil penalty in this proceeding will not affect Contestant's ability to continue in business.

5. The annual production of Rushton Mine is six hundred seventy-six thousand two hundred and thirty-two tons.

6. The annual production of the Company is one million three hundred and eighty-one thousand three hundred and ten tons.

7. The Rushton Mine employs approximately two hundred and fifty-seven miners.

8. The Contestant demonstrated good faith in the abatement of the citation.

9. Rushton Mine was assessed two hundred sixty-nine violations over five hundred and eighty-three inspection days during the twenty-four months preceding the issuance of the subject citation.

10. The Parties stipulate to the authenticity of their exhibits, but not to their relevance nor the truth of the matters asserted therein. (Tr. 5-6.)

Findings of Fact and Discussion

I.

Based upon the Parties' stipulations, I conclude that I have jurisdiction to hear and decide this case, and that the Contestant is subject to the provisions of the Federal Mine Safety and Health Act of 1977 and regulations promulgated thereunder.

II.

Contestant at the 2N-3 section of its Rushton Mine designated an escapeway, hereinafter called the Rushton escapeway, to serve miners working in rooms 11 through 15. This escapeway runs in a northeasterly direction, makes a 90 degree turn to go in a northwest direction, makes a 90 degree turn to go in a southwest direction, makes a 90 degree turn to go in a northwest direction, and makes a 90 degree turn to go in a southwest direction to the No. 2 shaft which is the nearest shaft for exiting from the 2N-3 Section. The length of this escapeway is approximately 1700 feet. According to 40 C.F.R. § 75.1704-2(a), escapeways shall follow ". . . the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners." (Emphasis added.) Inasmuch as this escapeway heads in a northeasterly direction for 12 crosscuts turns left, and then subsequently returns in a southwesterly direction, parallel to the direction in which it started, and runs for approximately 15 crosscuts to the mine opening at shaft No. 2, it clearly can not be found to be a "direct" route. To find otherwise would violate the clear meaning of the word "direct" as defined in Webster's New Collegiate Dictionary, (1979 editions) as: "1a: proceeding from one point to another in time or space without deviation or interruption: straight b: proceeding by the shortest way . . . "

As such, it must be found that Contestant herein violated section 75.1704-2(a), supra.

III

Contestant, in abatement, upon consultation with MSHA, designated the MSHA escapeway to be the escapeway for the 2N-3 Section. The MSHA escapeway runs for approximately 500 feet to the No. 2 shaft, and contains only one jog and this jog is less than 90 degrees. The MSHA escapeway has signs and was not noted to have any problems with its roof or floor.

In essence, Contestant maintains that the Rushton escapeway is the safest route to the nearest mine opening. The Rushton escapeway is located in an intake entry. In contrast, the MSHA escapeway depends for air upon leakage in a hole around a door located in the escapeway. The volume of air entering the MSHA escapeway, through the closed door, was measured by Donald J.

Klemick, a MSHA Coal Mine Inspector, at approximately 1100 cubic feet. Klemick and Raymond G. Roeder, a professional engineer and Contestant's Mine Manager, disagreed as to whether the 1100 cubic feet a minute measured was enough air for the escapeway. However, although the Rushton escapeway would clearly have more air, I find that the MSHA escapeway satisfies the requirement of 30 C.F.R. § 75.1707, inasmuch as it is ventilated with intake air.

Roeder and Horace C. Pysher, Contestant's Section Foreman and Safety Inspector Trainer, at the date the Citation was issued, testified, in essence, that in the event the door in the MSHA escapeway would be left open as the result of miners leaving in haste, this would have a substantial impact upon two other sections of the mine that depend upon the intake air from shaft No. 2. Klemick and Pysher explained that with the door in the MSHA escapeway open, there will be much less resistance to intake air from the No. 2 shaft which is in very close proximity and which would reduce the flow to the other two sections. However, neither Klemick nor Pysher nor any other witness stated with specificity the quantity of air that will be lost to the other sections as a consequence of a door being left open in the MSHA escapeway. I thus find that there was no basis to conclude that, with the MSHA escapeway door left open in an emergency, there would be either a substantial or significant reduction of air in other sections.

Respondent's witnesses, including miners Jerome F. Hewitt and Chester Switala, the UMW Mine Safety Committee Chairman and Mine UMW Safety Committeemen respectively, testified, in essence, that in all Contestant's other escapeways, miners are trained to escape in an outby direction. Thus, in their opinion, confusion would result at the MSHA escapeway which requires miners to escape in an inby direction. In their opinion, this problem was further exacerbated by the fact that miners are not assigned to 2N-3 section on a regular basis, and are sent there only when work is not feasible in their original sections. I find that the record is devoid of any empirical data to support this opinion testimony and accordingly find it to be speculative.

Roeder indicated that the MSHA escapeway is unsafe as it is routed through the working sections 11 to 15, which contain various equipment and where there is the potential for a fire. He thus opined that a miner would have to go through the smoke to get to the escapeway. In contrast, Roeder indicated that with the Rushton escapeway one would enter the air intake entry and thus escape from the smoke. However, as brought out in cross-examination, it is clear that a miner working in a room in this

section would similarly have to traverse any working rooms that are positioned between his location and the Rushton escapeway, in order to enter the Rushton escapeway. It thus would appear that the same hazards of using the MSHA escapeway would apply equally to the use of the Rushton escapeway.

In addition, Roeder indicated that the Rushton escapeway is the shortest of all the escapeways at Contestant's mine and that Contestant has never been cited for the length of its escapeways, including those that are over 10,000 feet. Also, Pysher has noted that due to the proximity of the No. 2 shaft, the door in the MSHA escapeway would be difficult to open while carrying a stretcher, due to the pressure on the door. He also opined that the 6 inch pipe placed below the roof, which is 5 feet above the floor, would unduly impede the progress of a stretcher-bearer. Also, Switala asserted that the Rushton escapeway provides more alternative avenues of escape.

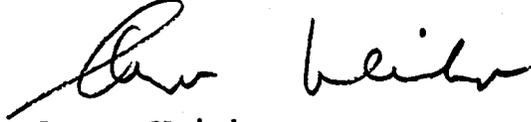
I conclude that the Rushton escapeway was violative of section 75.1704-2(a), as it was not a direct route to the shaft. In the event a hazard necessitating escape from the section, it is clear that an indirect route containing three 90 degree jogs and doubling back on itself, is a greater impediment to a speedy exit from a dangerous situation as opposed to the MSHA escapeway, which is direct and less than one third of the distance of the Rushton escapeway. As such, it must also be considered to be the "safest" within the purview of section 1704-2(a), supra.

IV.

Klemick testified that the use of the Rushton escapeway, as it is longer than the MSHA one, could result in a fatality by a miner being exposed to smoke or could result in falls occasioned by the rush to leave a dangerous situation. However, in essence, he indicated that in the absence of specific information, as to a specific hazard, it would be difficult for him to tell what would occur if one would have to use the Rushton escapeway. As such, I must find that the Respondent has not met its burden in establishing that the violation herein is to be considered significant and substantial (see Mathies Coal Co. 6 FMSHRC 1 (January 1984)).

ORDER

Citation No. 2883649, dated December 8, 1987, is modified in that it is found to be not significant and substantial. In all other aspects it is affirmed.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 8 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-189-D
ON BEHALF OF ORVILLE SPARKS,	:	
Complainant	:	BARB CD 87-18
v.	:	
	:	No. 10 Mine
SANDY FORK MINING COMPANY,	:	
	:	

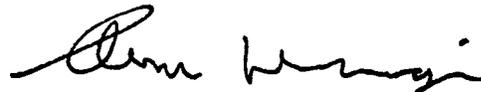
ORDER OF DISMISSAL

Before: Judge Weisberger

This matter is before the Administrative Law Judge upon the Parties' Joint Motion to Approve Settlement and Petitioner's Motion to Approve Settlement and Motion of Dismiss.

Upon consideration of the stipulation of the Parties and the Motions filed herein, the Administrative Law Judge, being fully advised, finds that the Settlement between the Parties should be approved and the case should be dismissed.

It is therefore ORDERED that the Respondent comply with the terms of the Settlement which have not already been carried out and that the case herein is DISMISSED.



Avram Weisberger
Administrative Law Judge

Distribution:

G. Elaine Smith, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B201, Nashville, TN 37215 (Certified Mail)

Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, P. O. Box 360, Hazard, KY 41701 (Certified Mail)

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 10 1988

BETHENERGY MINES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 88-107-R
	:	Order No. 2878578; 12/8/87
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Cambria Slope Mine No. 33
ADMINISTRATION (MSHA),	:	Mine ID 36-00840
Respondent	:	
	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, Pennsylvania.

Before: Judge Weisberger

Statement of the Case

In this proceeding, BethEnergy Mines, Inc., (Contestant) seeks to contest a section 104(d)(2) Order issued on December 9, 1987. The Notice of Contest was filed on January 4, 1988, and the Answer of the Secretary (Respondent) was filed on January 25, 1988. Pursuant to notice, the case was heard in Hollidaysburg, Pennsylvania, on February 25, 1988. Samuel J. Brunatti and Joseph D. Hadden, Jr. testified for Respondent. William H. Radebach and John Gallick testified for Petitioner.

Contestant filed its Brief on April 21, 1988 and the Respondent filed its Findings of Fact and Conclusions of Law on April 25, 1988.

Stipulations

The Parties stipulated the following facts as set forth in Contestant's Prehearing Memorandum:

1. The Cambria Slope Mine No. 33 is owned and operated by BethEnergy.

2. The Administrative Law Judge has jurisdiction over this proceeding; BethEnergy and Mine No. 33 are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801 et seq.

3. The annual production of Mine 33 is approximately 1.7 million tons. The operator's annual production is approximately 6 million tons.

4. The authenticity of the exhibits at hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.

5. The subject order was properly served by a duly authorized representative of the Secretary of Labor upon agents of BethEnergy and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statement asserted therein. (Respondent's Prehearing Memorandum P. 2-3, Tr. 9-10.)

6. That no clean intervening inspection had occurred since the issuance of the June 25, 1985, section 104(d) Order on which the section 104(d)(2) Order was based. (This stipulation is contained in Contestant's Letter of March 1, 1988.)

Regulatory Provision

30 C.F.R. § 75.316 provides as follows:

"A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months."

Approved Ventilation Plan

Page 7 of the approved plan as pertinent provides as follows:

* * *

In addition to the other information required to be shown on the map, the following shall also be shown:

* * *

2. All stopping, regulators, overcasts, undercasts, air-lock and man doors.

Revision No. 29 approved August 24, 1987, provides as pertinent as follows:

Construction of Regulators

"Regulators are constructed of concrete blocks or steel or a combination of both."

Order No. 2878578

Order No. 2878578 issued on December 8, 1987, provides as follows:

The approved ventilation and methane and dust control plan was not being complied with in the 1 West C prime area of the mine in that an intake regulator constructed of brattice cloth was placed across the 1 West left side intake entry just inby the junction of the No. 7 entry of left. The operator has no approval to construct air intake regulators at this location. The operator was previously notified that prior to constructing intake regulators prior approval must be obtained from the District Manager. The operator's approved plan states regulators will be constructed of concrete blocks or steel or a combination of both, not canvas. This area is examined each week by a certified person.

Findings of Fact and Conclusions of Law

Based upon the stipulation of the Parties, I conclude that Contestant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.F.C § 801 et seq., and that I have jurisdiction over this proceeding.

I.

William H. Radebach, who was responsible for all the underground work at Respondent's C prime seam, testified, in essence, that sometime in September of 1987, there was too much air going up the No. 4 intake entry. Accordingly, he installed a curtain with an opening of approximately 2 feet by 3 feet in the upper right hand corner in order to decrease the amount of air going up this entry. The ventilation plan in affect, when the curtain was installed, and when it was observed by MSHA Inspector Samuel J. Brunatti, on December 9, 1987, did not indicate any regulator, door, or check curtain at the site where Radebach installed the curtain in question.

It is Contestant's position, as testified by Radebach, that the curtain in question was installed only as a temporary measure pending approval of permanent stoppings in entry No. 4, which had been submitted to MSHA for approval on October 29, 1987. John Gallick, the Director of Safety for Respondent's Pennsylvania Division, testified, in essence, that temporary curtain checks are usually installed at the discretion of the foreman, as there are always daily adjustments being made. Essentially he indicated that subsequent to the installation of temporary curtains, submissions are provided to MSHA at the next six month ventilation plan review. On cross-examination, Brunatti indicated that he agreed that temporary canvas curtains in the work face can be moved in the course of the day without prior approval, and that if a regulator would have to be repaired a temporary curtain could be installed without prior approval of MSHA.

The ventilation plan for Respondent, as indicated in Government Exhibit 2, required all regulators to be shown on the Ventilation Plan Map. The plan does not contain any definition of the term regulator nor is such a term defined in the regulations. The only definition in the record of the term regulator consists of the uncontradicted testimony of Brunatti and Joseph D. Hadden, Jr., MSHA's District Chief of Ventilation. Brunatti indicated that a brattice curtain or check redirects air from one entry to another, whereas a regulator is used to control the amount of air going through it by its opening and closing. (Tr. 24) In similar fashion, Hadden stated that a regulator provides an artificial resistance in an air course, (Tr. 127), and is designed to provide uniform distribution of air in sections (Tr. 139). Radebach also indicated that among other devices canvas checks are used to regulate air (Tr. 181). Also the MSHA Training Manual, Government Exhibit 8, indicates that a regulator can be made by tacking down one corner of a check curtain.

Accordingly, I find that the check curtain in question, installed with one corner down in order to decrease the flow of air in the No. 4 entry, was a regulator. Inasmuch as the curtain in question was placed at a position that was not approved for the placement of a regulator in the ventilation plan that was in effect, I find that there was a violation of the ventilation plan and hence of section 75.316, supra.

In reaching my decision, I did not place much weight upon Respondent's argument that the check curtain in question was only temporary, and that temporary curtains do not have to be shown on a ventilation plan. Gallick's testimony is to the effect that, in general, temporary checks are installed at the discretion of the foreman (Tr. 242), and thus are not required to be noted in a ventilation plan. I find that Brunatti's testimony clarifies that temporary curtains can be moved and installed on a regular basis when they are utilized at the working face where coal is actually being mined (Tr. 23, 57). He also indicated that temporary curtains could be installed at the site of a regulator if the latter is being repaired (Tr. 82, 87). In contrast, the curtain in question was installed approximately 5,000 feet from the working face. Also, there is a doubt as to whether the instant canvas curtain was only temporary. I note that Radebach indicated, on cross-examination, that it was intended to leave the curtain in question in place "forever" if necessary or until MSHA had approved his plan for a permanent stopping. (Tr. 203)

II.

Brunatti also found the canvas curtain in question to be violative of a provision of the plan, Government Exhibit 4, which is headed "construction of regulators" and which provides that "Regulators are constructed of concrete blocks or steel or a combination of both." Radebach testified that MSHA employee Alex O'Rourke, upon reviewing Contestant's proposals concerning construction of regulators, indicated, in essence, that MSHA's concern was directed to the regulators used to control the return air on working sections. (Tr. 183) Gallick indicated when he met with O'Rourke, pursuant to a MSHA's request to present language concerning the construction of regulators, there was no discussion with regard to temporary regulators and the examples used at the discussion related to split regulators. He said that it was not contemplated that the language in Government Exhibit 4 was to include temporary regulators. However, for the reasons I set forth above, (infra I.), I have concluded that the curtain in question was a regulator. As such, the unqualified language of

the plan, as evidenced by Government Exhibit 4, required it to be constructed of either concrete blocks or steel or both. Inasmuch as the curtain in question was constructed of canvas it violated the approved ventilation plan.

III.

It is the position of the Respondent, that the violation herein was significant and substantial. Respondent's witnesses indicated that the installation of the curtain in question, with only an approximately 2 feet by 3 feet opening, along with the fact that the other entries in the section are closed off, could have the effect of decreasing the air in the gob area to the point where there would be insufficient air to vent the methane there. In this connection, reference is made to testimony that Contestant's mine produces the most methane in the State of Pennsylvania. Also, Respondent cites testimony to the effect that the curtain herein, due to its canvas construction, is susceptible of becoming dislodged or knocked down in a rib roll or roof fall. It thus is argued that should it be dislodged it would have the effect of reducing the air available to ventilate the gob area between No. 2 West and No. 1 West Sections.

I conclude that the hazard of an accumulation of methane from the gob area, is contributed to by the installation of the curtain herein. However, I find that there was insufficient evidence to conclude that there is a "reasonable likelihood that the hazard contributed to will result in injury." (Mathies Coal Company 6 FMSHRC 1, 3-4 (January 1984); (See also, Texas Gulf, Inc. 10 FMSHRC (Slip. op. April 20, 1988))). I note, in this connection, that the Respondent has failed to introduce any evidence as to either the specific amount of methane in the gob area, or any measurement of air flow subsequent to the installation of the curtain in question. The only evidence with regard to methane, consists of Brunatti's statements, on cross-examination, that, based on an auto tester when he was in the area in question, he concluded that the methane was not in excess of one percent. He did not indicate the specific measurement of the methane. In addition, any likelihood of an explosion is minimized by the fact that on the date in question, mining was no longer being performed in the No. 1 West Main Section. I thus conclude that the violation herein was not significant and substantial (see Mathies Coal Company, supra).

IV.

Respondent's position, that the violation herein was caused by Contestant's "unwarrantable failure," appears to be predicated upon the opinion of Brunatti that, in essence, the installation of the curtain in question, was a device identical to that requested by Respondent in its letter of October 29, 1987, and not accepted by MSHA on November 19, 1987, (Government Exhibit 5).

Also cited by Respondent is the testimony of Radeback agreeing that the regulators in use in No. 1 West Section on December 9, did not meet the terms of Government Exhibit 4, which sets forth the construction requirements of regulators (Tr. 200). Respondent avers that accordingly contestant installed the curtain in question knowing it did not comport with Government Exhibit 4. In addition, Respondent argues that Contestant's witnesses acknowledged that the ventilation plan does not contain any provisions permitting the installation or erection of such a temporary curtain.

In the recent case of Emery Mining Corporation 9 FMSHRC 1997 (December 1987), the Commission held that "unwarrantable failure," is more than ordinary negligence and requires "aggravated conduct." I find the testimony of Contestant's witnesses to be credible and I conclude that they acted in good faith, although in error, in interpreting the ventilation plan in question as not requiring prior approval by MSHA of the installation of temporary curtains, such as the one in question. Accordingly, I find that Contestant's violation of the section 316, supra, and the ventilation plan was not as a result of its aggravated conduct. Further, I find the testimony of Contestant's witnesses to be credible and find that they acted in good faith in interpreting the ventilation plan herein as not requiring a temporary curtain regulator to be constructed of either concrete block or steel as set forth in Government Exhibit 4. Accordingly, I conclude that Contestant's action herein did not constitute an unwarrantable failure.

ORDER

It is ORDERED that Citation No. 2878578 issued on December 9, 1987, be modified to a section 104(a) Order and to reflect that it is not significant and substantial and is not caused by Contestant's unwarrantable failure. In all other respects the Citation is affirmed.



Avram Weisberger
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll, P.C., 600 Grant Avenue,
75th Floor, Pittsburgh, PA 15219 (Certified Mail)

Howard K. Agran, Esq., Office of the Solicitor, U. S. Department
of Labor, Room 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19104 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 13 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-95-M
Petitioner : A.C. No. 24-01804-05502
 :
v. : Garrick Gravel
 :
GARRICK GRAVEL INCORPORATED, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance was made on Respondent's behalf.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent with violation of three safety regulations promulgated under Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty in the amount of \$119 for each of the three violations in the total amount of \$357. The Respondent filed a timely appeal admitting the violations alleged in the three citations but contesting the amount of the proposed penalties.

After notice to the parties by certified mail as to time and place of hearing, a hearing was held in the above-captioned case on May 10, 1988. The Secretary was represented by Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor. No one appeared on behalf of Respondent.

The Secretary's request that the record be opened to present documentary and oral evidence was granted.

Richard C. Ferreira, a mine inspector employed by MSHA, inspected the Garrick Gravel plant on September 15, 1987. As a result of that inspection he issued Citation Nos. 2649490, 2649491 and 2649492 to the Respondent, Garrick Gravel Incorporated, for the violation of 30 C.F.R. § 56.12001, § 56.12025 and § 56.12013.

At the hearing oral and documentary evidence was presented fully justifying the \$119 proposed civil penalty for each of the violations. The mine inspector testified that at no time during his September 1987 inspection was anyone told that no penalties would be assessed on the violations.

On May 16, 1988 the undersigned Judge issued a notice of intention to issue a decision to uphold the violations and assess the Secretary's proposed civil penalty of \$119 for each of the three violations in the total amount of \$357 unless good cause to the contrary be shown in writing within 10 days. No response to the notice of intention has been received.

In concluding that the Secretary's proposed \$119 penalty for each of the violations is the appropriate penalty, I have considered the criteria set forth in Section 110(i) of the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to decide this case.
2. Respondent violated the mandatory safety standard 30 C.F.R. § 56.12001 as alleged in Citation No. 2649490.
3. Respondent violated the mandatory safety standard, 30 C.F.R. § 56.12025 as alleged in Citation No. 2649491.
4. Respondent violated the mandatory safety standard, 30 C.F.R. § 56.12013 as alleged in Citation No. 2649492.
5. The appropriate penalty for each of the violations is \$119.

ORDER

Citations Nos. 2649490, 2649491, 2649492 are affirmed and the Respondent is ordered to pay a civil penalty of \$357.00 to the Secretary within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street Denver, CO 80294 (Certified Mail)

Mr. Norman L. Garrick, President, Garrick Gravel Incorporated, P.O. Box 2966, Missoula, MT 59806 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 13 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 86-255-M
Petitioner : A.C. No. 05-03950-05503
 :
v. : Docket No. WEST 87-25-M
 : A.C. No. 05-03950-05504
COBBLESTONE, LTD., :
Respondent : Triangle One Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Leonard W. Lloyd, Owner, Cobblestone, LTD.,
Pagosa Springs, Colorado
pro se.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges Cobblestone LTD. (Cobblestone) with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act). These cases are before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Act.

Threshold Issue:

Respondent raises a threshold issue of jurisdiction which could be depositive of these proceedings. Respondent contends that he was not engaged in interstate commerce and therefore the Mine Safety and Health Administration (MSHA), is without jurisdiction over his activities at his gravel pit, particularly on the date of inspection through the date set for abatement. Respondent contends that the Secretary failed to establish that the activities in which respondent was engaged at the time of inspection affected interstate commerce.

The gravel pit in question is a family owned and operated enterprise. The owner, Mr. Lloyd, testified that he operates the pit with the help of his son, daughter and wife. He does 90 percent of his own labor. His only employee works part time.

Mr. Lloyd testified that he purchased the ten acres on which the pit is located solely for the purpose of building a family residence. Some years later he discovered a gravel deposit on the property and commenced extracting crushing and stock piling gravel. He extracts and crushes rock only when the weather permits. However, he is open all year round for sale of his stock piled gravel products to various contractors. Cobblestone's gross volume averages a little over \$100,000 a year. It uses United States mail and telephones in its business operations.

The primary product is crushed gravel from four-inch minus to three-quarter inch minus which is used for sub road and top road base. The contractors haul the purchased gravel from the site in their own trucks. Cobblestone has never delivered any of its products. The pit is located a little over a quarter of a mile from the public road.

There are two loaders on the property. The primary loader is a Michigan 275B rubber tire loader. Other equipment used at the site are a 955 Caterpillar, a D-8 Caterpillar and several crushers including a jaw crusher, and a roller crusher.

Respondent's gravel pit and crush stone operation is a mine within the meaning of the Act. Section 3(h)(1) of the Act reads in part as follows:

"Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form ... (B) private ways and roads appurtenant to such area, and (C) lands, excavations, ... workings, structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, ... or used in, or to be used in, the milling of such minerals ...

Respondent was extracting minerals (rock) from their natural deposit in nonliquid form, crushing it, and stock piling it for sale to various contractors throughout the year. Thus it is clear that respondent's gravel pit and crushed stone operation is a "mine" as defined in § 3(h)(1) of the Act.

Cobblestone, however, contends that it was not engaged in interstate commerce and therefore MSHA had no authority or jurisdiction to issue the citations in question on May 14, 1986. Respondent's contention is based upon the owners un rebutted testimony that on the date of inspection he was crushing and producing gravel solely for his own personal use on the mile and a half roadway which he maintains all year round on the property where he has his family residence and the gravel pit. The owner

testified that his production of gravel for his own personal use from May 12 to May 28, 1986, was not an isolated incident. Each year since he commenced operating the pit, approximately six years ago, he has produced gravel for his personal use on the driveway to his residence and on his gravel haul road.

Cobblestone also presented evidence that the gravel pit had been closed for production of gravel for commercial purposes since the Fall of 1985. The owner operator testified that he planned not to reopen the pit for production of gravel for commercial sale until June 9, 1986 and had so notified the MSHA Regional Office in Grand Junction, Colorado. This is reflected in MSHA's records.

Looking first to the Act itself, Section 4 for the Act states that:

"Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act."

"Commerce" is defined in section 3(b) of the Act as follows:

"Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof."

The use of the phrase "which affects commerce: in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB, 322 U.S. 643 (1944); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

On reviewing the relevant case law, I conclude that Respondent's contention that MSHA had no authority to issue the citations on the day of the inspection (May 14, 1986) because at that time he was producing gravel only for his personal use is contrary to the prevailing law. United States Supreme Court has ruled that a farmer growing wheat solely for his own needs affects interstate commerce. The Court stated that while the farmer's contribution to the demand for wheat may be insignificant by itself the cumulative impact of all such production by others similarly situated is significant and has an impact on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 128, (1942); Fry v. United States, 421 U.S. 542, 547 (1975).

Even though no evidence was presented to show that the gravel respondent produced for sale to contractors was or was not used solely intrastate, nevertheless it may reasonably be inferred that even intrastate use of the gravel would impact upon the interstate market. It is also reasonable to infer that some of the equipment respondent was using such as the 955 Caterpillar, the D-8 Caterpillar and the Michigan 275B rubber tired loader were manufactured outside the respondent's home State of Colorado. It has been held that use of equipment that has been moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78, 82 (1975).

It has been stated that accidents in mines disrupts production and causes loss of income to operators which in turn impedes and burdens commerce. See 30 U.S.C. Section 801(f). Thus any disruption of a mines operations in safety and health hazards affects interstate commerce. See Marshall v. Kilgore, 478 Supp. 4; Marshall v. Bosack, 463 F. Supp. 800. The United States Supreme Court in Donovan v. Dewey, 452 U.S. 594, 602 (1981) stated "As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce."

It is concluded that under prevailing law the operations and profits of Cobblestone affect interstate commerce and that its operation is subject to the provision of the Act.

Docket WEST 86-255-M

Citation No. 2634705

This citation charges Cobblestone with a violation of 30 C.F.R. § 56.15002 which provides as follows:

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

The Mine Safety inspector during his inspection of May 14, 1986, observed that Respondent's part time employee, Mr. Hagar, was not wearing a hard hat while operating the jaw crusher. The inspector testified that the intake opening at the top of the jaw breaker where the material is dumped did not have a screen. Consequently, when some of the stones dumped into the top opening were pinched by the jaws and flew up in the air there was nothing to prevent the stones from falling on the operator's unprotected head.

The part-time employee was observed again on May 28th working in the plant area without a hard hat. At that time the citation was replaced by a 104(b) noncompliance order. Thereafter the employee wore a hard hat. Both the citations and the noncompliance order state that only one person was affected by the violation.

On the basis of the mine inspectors testimony it is found that at the time of the inspection the operator of the jaw crusher was not wearing a suitable hard hat while operating the jaw crusher. It is therefore concluded that there was a violation of 30 C.F.R. § 56.15002.

The appropriate penalty for each citation will be discussed below under the heading penalty.

Citation No. 2634707

This citation charges respondent with the violation of 30 C.F.R. § 56.15003 provides as follows:

All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

During the May 14, 1986 inspection Roy Trujillo, the MSHA mine inspector, observed the owner-operator wearing a pair of tennis shoes while working in and around an area of the plant where there was a hazard from falling rocks that could cause injury to his feet. The mine inspector presented evidence that tennis shoes were not a suitable protective footwear when a person is in or around an area of the mine or plant where such a hazard exists.

The evidence presented establish a violation of 30 C.F.R. § 56.15003.

On May 28, 1986, the citation was replaced by a 104(b) noncompliance order. The citation and the 104(b) noncompliance order were terminated June 17, 1986.

Citation No. 2634706

The citation charges respondent with a violation of 30 C.F.R. § 56.12028 which provides as follows:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

This citation states that "a continuity and ground resistance test hadn't been performed this year since the operator started". The mine inspector presented undisputed testimony that the required test had not been performed.

On May 28, 1986, the mine inspector replaced the citation with a 104(b) noncompliance order because the operator failed to have records showing the resistance of the grounding system.

The operator testified that the test was made as soon as he could get a qualified person to make the test. The citation was terminated June 17, 1986.

The evidence presented established a violation of 30 C.F.R. § 57.12028.

Citation No. 2634737

This citation charges the operator with a violation of 30 C.F.R. § 57.14001 which provides as follows:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The mine inspector presented evidence that there was no guard on the V-Belt drive for the jaw crusher's electric motor. The belt was opposite the bull wheel in by the ladder used to climb to the crusher platform. The absence of the guard created a pinch point hazard. The pinch point was located five feet four inches above the ground.

The evidence presented establish a violation of § 57.14001.

At the time of his re-inspection the mine inspector observed that the operator had not installed a guard for the V-Belt drive on the jaw crusher. He therefore replaced the citation with a 104(b) noncompliance order.

The violation was corrected and terminated on June 17, 1986.

Docket No. WEST 87-25-M

Citation No. 2634736

Respondent was charged with a violation of 30 C.F.R. § 56.12032 which provides as follows:

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The mine safety inspector presented evidence that the cover was missing on the junction box for the electric motor that drives the jaw crusher. It was undisputed that a big rock had fallen and smashed the junction box. The electrical connection within the junction box was exposed to the weather.

On the re-inspection of May 28, 1986 the mine inspector observed that the junction box still did not have a cover. Consequently, he replaced the citation with a 104(b) noncompliance order. The violation was terminated on June 17, 1986. On July 7, 1986, the citation was modified by MSHA from a significant and substantial to a non significant and substantial violation.

The evidence presented established a violation of 30 C.F.R. § 56.12032.

Penalties

Section 110(i) of the Act mandates Commission consideration of six criteria in assessing appropriate civil penalties:

(1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. 30 U.S.C. § 820(i).

The parties stipulated to the small size of the operator's business. This stipulation is appropriate and accepted. It was a small family enterprise with the operator performing most of the work with the help of his family and only one part-time employee.

The record reflects the operator has at least a moderate history of previous violations.

The operator testified as to his substantial financial obligations including the payment of a heavy mortgage on the equipment and property. Nevertheless, I find no persuasive evidence that the imposition of authorized penalties would adversely affect respondent's ability to continue in business.

The operator was negligent in failing to comply with the standard alleged in each of the citations. Although there was no accident or injury during the years the respondent operated the gravel pit, the violations if continued unabated could have resulted in serious injury.

In determining the appropriate penalty I have also taken into consideration that most of the work was performed by the operator himself and that each of the citations reflect that only one or two persons were affected by the violations.

The operator's failure to promptly abate the violations during the period of time from the May 14th inspection to the May 25th reinspection is serious. However, I am satisfied from the record that the operator was sincere though mistaken in his belief that MSHA did not have jurisdiction or authority to issue the citations because during that period of time the owner-operator was producing gravel solely for his personal use.

Taking into consideration the six statutory criteria set forth in Section 110(i) of the Act particularly the size of this family enterprise, the appropriateness of the penalty to the size of the business and the operator's sincere though mistaken belief that MSHA had no authority to issue the citations during the period May 12th to May 28th, I find that the appropriate civil penalty for each of the violations is \$50.00.

Conclusions of Law

1. The Commission has jurisdiction to decide this case.
2. Respondent violated the mandatory safety standards as alleged in each of the citations.
3. The appropriate civil penalty for each of the violations is \$50.00.

ORDER

Each of the citations herein is affirmed and the respondent is ordered to pay a civil penalty of \$250.00 to the Secretary within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Cobblestone, LTD., Mr. Leonard W. Lloyd, P.O. Box 173, Pagosa Springs, CO 81147 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 14 1988

YOUGHIOGHENY & OHIO COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. YOUGHIOGHENY & OHIO COAL COMPANY, Respondent
: CONTEST PROCEEDING
: Docket No. LAKE 86-121-R
: Order No. 2828634; 8/5/86
: Nelms No. 2 Mine
: CIVIL PENALTY PROCEEDING
: Docket No. LAKE 87-9
: A. C. No. 33-00968-03650
: Nelms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for the Secretary of Labor; Robert C. Kota, Esq., St. Clairsville, Ohio, for Youghiogheny & Ohio Coal Company.

Before: Judge Melick

These cases are before me upon remand by the Commission on May 13, 1988, to determine the validity of the order at bar issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". More specifically the issue on remand is whether the admitted violation of 30 C.F.R. § 75.1710-1(a)(2) charged in the order was the result of the mine operator's unwarrantable failure to comply. The Commission has also directed that the penalty assessment be reexamined in light of the determination on unwarrantability.

Unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997

(1987), petition for review filed 88-1019 (DC Cir. January 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (1987). In these cases the Commission compared ordinary negligence, as conduct that is "inadvertant," "thoughtless," or "inattentive," with conduct constituting an unwarrantable failure i.e. conduct that is "not justifiable" or "inexcusable".

In this case the evidence is undisputed that on August 1, 1986, Youghiogeny and Ohio Coal Company (Y & O) section foreman John Slates directed one of his miners, David Parrish, to operate a scoop tractor not equipped with a canopy inby the last open crosscut in the main north section of the Nelms No. 2 mine. Because of the mining height the operation of the scoop in this area without a cab or canopy was acknowledged to be a violation of the cited standard.

David Parrish testified that Slates told him to operate the scoop in the violative manner. Moreover Slates himself admitted to Inspector Ervin Dean of the Federal Mine Safety and Health Administration (MSHA), in the presence of Y & O mine superintendent Charlie Wurschum and Y & O safety director John Woods, that "they had used the scoop in and inby that area, inby the last open break," and that "it didn't have a canopy on it," and that "he knew that it was supposed to." (Tr. 13-14 and 16-17). Slates also acknowledged to Inspector Dean that he had ordered the scoop tractor to be operated without a canopy in the last open crosscut and that he knew it was a violation (Tr. 13 and 28).

Under cross examination by counsel for Y & O, Inspector Dean thought that Slates "might have said something to the effect I wasn't thinking", but he was not sure that was said. In addition on further cross examination of Dean the following colloquy occurred:

Q [By Y & O Counsel] You said he [Foreman John Slates] wasn't thinking. Did that lead you to believe he might have made a mistake?

A [By Inspector Dean] I don't have a doubt that he made a mistake.

Q I mean as opposed to intentionally breaking the law?

A Yes. And again, I said he may have said that. I don't really remember what was said.

Q Wouldn't that be very important to you to know why he operated that piece of equipment like that?

A Yes.

Q But you didn't -- you just thought he might have said it -- that he wasn't thinking at the time?

A Yes, I guess so. [Tr. 28-29].

Y & O has suggested that the above testimonial exchange proves that Section Foreman Slates did not intentionally direct the scoop tractor to be operated without a canopy in the last open crosscut and that his conduct or failure to act was therefore the result of mere inattention or inadvertance. However since a necessary premise underlying the questions propounded by Y & O counsel was never established (Dean could not "really remember" what Slates had said) the testimonial conclusion (that Slates was not intentionally breaking the law) based on that premise must be disregarded. Indeed the testimony of Inspector Dean is so equivocal, uncertain and ambiguous on this point as to be without probative value.

In addition I can give but little weight to the answer of the scoop operator, David Parrish, to the ambiguous and speculative question under cross examination by Y&O counsel that he did not think his section foreman was intentionally placing him in a position where he might be hurt. The response is particularly inconsequential in the context of unwarrantability since the violation has not been found to be "significant and substantial" or serious. Parrish was also asked to speculate in the following exchange:

Q [By Y & O Counsel] In your estimation do you think that possibly the section foreman may have gotten mixed up on where this scoop was being operated?

A I don't believe that he got mixed up, with his experience, but I believe that in the confusion of stuff and not loading any coal -- he didn't mean to have it done, as far as that. John Slates is a safe man. He's a safe boss to work for as far as that (Tr.35).

Again however such a speculative, ambiguous and conflicting response has no probative value to the issue at hand.

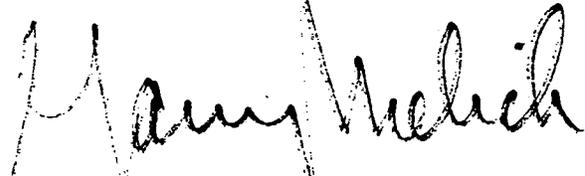
I also give but little weight to the speculation of Don Statler, the Y & O Safety Director who, although not present either at the time of the violation or at the later interview of Statler, suggested that Foreman Slates could have been confused in ordering his employee to operate the scoop in the manner described. There is insufficient probative evidence in the record before me that Slates was in fact confused and there is no evidence that he in fact told Statler that he was confused. In sum there is essentially nothing but vague speculation to support Y & O's contentions in this record.

Moreover the one person who could have answered the question at issue, Section Foreman Slates, was not even called as a witness by Y & O. It is a well established rule of evidence that if a party knows of the existence of an available witness on a material issue and such witness is within its power to produce and, if, without satisfactory explanation it fails to call him, an inference may be drawn that the testimony of the witness would not have been favorable to such party. 2 Wigmore, Evidence § 285 (Chadbourn rev. 1979); Jones on Evidence, Presumptions and Inferences § 3.91. It may indeed reasonably be inferred in this case by the unexplained failure of Y & O to have called this most essential witness who was one of its own employees, that his testimony would not have been favorable to Y & O. The same inferences can be drawn from the unexplained failure of Y & O to have called Wurschum and Woods, two of its other employees who were present at the meeting at which Slates made his critical admissions to Inspector Dean.

Under the circumstances Y & O's claim that Slates' commission of the violation herein was merely the result of inadvertance, thoughtlessness or inattention is without credible or probative evidentiary support. In light of the strong affirmative evidence that Slates directed Parrish to perform work in violation of the standard and that he knew it was a violation to do so, I find that his conduct was aggravated and neither justifiable nor excusable. This constitutes "unwarrantable failure" and the section 104(d)(1) order is accordingly affirmed. This evidence also supports a finding that this was an intentional violation and the \$400 penalty previously ordered in this case is accordingly warranted.

ORDER

Order No. 2828634 is affirmed and the contest of that order is denied. Youghioghney & Ohio Coal Company is directed to pay a civil penalty of \$400 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1988

SAMUEL GRIFFIN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 88-84-D
v.	:	BARB CD 87-37
	:	
ENERGY PRODUCERS ASSOCIATES	:	
INC.,	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On February 16, 1988, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On April 20, 1988 a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.


Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. Samuel Griffin, P. O. Box 43, Pathfork, KY 40863
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Energy Producers Associates, Inc., 948 Compton Road, Cincinnati,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 87-343
Petitioner : A. C. No. 46-01452-03643
v. :
 : Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :
:

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania.

Before: Judge Weisberger

Statement of the Case

On September 28, 1987, the Secretary (Petitioner) filed a petition for an assessment of Civil Penalty for alleged violations by the Respondent of the following regulations on June 9, 1987: 30 C.F.R. § 75.515, 30 C.F.R. § 75.1725(a), 30 C.F.R. § 75.902, and the following regulations on June 10, 1987: 30 C.F.R. § 75.518-1, and 30 C.F.R. § 513-1. Respondent's Answer was filed on October 22, 1987.

A Prehearing Order was issued on November 4, 1987, setting a hearing on this matter for January 13, 1988, in the event that no settlement was reached. On January 4, 1988, an Order was entered continuing the hearing based upon Respondent's request for continuance, which was not objected to by Petitioner.

On January 20, 1988, the case was reassigned to the undersigned. Pursuant to notice, the case was rescheduled and heard in Wheeling, West Virginia, on March 22, 1988. Edwin Fetty and Alex Volek testified for Petitioner. John Farley, II, Donald S. Bucklew, and Harold P. Schaffer testified for Respondent.

Petitioner filed its Proposed Findings of Fact, Conclusions of Law, and Memorandum Law on June 7, 1988, and Respondent filed

its Posthearing Brief on June 7, 1988.

Stipulations

At the Hearing the Parties intered into the following stipulations:

a. That jurisdiction of this matter properly rests with the Federal Mine Safety and Health Review Commission.

b. That the operator has a history of 389 assessed violations at this mine.

c. The size of the operator is reflected by the following data:

(i) Arkwright Number 1 employees approximately 225 employees.

(ii) Daily production of Arkwright Number 1 equals approximately between 7000 and 9000 tons, while annual production equals approximately 1,400,000 tons.

(iii) The Respondent operates 33 mines.

(iv) The annual production of all the Respondent's mines is approximately 41,221,321 tons.

(v) The annual dollar volume of sales by the Respondent for 1988 will not be released by the Respondent.

(vi) DuPont E.I. DeNemours and Company is the parent company; Consolidation Coal Company is a wholly-owned subsidiary.

d. The violations were abated within the required time period in each instance.

e. Approximately two (2) miners were exposed to the hazard created by each violation.

f. Injury incidence rate:

	<u>Fatal</u>	<u>Non Fatal*</u>	<u>No. Days Lost*</u>	<u>Total*</u>
<u>Arkwright No. 1</u>				
1986	0			
1987	0			
<u>Consolidation Coal Company</u>				
1986	.09	3.23	1.49	4.81
1987	.02	6.47	1.58	8.07
<u>Nation</u>				
1986	.05	5.68	1.69	7.43
1987	.04	7.11	2.17	9.33

*Data on non-fatal injuries and lost work days at Arkwright No. 1 for 1986 and 1987 will be furnished upon receipt.

With regard to paragraph 5(c)(ii) Arkwright I employees approximately 225 employees and not 4,000 as stated there.

with regard to paragaraph 2, the daily production of Arkwright Number 1 equals approximately 7,000 to 9,000 tons.

Issues

The Respondent, the Owner/Operator of the subject underground mine was cited, along with the independent contractor, who owned and operated the equipment in issue, for violations of the following regulations: 30 C.F.R § 75.1725(a), § 75.902, § 75.518-1, and § 75.513-1. The issues are whether the Respondent was properly cited, and whether the Respondent violated these regulations as well as 30 C.F.R. § 75.515. If these issues are found in the affirmative, it must be determined, in each case, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Also, it will be necessary, for each violation of Respondent, if any, to determine the appropriate civil penalty to be assessed in

accordance with section 11(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., (the Act).

Proper Party

It appears to be the position of the Respondent, in reliance upon Phillips Uranium Corporation 4 FMSHRC 549 (April 1982), that the independent contract herein, Frontier-Kemper, is the most responsible party, as it, rather than Respondent, owned and operated the various equipment involved in Citation Nos. 2698629, 2698630, 2698631, and 2698632. In this connection, John Farley, II, the Project Manager for Frontier, the independent contractor, testified that prior to the commencement of its work at Respondent's mine, it was agreed that Respondent was to do the preshift and onshift examination, take the employees of the independent contractor in and out of the mine, perform hazard training, and supply power. On the other hand, the independent contractor was to perform all electrical work on its own equipment, and the Respondent was not in any way to direct the work force of the independent contractor. Farley also testified that "very seldom" were Respondent's employee at the work site. Harold P. Schaffer, Respondent's supervisor, testified, in essence, that Respondent's employees conducting its preshift examinations inspected only for hazardous conditions and did not inspect any of the independent contractor's equipment as that was to be done by certified persons. Farley also indicated that the blower, which is the subject of Citation No. 2698629, was designed specially for the independent contractor. Indeed, Farley further testified that even the independent contractor's electrician on the site was not familiar with this piece of equipment.

In the Phillips case, supra, only the operator, rather than the independent contractor, was cited for violations involved in the specialized task of shaft construction at the operator's mine. The Commission, in Phillips, supra, at 552 quoted with approval from Old Ben Coal Company, 1 FMSHRC 1480 (1979), to the effect that the inclusion of an independent contractor within the definition of "operator" in the Act, reflects the Congressional intent to ". . . subject contractors to direct enforcement of the Act." In Phillips, supra, in reversing the judge who below had upheld the citations and orders issued to Phillips, the operator, the Commission reasoned as follows:

"The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors; the violations would be entered into Phillips' history of violations, rather than the

contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases. Compared to Phillips' burden in bearing the full brunt of the effect of the violations committed by the contractors, the contractors would proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices." (Phillips, supra, at 553).

In contrast, in the instant case, the independent contractor was also cited, and even was served with 104(d) Orders, for the exact violations, which are the subject of Citation Nos. 2698629, 2698630, 2698631, and 2698632. Accordingly, the rationale behind the Commission's decision in Phillips, supra, is inapposite to the instant case, and thus is not controlling of the issue presented herein, i.e. as to whether the independent contractor and the operator are jointly liable.^{1/}

In Bituminous Coal Operators Association v. Secretary of Interior 547 F.2nd 240 (4th Cir. 1977), the Court held, that under the Coal Act of 1969, the owner of a mine is liable for the independent contractor's safety violations without regard to the owner's fault. It is significant, that as stated by the D.C. Circuit, in International Union United Mine Workers of America, v. FMSHRC, (slip op., February 23, 1988, No. 87-113), "The Senate committee report on the bill, that later that year became the Mine Act, expressly took note of and approved the BCOA decision. S. Rep. No. 181, 95th Cong., 1st Sess. 14, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 3401, 3414." The holding in Old Ben, supra, has, in essence, been followed by the 9th Circuit in Cyprus Indus. Minerals Company v. FMSHRC, 664 F.2nd 1116 (9th Cir. 1981). In the Cyprus case, supra, at 1119, the Court stated that "...mine owners are strictly liable for the actions of the independent contractor violations (sic).... ." (See also Republic Steel Corporation, 1 FMSHRC 5, 9 (1979); Old Ben Company, 1 FMSHRC 140, 1481-83 (1979); International Union Mine Workers v. FMSHRC, supra).

^{1/} In this connection, I find irrelevant Old Dominion Power Co. 5 FMSHRC 1886 (August 1984) and Calvin Black Enterprises, 7 FMSHRC 1151 (August, 1985) cited by Respondent, as neither of these cases dealt with the issue of whether an independent contractor and a owner can be jointly liable. (In Old Dominion supra, the issue presented was whether a contractor was properly cited. In Calvin Black, supra the Commission affirmed the citation issued to a owner-operator.)

Accordingly, based upon the above line of cases, I conclude that it was proper herein to cite Respondent, along with the independent contractor, for violations concerning equipment owned and operated by the independent contractor.

Citation No. 2698627

Citation No. 2698627 alleges that the energized 4160 volt cables entering the metal disconnect switch box which was located on the main butt section ". . . are not provided with proper fittings where they are entering the metal box. The cables are loose running through 3 inch pipe."

Regulation

30 C.F.R. § 75.515 provides, as pertinent, that "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings."

Edwin Fetty, an Electrical Inspector for MSHA, testified, in essence, that the cable in question was energized, and extended through a piece of pipe into the box. He said that he did not observe any fitting. He offered his opinion that the phrase "proper fitting," as contained in section 75.515, supra, meant a "secure" fitting. Essentially, it was his opinion, that the only "proper fitting," was a strain clamp, which in fact was provided to abate this violation. In contrast, Donald S. Bucklew, Respondent's maintenance foreman, testified that the cable in question entered the disconnect box through a conduit which was a little larger than the cable, and which was welded to the disconnect box. He described the conduit as being a quarter inch metal and running from approximately 1 inch into the box, to 4 to 5 inches outside the box. He said that the cable, in being inserted in the conduit, was shoved through a tape, or rubber bushing, which was wrapped inside the conduit. Fetty testified that this connection was "not common."

I adopt the version testified to by Bucklew with regard to the description of how the cables in question entered the box, due to my observations of his demeanor, and the detailed nature of his testimony. I find that the Petitioner has not established that the cables in question, did not pass "through proper fittings." Aside from Fetty's opinion that a proper fitting is only a strain clamp, and that the connection used by Respondent was "not common," there was no evidence presented as to prevailing practice. Further, Fetty indicated that because the cable was energized he did not test the cable by pulling it to see whether the connection used by Respondent held.

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Accordingly, inasmuch as Petitioner has not established that the cable entering the disconnect box did not pass "through proper fittings," I find that Respondent herein did not violate 30 § 75.515, supra.

Citation No. 2698629

On June 9, 1987, Citation No. 2698629 was issued which provides, as pertinent, as follows: "The over temperature device installed on the 2 lube rotary positive blower, Model 23000, to cause the blow to shut down when the temperature rises to approximately 325 degrees F, is not maintained in an operatable condition. When the normally opened contact tips on the switch are closed, the blower continues run. When the contact closes it should cause the blower to shut down. ***"

Regulation

30 C.F.R. § 75.1725(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition"

It was the testimony of Fetty, in essence, that when he closed the contact tips on the over temperature device on the rotary blower, the blower continued to run, whereas it should have shut down to prevent it from over heating. He said that he was aware that the over temperature device had a time delay on it, and that when it was tested in his presence an electrician closed the contacts for a "long time" which was to his recollection more than a few seconds, and the blower still did not shut down. He stated that he thus concluded that the device was not "properly maintained."

John Farley, project manager for the contractor, testified that James Walker, the independent contractor's electrician, had contacted the headquarters of the independent contractor on June 9, 1987, after Fetty made his inspection, in order to determine how to fix the over temperature device. Fetty said that the electrician was told that the device had a 6 second delay and when the latter rechecked it it worked properly. Indeed, when Fetty abated the violation on the following day, he noted that the over temperature device was ". . . now in an operative condition. It will cause the blower to shut off when the normally open contacts are closed." There is no evidence that any repair was done to the device between Fetty's inspection on the 9th and subsequent abatement on the 10th. Fetty, who acknowledged that the device had a time delay on it, did not contradict the testimony of Farley that the amount of the time delay was 5 seconds. Fetty's testimony that, when tested on the

9th, the contacts were closed "for a long time," i.e. "more than a few seconds," does not positively establish that the delay lasted more than the time delay of 6 seconds. Thus, there is insufficient evidence, that, when tested on the 9th, the over temperature device did not function as it should. There is no evidence that a 6 second delay renders this device unsafe. I find thus that it has not been established that this device was not maintained in a "safe operating condition." Accordingly, I find that there has not been any violation by Respondent herein of section 1725(a), supra.

Citation No. 2698630

On June 10, 1987, Fetty issued Citation 2698630 which provides, in essence, that the energized 460 oil pump mower installed on the 2 lube rotary blower in the main butt section ". . . is not provided with a fail safe device to cause the circuit breaker to open when either the pilot or ground wire is broken." The citation alleges that the above condition is a violation of 30 C.F.R. § 75.902 which provides that ". . . On or before September 30, 1970, low- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken, or other no less effective device approved by the Secretary or his authorized representative to assure such continuity, except that an extension of time, not in excess of 12 months, may be permitted by the Secretary on a mine-by-mine basis if he determines that such equipment is not available. Cable couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled."

In essence, Fetty testified that the pump motor in question has three phases and that there were no fail-safe devices which would cause the circuit breaker to open and deenergize, when either the pilot or ground wire would be broken in any point in the circuit. Fetty's testimony has not been contradicted. Accordingly, I find that it has been established that the Respondent herein violated section 75.902, supra, by not having a fail-safe ground check circuit for the pump motor in question.

It was the testimony of Fetty that without a fail-safe device, if the ground wire would have been detached, the circuit-breaker would not deenergize the system. He said that if the insulation in the motor would break down or there would be damage to the conductor, this could result in voltage in the frame of the motor causing injury to one touching the frame. However, on cross-examination, Fetty agreed that there was a

grounding protection of the cable and if there was a problem with the insulation and an individual touched the motor frame he would not be affected.

Although I find that there has been a violation of section 75.902, supra, with some measure of danger contributed to by the violation, there is insufficient evidence to conclude that there was a "reasonable likelihood that the hazard contributed to will result in an injury," and I thus conclude that the violation herein was not significant and substantial (Mathies Coal Company 6 FMSHRC 1, 3-4 (January 1984)).

For the reasons discussed above, infra, I conclude that gravity of the violation was low. Also, based upon the testimony of Farley, I conclude that the equipment herein, which contained the violative condition, was owned and operated exclusively by the independent contractor. Further, based on Farley's testimony, I conclude that Respondent did not have any contractual obligations to inspect the contractors equipment or supervise the work of its employees. I thus conclude that the negligence of Respondent herein was low. I also have considered the various other statutory factors in section 110(i) of the Act, as stipulated to by the Parties. I conclude based upon all of the above that the Respondent pay \$20 as a civil penalty for the violation of section 75.902, supra.

Citation 2698631

On June 10, 1987, Fetty issued a citation which alleges essentially that the energized 500 mcm cable supplying 460 volt power for the 500 hp blow motor on the main butt section, ". . . is not provided with proper short-circuit and over load protection. The cable is protected by a 1200 amp sylvania circuit breaker set on 1200 amps according to the information on the face of the circuit breaker."

30 C.F.R. § 75.518 provides that "Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short-circuit and overloads." 30 C.F.R. § 518-1, as pertinent, provides that such a device ". . . which does not conform to the provisions of National Electric Code, 1968, does not meet the requirements section 75.518."

Fetty testified as to the essentials of the citation issued on June 10. Respondent did not rebutt this testimony and in fact stipulated as to these facts. Fetty explained that in his opinion, in essence, the setting at 1200 amps is too high for a cable supplying power to a 540 amp blower motor, as, in the event of a short-circuit, the breaker would not trip out and the

current would continue to flow until 1200 amps are reached, thus, taking longer to clear the circuit. Respondent maintains, in essence, that the amperage of the setting on the circuit breaker at 1200 amps is not relevant inasmuch as the breaker at Respondent's power center, set at 2500 amps, will trip at that point and thus deenergize the 500 hp motor. I find however, that the circuit breaker, being set at 1200 amps was not installed in such a way, "as to protect" the equipment of the blower served by the cable, and thus is violative of 30 C.F.R. § 75.518, supra. I also note that it was the uncontradicted testimony of Fetty that Respondent's engineer John Cormack agreed that the setting was too high. Thus, I find that the Respondent herein did violate section 75.518, supra, as alleged in the citation.

Fetty indicated that in an event of a roof fall or damage to the cable leading to a short-circuit, an arc will result which will continue to present a hazard as power will not be shut off until 1200 amps are released. Further, it was Fetty's opinion that due to the setting at 1200 amps, there will be increased heat passing through the cable which will cause a breakdown of the cable if there is rock or a bent cable. In this connection, Fetty said that in his opinion the cable was old as it did not have any markings on it. It was his opinion that sooner or later there would be an accident due to the breakdown of the cable causing arcing. I find that although there is some measure of danger contributed to by the breaker being set at 1200 amps, this danger is not very high considering the testimony of Bucklew, which I adopt as it has not been contradicted, that the breaker at Respondent's power center is set to trip at 2500 amps, and will thus deenergize the 500 hp blower motor. Further, I note, that on cross-examination, Fetty had agreed that the cable leading to the motor in question was warm and not hot, and that although there were some signs of abrasions on the outer jackets the insulation was intact. I thus find that Fetty's opinion that, "sooner or later" an accident will occur due to break down of the installation causing arcing, falls short of establishing a "reasonable likelihood" that the hazard of arcing will occur (Secretary v. Consolidation Coal Company, 6 FRSHRC 189, at 193 (February 1984)). Accordingly, I find that it has not been established that the violation herein is significant and substantial (Mathies Coal Company, supra).

For the reason discussed above, infra, under Citation No. 2698630, I conclude that the Respondent herein exhibited only low negligence in violating section 75.518, supra. Further, for the reason discussed above, infra, I conclude that the gravity of the violation herein to be low. Further, I have considered the remaining statutory factors in section 110(i) of the Act, as stipulated to by the Parties. Based upon all of the above, I

conclude that the Respondent shall pay a fine of \$20 as a civil penalty for the violation of the above regulation.

Citation No. 2698632

On June 10, 1987, Fetty issued Citation No. 2698632 which alleges that the cable supplying 460 volts for the 500 hp motor on the blower in the main butt section, ". . . is not sufficient size to have adequate current carrying capacity. Full load current of the motor is 540.2 according to the name plate information and a 500 mcm cable is being used." This citation alleges a violation of section 30 C.F.R. § 75.513-1, which provides that "An electric conductor is not of sufficient size to have adequate carrying capacity if it is smaller than is provided for in the National Electric Code, 1986." Fetty testified that the code requires a size of 125 percent of the full load, and that in this case, the full load of the motor was 540.2 amps. He said he performed calculations and that the cable in question was "too small." Fetty also indicated that the cable was hot and that there were signs of deterioration. This testimony was not contradicted by any of Respondent's witnesses. Accordingly, I find based upon this testimony of Fetty, that there was a rise of temperature with some sign of damage to the installation material. Accordingly, I conclude that it has been established that the cable was of insufficient size as defined in section 75.513, supra.

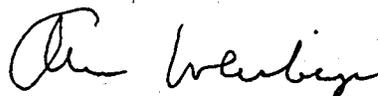
It was Fetty's testimony that with a cable being too small in size, therefore carrying too many amps, there will be an increase in heat which will break down the insulation, with arcing, smoke, asphyxiation, and possible high burns being reasonably likely to occur. It was his opinion that continued operation of too small sized cable will lead to insulation breakdown which will cause contact with the ground conductors which will lead to a short-circuit. He also indicated that although the area was rock dusted, there were wooden timbers, oil on the blower, and spalling coal. It was the testimony of Farley, which was not contradicted, that the equipment was being run at only 60 percent of full capacity, and the amps were continually monitored. As such, I conclude that it has not been established that there was a "reasonable likelihood" of the hazard of arcing or fire occurring (See, Secretary v. Consolidation Coal Company, supra). Accordingly, I find that it has not been established that the violation herein was significant and substantial (Mathies, supra).

I find that the negligence of Respondent herein be low, as analyzed with regard to Citation No. 2698629. Also, for the reasons which I discussed above, infra, in discussing whether the violation was significant and substantial, I conclude that the

gravity herein of the violation was low. Also, I have considered the other statutory factors in section 110(i) of the Act as stipulated to by the Parties. Based upon all of the above, I conclude that a penalty herein of \$20 is reasonable and proper for the violation of section 75.513, supra, by the Respondent.

ORDER

It is ORDERED that Citation No. 2698627, and Citation No. 2698629 be DISMISSED. It is further ORDERED that Respondent pay the sum of \$60, within 30 days of this Decision, as a civil penalty for violations of Citation Nos. 2698630, 2698631, and 2698632.



Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 20 1988

BEAVER CREEK COAL COMPANY, : CONTEST PROCEEDING
Contestant :
 :
v. : Docket No. WEST 88-145-R
 : Order No. 3224939; 3/17/88
 :
SECRETARY OF LABOR, : Trail Mountain #9 Mine
MINE SAFETY AND HEALTH : Mine I.D. 42-01211
ADMINISTRATION (MSHA), :
Respondent :

ORDER OF DISMISSAL

Appearances: Charles W. Newcom, Esq., Sherman & Howard, Denver, Colorado,
for Contestant;
James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
for Respondent.

Before: Judge Morris

Contestant Beaver Creek Coal Company seeks declaratory relief, attorneys fees and reimbursement for costs.

Procedural History

The Commission file reflects the following procedural history:

1. On March 22, 1988 Beaver Creek filed a contest seeking a review of MSHA Citation 3224939, issued on March 17, 1988. The crux of Beaver Creek's contest of the 104(d)(2) order was that contestant had not accepted the cited condition as a part to its roof control plan (RCP). 1/

In its contest Beaver Creek also sought attorneys fees pursuant to Rule 11 of the Federal Rules of Civil Procedure.

At the same time Beaver Creek moved for an expedited hearing.

2. On March 24, 1988 the judge granted Beaver Creek's motion for an expedited hearing and set the case for March 31, 1988.

1/ Under existing law an operator cannot be cited for violating its plan unless the plan and any amendments have been adopted by the operator. Bishop Coal Co., 5 IBMA 231, 1 MSHC (BNA) 1367 (1975).

3. On March 30, 1988 the hearing date of March 31, 1988 was cancelled. Further, Beaver Creek was granted until April 8, 1988 to amend its notice of contest and the Secretary was granted until April 15, 1988 to respond.

4. On April 4, 1988 the Secretary filed a letter indicating that MSHA's Order No. 3224939 was vacated on March 25, 1988. The letter vacating the order indicates there had, in fact, been no agreement on a proposed modification of Beaver Creek's RCP.

5. On April 6, 1988 Beaver Creek filed interrogatories and further requested that certain documents be produced.

6. On April 8, 1988 Beaver Creek filed an amended notice of contest and offer of proof and memorandum in support thereof.

As a factual basis for its amended notice of contest Beaver Creek states as follows:

A. By letter dated January 13, 1988, Exhibit A hereto, Beaver Creek sought a minor modification of its roof control plan, a request that it be allowed to go from a 10 foot cut to a 20 foot cut in development mining. As a part of that request, Beaver Creek also sought a technical amendment to its plan to add, as a matter of informational background in the plan, that it would be using remote controlled continuous mining machines in development pursuant to an approval which had been previously been given for use of such machines in connection with Beaver Creek's ventilation plan. See Exhibit B hereto.

B. By reply letter dated February 16, 1988, Exhibit C hereto, MSHA "tentatively" approved a plan change going to a 20 foot cut. However, that approval letter sought to add five stipulations/conditions, none of which was tied to mining conditions in the Beaver Creek mine as required by Secretary of Labor v. Carbon County Coal Co., 3 MSHC (BNA) 1943 (1985), [7 FMSHRC 1367] and none of which was related to any consequences growing from the proposed change of going from a 10 foot cut to a 20 foot cut. MSHA issued a short follow-up modification to its February 16 letter on February 24, 1988. See Exhibit D hereto.

C. In a responsive letter dated March 9, 1988, (mailed March 14, 1988), Beaver Creek specifically objected to four of the proposed stipulations/conditions and agreed to accept one of the proposed stipulations/conditions. See Exhibit E hereto.

D. Thereafter, Citation and Order No. 3224939 was issued by MSHA on March 17, 1988, as described in the Amended Notice of Contest.

E. By letter dated March 21, 1988, MSHA sought to give added reasons for its actions. See Exhibit F hereto. With regard to those three reasons, it is to be noted with respect to the first reasons that Beaver Creek has safely operated with a plan involving mining distances of up to 140 feet, using temporary roof support, before installing full overhead roof support. The issue as to the location of the continuous miner operator, point number two in the letter, had not been previously raised. That issue is not related to the question of a 10 foot versus a 20 foot cut, and as previously noted, use of remote controlled continuous mining machines had previously been approved under Beaver Creek's ventilation control plan. The third issue raised in the letter relating to face ventilation is simply wrong in addition to being a new assertion. Ventilation is not extended until temporary supports have been set.

F. By letter dated March 25, MSHA advised Beaver Creek, essentially, that in MSHA's view things were "to go back to square one" and enforcement action would commence on Wednesday, March 30, 1988, absent some agreement. See Exhibit G hereto. A copy of that letter was first received by Beaver Creek personnel by hand delivery on March 28, 1988, at a meeting involving Beaver Creek personnel and MSHA personnel at MSHA's Denver offices.

G. During the course of the March 28, 1988 meeting, or in subsequent discussions relating to the roof control plan approval process, MSHA has taken, and continues to take, the following positions with regard to review and/or approval of Beaver Creek's current plan or any requested amendments thereto:

1. MSHA understood that the stipulations in the February 16, 1988 letter had been accepted by Beaver Creek personnel. Beaver Creek disputes that. Further, Beaver Creek states that MSHA Coal Mine Safety and Health District 9 has improperly departed from the District's prior plan approval practice and has begun in recent months attaching to many, if not all, roof control and ventilation control plan approval requests such as the request by Beaver Creek, additional "conditions" or "stipulations" which do not relate to changed roof control circumstances caused by the proposed amendment, but rather involve ancillary matters not addressed to the conditions at the particular mine. These additional proposed conditions/stipulations thus appear to be matters of personal preference rather than changes needed to address some inadequacy specific to the mine in question and its roof control plan. Such efforts to use the amendment process to "open" a plan are improper.

2. MSHA's position is that it may undertake a general review, whether in response to an amendment request or on its own initiative, of the Beaver Creek roof control plan regardless of whether the current plan "continues to effectively control the roof face and ribs." This position is contrary to the new regulations. 30 C.F.R. § 75.200, 53 Fed. Reg. 2375 (January 27, 1988).

3. MSHA's position is that in reviewing the issue of moving from a 10 foot cut to a 20 foot cut, it may base its approval of the amendment, in some part, upon non-roof control matters such as perceived traffic hazards or the type of production equipment to be used in advancing the face. Beaver Creek does not dispute MSHA's right to properly exercise its statutory powers, but it does dispute MSHA's position that unrelated issues, such as those just noted, may be raised and used as a basis for refusing approval of a proposed amendment to a roof control plan or withdrawing approval of an existing roof control plan.

H. As matters are currently postured, Beaver Creek may imminently be subject to enforcement action including the possibility of closure orders which could prevent coal production. In these circumstances, and in light of the continuing dispute, Beaver Creek should be allowed to pursue declaratory relief rather than being unnecessarily forced to face MSHA enforcement action.

7. On April 11, 1988 Beaver Creek filed a notice to take the deposition of witness DeMichiei.

8. On April 12, 1988 Beaver Creek filed notices to take the depositions of witnesses Poncerhoff, Holgate, Jones, and Smith.

9. On April 18, 1988 the Secretary moved for an extension of time to respond to the amended notice of contest and further moved to stay discovery until a ruling is entered on the Secretary's motion to dismiss.

10. On the same date, Beaver Creek responded to the Secretary's motions. Beaver Creek objected to any extension of time on discovery. Further, Beaver Creek asserts any indefinite stay may prejudice its interests. Beaver Creek did not object to an extension until May 6, 1988 for the Secretary to respond to its amended notice of contest.

11. On April 19, 1988 the judge granted the Secretary until May 17, 1988 to file his response to the notice of contest. Further, the judge further authorized Beaver Creek to proceed with discovery. Oral arguments were set for May 27, 1988.

12. Subsequently amended notices were filed by Beaver Creek resetting the above depositions for May 25, 1988.

13. On May 2, 1988 the Secretary filed two motions to dismiss and for a protective order. The motion to dismiss was supported by memorandum. In her motion for a protective order, the Secretary seeks to protect from disclosure any deliberations between any agency personnel relating to contestant's claims and from identifying or disclosing the contents of any internal agency deliberative document relating to Beaver Creek's claims. The Secretary further submitted authorities in support of her position.

The Secretary seeks the protective order as to the Beaver Creek's interrogatories as well as to the depositions of the district manager, the district engineering supervisor, and the district roof control supervisor.

14. The Secretary's supplemental motion to dismiss (filed May 2, 1988) states that MSHA has granted the RCP modifications requested by Beaver Creek and the parties are no longer engaged in Bishop negotiations.

15. On May 5, 1988 the Secretary filed a second motion to stay discovery. The Secretary states there are two days scheduled for depositions in Denver, Colorado and three days in Price, Utah. The Secretary estimates that \$4,000 will be spent on such depositions.

16. On May 6, 1988 Beaver Creek filed its response opposing the Secretary's second motion to stay.

17. On May 9, 1988 Beaver Creek filed its response in opposition to the Secretary's motion for a protective order.

18. On May 11, 1988 the judge issued an order directing the Secretary to respond to Beaver Creek's interrogatories. Further, if the Secretary believed her answers were protected by her claim of privilege she was directed to submit said answers for an in camera inspection by the judge. The depositions of all witnesses were otherwise stayed until the entry of an order on the Secretary's motions to dismiss. The judge's order further reconfirmed the oral arguments previously set for May 27, 1988.

In connection with the Judge's Order of May 11, 1988 the Secretary filed two notebooks of documents for an in camera inspection by the judge relating to the Secretary's claim of privilege. In connection with the documents the Secretary requested that any matter the judge finds is not privileged be

returned to the Secretary without releasing the contents to Contestant. The Solicitor states this procedure will preserve his position in event he elects to appeal an order requiring disclosure. If the case is remanded the judge will grant the Secretary's request in this regard.

Since the issue of privilege has not been reached in the case the two notebook files remain in the Commission's office in Denver, Colorado.

The Secretary further requested that the Solicitor be present for any in camera review. He believes that such proceedings should be ex parte because the reason for the privilege is not always apparent from the face of the document and the contents of certain documents will be revealed in an explanation of the privilege involved. The Secretary states this procedure is not without precedent since warrants are often issued with only the moving party present.

It is the Judge's view that the Secretary's request should be denied. Her presence, without the presence of Contestant, would constitute an ex parte communication in violation of Commission Rule 82, 29 C.F.R. § 2700.82. If the case is remanded the judge will so rule on this issue.

19. Oral arguments took place as scheduled.

Discussion and Evaluation
on Motions to Dismiss

The two issues presented here are whether Beaver Creek is entitled to costs and attorneys fees and whether declaratory relief should be granted.

In connection with attorneys fees and reimbursement for costs Beaver Creek particularly relies on Rule 11, FRCP. In support of its position Beaver Creek also cites Rushton Mining Company, 9 FMSHRC 392 (1987).

Rushton was originally heard by Commission Judge James A. Broderick. After Judge Broderick entered his initial decision Rushton raised, for the first time and before the Commission, the issue of reimbursement. The Commission remanded the case to give Judge Broderick an opportunity to rule on the issue, 9 FMSHRC at 393.

In his decision after remand Judge Broderick concluded that Rule 11 of the Federal Rules of Civil Procedure was not applicable, 9 FMSHRC 1270 (1987). I completely agree with Judge Broderick's decision. Inasmuch as this is an expedited ruling it is not necessary to further review Judge Broderick's views.

Beaver Creek argues the Commission would not have remanded Rushton to Judge Broderick if the Commission believed Rule 11 was not applicable. I cannot speculate on the Commission's reasons for the remand. However, a Commission decision in Rushton and in this case will no doubt serve as a guide as to these issues.

The second issue presented here is whether Beaver Creek is entitled to declaratory relief.

As a threshold matter the Commission has jurisdiction to grant declaratory relief under section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e). Such authority is discretionary and it may be used to terminate controversy or remove uncertainty. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, (10th Cir. 1983).

However, declaratory relief is not warranted here because the issues are moot. The modification sought by Beaver Creek was granted by the Secretary. In addition, the parties have not reached an impasse in Bishop negotiations. Further, the relief sought by Beaver Creek (paragraphs 4(a) through 4(f) of amended Notice of Contest) appears to be an open invitation for the Commission to become a third party in Bishop negotiations. However, without specific facts any determination made by the judge would be of no value.

Beaver Creek vigorously asserts that if declaratory relief is not allowed here it has only two choices. It can acquiesce in the improper interpretative positions taken by the Secretary regarding roof control plan review procedures (see paragraph 4(a) through 4(f), amended notice of contest) or object and risk enforcement actions which could cause a shutdown of the mine.

Beaver Creek is not without remedy. In Penn Allegh Coal Company, 3 FMSHRC 2767 (1981) the Commission observed that the statute makes it clear that a plan similar to the one involved here is not formulated by the Secretary but is "adopted by the operator". While the plan must be approved by the Secretary's representative, who may on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose terms. For even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required, 3 FMSHRC at 2772.

In view of the foregoing factors it follows that declaratory relief is not warranted.

For the foregoing reasons, the Secretary's motion to dismiss is granted.


John J. Morris
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 21 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-168
Petitioner : A. C. No. 46-06898-03530
v. :
 : No. 1 Mine
DAVIDSON MINING INC., :
Respondent :
 :
DAVIDSON MINING INC. : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 88-82-R
 : Order No. 2953130; 12/2/87
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Mine I.D. 46-06898
ADMINISTRATION (MSHA), :
Respondent : Davidson No. 1 Mine

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor;
William D. Stover, Esq., Beckley, West Virginia for Davidson Mining Inc.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge a citation and withdrawal order issued to Davidson Mining Inc. (Davidson) under sections 104(a) and 104(b) of the Act, respectively, and for review of the civil penalty proposed by the Secretary of Labor for the violation alleged therein. At hearing Davidson acknowledged the violation and allegations set forth in the citation and asserted that it was challenging only the validity of section 104(b) Order No. 2953130 and the amount of penalty proposed.

The underlying citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.301 and charges as follows:

Only 2420 cubic feet of air a minute could be measured in the last open crosscut between No. 8 and No. 9 entries in the 007-0 Moose Mains Section when measured with chemical smoke and only 1995 cubic feet of air a minute could be measured behind line brattice in No. 8 entry where roof bolting machine was preparing coal and only 1450 cubic feet of air a minute could be measured in face No. 6 entry where continuous mining machine was located.

30 C.F.R. § 75.301 provides in part as follows:

The minimum of quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9000 cubic feet a minute The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute.

The Section 104(b) order reads as follows:

Only 6042 cubic feet of air a minute could be measured in the last open crosscut when measured with chemical smoke, management was building permanent undercasts and ventilation stoppings which were tore [sic] out due to a roof fall which occurred on 11/28/87. 007-0 Moose Mains Section right side.

Section 104(b) of the Act reads as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

It is not disputed that the violation charged in Citation No. 2953127 was not totally abated within the time set forth in that citation and that the period of time for abatement had not been extended. The issue before me then is whether MSHA

Inspector Ernest Thompson, the authorized representative of the Secretary, acted reasonably in refusing to extend the time for abatement. In this case I find that he did in fact act reasonably.

Inspector Thompson was performing a general inspection at the Davidson No. 1 Mine on December 1, 1987, when he learned that a roof fall had occurred in the Moose Mains Section of the mine three days earlier. Thompson observed, and it is not disputed, that the mine ventilation had been interrupted as a result of the roof fall and the air was short circuited and not adequately ventilating the working faces. Only 2,420 cubic feet per minute (cfm) of ventilating air was found at the last open crosscut where 9,000 cfm was required. In addition only 1,995 cfm was found behind the line brattice at the No. 8 entry and only 1,450 cfm was found at the face of the No. 6 entry--locations where 3,000 cfm was required. Thompson accordingly issued the section 104(a) citation at bar.

Thompson told Section Foreman James Hancock at about 12:40 p.m. that he was then "under a citation" and that he was to "pull the power on his equipment and restore his ventilation." Although Thompson did not then inform Hancock of a specific abatement time Thompson anticipated that temporary check curtains would be hung within 20 or 30 minutes to correct the immediate problem of inadequate ventilation. Thompson later prepared the written citation on the surface around 1:30 or 2:00 p.m. setting forth a specific abatement time and presented it to Dale Patten, the company representative. No objection was then raised to the abatement time.

On December 2nd Thompson returned to the subject area with Patten. Arriving at 10:59 a.m. he again took air readings in the last open crosscut and found only 6,042 cfm where 9,000 cfm was required. Thompson observed that the belt conveyor had been advanced forward one or two crosscuts, and that there had been additional coal production as evidenced by several new connecting crosscuts. He estimated that since the citation had been issued there had been 6 to 8 hours of coal production with a regular crew (48 man hours) taking 8 or 9 cuts of coal. Stoppings had also been erected inby the fall area necessitated by the belt move and Thompson estimated that this involved an additional 12 man-hours.

Thompson thereupon told Patten that he was issuing a section 104(b) order, basing his decision on the evidence that they had "run coal", made a belt move, and added new stoppings-- indicating to him that they had had time to correct the ventilation problem but chose rather to continue running coal. Thompson was also concerned that the continued inadequate

ventilation increased the danger from the accumulation of methane and other dangerous gases. This hazard was exacerbated by the extraction of virgin coal in a coal seam having a history of methane liberation (i.e. the Cedar Grove Coal Seam) and in a coal seam located below the water table.

Subsequent examination of the mine preshift reports confirmed to Thompson that mining had continued without adequate ventilation even after the citation had been issued. It is not disputed that the designation on the preshift report for the evening shift (p.13 Exhibit G-5) "LOB R =3,010 cfm" means that during the preshift examination between 2:00 a.m. and 3:30 a.m. on December 2, the ventilation was not legally sufficient. The report (p.14 Exhibit G-5) does not show that the ventilation was corrected before coal was mined.

In closing argument Davidson claimed that the "whole situation reeks of unreasonableness" and that Inspector Thompson should have extended the abatement time to permit completion of an undercast rather than have issued the subject order. Davidson argues that the initial abatement time set forth in the citation was not reasonable. It maintains that Inspector Thompson and Mine Superintendent Larry Presley had agreed to abate the violative condition by the construction of an undercast and implies that it must therefore have been understood by Thompson that the violative condition could not have been abated within the limited time given in the citation.

Inspector Thompson denies however that there was any such agreement and, to the contrary, testified that he anticipated that temporary controls would have been erected within 20 or 30 minutes to abate the immediate ventilation problem. Inasmuch as Thompson did in fact provide a relatively short abatement time in the citation, it is readily apparent that he did in fact anticipate the use of temporary measures to quickly abate what he perceived to be a hazardous condition. Whether or not there was an additional agreement to construct an undercast as a permanent solution to the ventilation deficiency is therefore not particularly relevant.

I also find Davidson's complaint that it was not given sufficient time to abate to be less than credible for the reason that it did not object to that abatement time when the citation was issued and complained only after Thompson had already issued the 104(b) order the next day. If company officials truly believed they had reached an agreement to defer abatement until they had time to complete construction of a permanent undercast it is reasonable to expect that they would have immediately protested the brief time allowed by Thompson in his citation and have requested an extension. Under the circumstances I find that

the abatement time set forth in the citation was reasonable for the immediate construction of temporary corrective measures--and that Davidson knew that the abatement time was reasonable for that purpose. In light of this evidence I also reject Davidson's claims that temporary corrective measures were not feasible or could not have been achieved before the order was issued.

Davidson also argues that it did not mine coal without adequate ventilation after the citation had been issued. However in light of Davidson's own "Daily and On-Shift Reports" (Exhibit G-5 pps. 13-14) I find this claim to be without merit. Indeed even Mine Superintendent Presley conceded that the reports show that the inadequate ventilation reported on December 1st at the last break on the right side was not corrected before resumption of coal production in that area. Thus the credible evidence supports Inspector Thompson's belief at the time he issued the subject order that Davidson had produced coal without adequate ventilation after the issuance of the citation and contrary to his specific instructions to mine officials. In order to prevent further violations and exposure of miners to hazardous conditions and in light of Davidson's demonstrated bad faith in continuing to mine coal without proper ventilation it was particularly important and reasonable for Thompson to have issued a section 104(b) order of withdrawal requiring all miners not working on the abatement to be removed. Indeed I find that this basis for issuing the order was sufficient in itself regardless of whether the original abatement time was reasonable or not. Under the circumstances I find that Order No. 2953130 was properly issued and is valid.

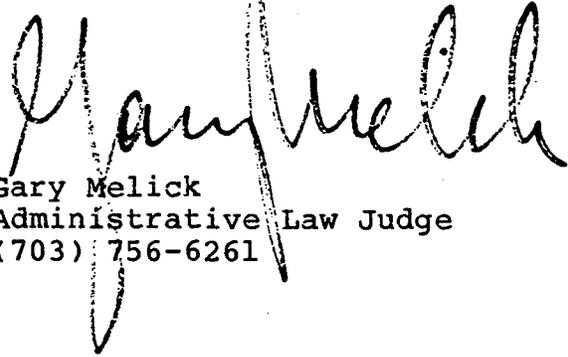
I also find that the violative condition was the result of operator negligence. The roof fall that initially caused the ventilation problems occurred three days before the citation was issued so the operator should have been on particular notice for ventilation problems. Moreover it is not disputed that there was so little air in the cited area when Thompson tested it that his anemometer would not even move. In spite of these conditions Davidson continued to mine coal until the citation was issued.

The evidence that Davidson continued coal production without adequate ventilation even after the issuance of the citation and its failure to have abated the violative condition within the time prescribed also show bad faith. Moreover, the continued mining of coal without adequate ventilation greatly increased the gravity of the violation. As Inspector Thompson observed, the continued mining of coal could have created excess methane and coal dust without adequate ventilation greatly increasing the potential for a fatal mine fire or explosion. In assessing a civil penalty in this case I have also considered Davidson's

size and history of violations. Under the circumstances I find that a civil penalty of \$1,000 is appropriate.

ORDER

Citation No. 2953127 and Order No. 2953160 are affirmed and the Contest of the Order is denied. Davidson Mining Inc. is hereby directed to pay a civil penalty of \$1,000 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary K. Spencer, Esq., U.S. Department of Labor, Office of the Solicitor, Room 516, Arlington, VA 22203 (Certified Mail)

William D. Stover, Esq., 41 Eagles Road, Beckley, WV 25801 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1988

PATRICK J. BURNS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. PENN 88-4-D
	:	PITT CD 87-10
	:	
GARY KLINEFELTER,	:	
(U. S. STEEL COMPANY)	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On October 5, 1987, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977.

On this same day you were sent a letter from the Commission informing you of what was needed to be done in order for your complaint to be processed. On January 19 and again on March 23, 1988, my law clerk spoke with the complainant's wife and informed her of what the complainant needed to do so that the complaint could be processed.

Finally on April 20, 1988 a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. Patrick J. Burns, Jr., 125 Cumberland Avenue, Masontown, PA 15461 (Certified Mail)

Mr. Gary Klinefelter, Ventilation Foreman, U. S. Steel Mining
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Mr. Thomas Shumaker, Int'l. H&S Rep., District 4, 32 S. Mains
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 22 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 86-35
Petitioner : A.C. No. 11-01845-03586
v. :
: Zeigler No. 5 Mine
ZEIGLER COAL COMPANY, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner; Brent L. Motchan, Esq., Vice-President
and General Counsel, Zeigler Coal Company,
Fairview Heights, Illinois, for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", in which the Secretary charges the Zeigler Coal Company (Zeigler) with one violation of the mandatory standard at 30 C.F.R. § 75.200. The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on March 28, 1988, at St. Louis, Missouri. Documentary exhibits and oral testimony were received from both parties.

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. § 75.200 provides as follows:

§ 75.200 Roof control programs and plans.

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each

coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Condition or Practice

Order No. 2614140 cites a violation of 30 C.F.R. § 75.200 for the following condition:

The roof control plan approved for this mine was not being followed in unit No. 2 in the cross-cut between 3 and 4 South entries at 2550 feet. The machine operator while loading coal was 3-1/2 feet inby the last row of permanent roof support in the cross-cut. The roof control plan for this mine states that work shall not be performed inby unsupported roof. Unit 2 in South off West off 2nd main North off 1st Main West off Main North.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted:

1. On August 26, 1985, Zeigler had a roof control plan in compliance with MSHA regulations, which had been approved by MSHA.
2. During the 24 month period preceding the issuance of the instant order of withdrawal, Zeigler had a total of 38 assessed violations.

3. During the calendar year preceding the issuance of the instant order of withdrawal, the Zeigler No. 5 Mine had produced 985,638 tons of coal and the controlling entity produced 2,872,758 tons of coal.

4. Payment of the proposed assessed penalty would not affect Zeigler's ability to remain in business.

5. The Commission and the presiding administrative law judge have jurisdiction over this proceeding.

Discussion and Analysis

Inspector Jesse B. Melvin, who issued the subject order on August 26, 1985, testified on behalf of the Secretary. He has been a coal mine inspector for some 15-1/2 years, and further testified as to his qualifications, training and experience with MSHA and previously as an underground coal miner for 19 years.

While inspecting the Zeigler No. 5 Mine on August 26, 1985, Inspector Melvin deduced by his observations and a series of measurements that the operator of a continuous mining machine on an earlier shift had travelled 3-1/2 feet inby permanent roof support. He therefore concluded that a violation of 30 C.F.R. § 75.200 had occurred and so issued the § 104(d)(2) order at bar.

The continuous miner had been mining in the crosscut from the No. 3 entry side towards the No. 4 entry on the shift prior to the inspection. However, the continuous miner was not in the crosscut when the inspector viewed the area on August 26, 1985.

Since the mining machine was no longer in the unbolted crosscut at the time of his inspection, the inspector calculated the position of the miner operator vis-a-vis the last row of roof bolts by a series of measurements he made with the assistance of Mr. Johnson, a safety committeeman travelling in the mine with him. They observed the impression left by the front edge of the pan of the mining machine on the bottom and measured from there back to the last row of roof-bolts which was 23-1/2 feet. They then located the continuous mining machine in an adjacent area and measured it from the front of the pan to the miner operator's seat. That distance turned out to be 19 feet. Subtraction yielded the result that the miner operator on the previous shift had proceeded inby permanent roof support by approximately 3-1/2 feet.

The accuracy of the 23-1/2 foot pan-to-bolt measurement necessarily depends on the ability to see the impression of the pan on the bottom. The inspector is positive he observed the impression of the pan on the bottom. He explained that where

anything heavy sits down on something that is soft, it will leave an impression of it. Then, when it (the pan) drags back, it shows where the machine has travelled backwards. Mr. Johnson also testified that the impression of the pan was clear. He stated that after the crosscut was bolted, enabling him to get in there, he assisted Inspector Melvin with the measurement by holding his end of the tape measure at the edge of the pan impression. Mr. Dennis Collins, a former timberman at the Zeigler No. 5 Mine, further corroborated the testimony of the inspector and Johnson on this critical point. He testified that he witnessed the Melvin/Johnson measurement and also observed the tracks of the continuous mining machine pan on the bottom.

Mr. Don Kroll, currently the manager of safety and training at the Murdock Mine of the Zeigler Coal Company, testified on behalf of the respondent. On the date in question herein, he was in the safety department at the Zeigler No. 5 Mine and had accompanied the inspector that day. He testified that at that time, in the crosscut from 3 to 4, there was a 1-1/2 foot notch left on the left hand rib and a 4-1/2 foot notch along the right hand side, of a 17 foot wide crosscut. The respondent's point being that it would have been very difficult, although admittedly not impossible, to get the head of the miner through that hole in the crosscut and therefore the miner operator himself could not have penetrated so deeply as to be under unsupported roof.

Mr. Kroll also testified that he did not see any mark or track from the pan of the continuous miner on the bottom.

I make the necessary credibility finding concerning the visibility of the impression of the pan on the bottom in favor of the Secretary. Three witnesses, including the inspector, state they clearly saw it and recognized it as an impression of the miner's pan on the bottom. I also find it credible that the measurement from the front of that pan impression back to the last row of bolts was 23 or 23-1/2 feet. This was also corroborated testimony. I further find as a fact that the distance from the front of the pan of the miner back to the operator's seat on the miner was measured to be and is 19 feet. It therefore follows that I agree with the inspector and find as a fact that the miner operator was in by permanent roof support by a distance of 3-1/2 feet. I therefore conclude that the Secretary has established a violation of 30 C.F.R. § 75.200, as alleged.

A violation is properly designated 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." National Gypsum, 3 FMSHRC 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 safety 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.

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

I have already found an underlying violation of the mandatory safety standard. The safety hazard contributed to by the violation and the consequences of the same are obviously serious injury and/or death from a roof fall. The only remaining element is the reasonable likelihood that the hazard contributed to will result in an event, such as a roof fall in which someone will be seriously injured or killed. In this regard, Inspector Melvin testified that there had already been roof falls in other units close to the cited area and that in his opinion it is reasonably likely to expect miners working under unsupported roof to be seriously injured or killed in the event of a roof fall in such an area. The continuous miner had a canopy installed and the roof conditions in the crosscut were generally described as good, but I nevertheless conclude that the instant violation of the cited mandatory safety standard was significant and substantial and serious.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dismissed per stip., No. 88-1019 (D.C. Cir. March 18, 1988), and Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act."

In this case, the Secretary argues that Zeigler demonstrated a moderate degree of negligence. All of the Secretary's evidence

is to that effect. The order is marked that way and the inspector testified consistent with that marking at the hearing. Therefore, even making this finding as urged by the Secretary, as I do for purposes of assessing the civil penalty, that is not sufficient to sustain an "unwarrantable failure" finding. Furthermore, there is no other evidence contained in this record that would support a finding of aggravated conduct on the part of Zeigler with respect to this violation. Accordingly, I will modify the § 104(d)(2) order at bar to a citation issued under § 104(a) of the Act, and affirm the significant and substantial violation of 30 C.F.R. § 75.200 as such.

With regard to the civil penalty to be assessed in this case, I have thoroughly reviewed the record and considering the statutory criteria contained in § 110(i) of the Act, conclude that an appropriate penalty for the violation found herein is \$400.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2614140 properly charged a violation of 30 C.F.R. § 75.200 and properly found that the violation was significant and substantial. However, the order improperly concluded that the violation resulted from Zeigler's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a § 104(d)(2) order. Accordingly, Order No. 2614140 IS HEREBY MODIFIED to a § 104(a) Citation and AFFIRMED.

2. The Zeigler Coal Company IS HEREBY ORDERED TO PAY a civil penalty of \$400 within 30 days of the date of this decision.



Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-90
Petitioner : A. C. No. 46-01318-03789
v. : Robinson Run Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DISAPPROVAL OF SETTLEMENT
ORDER TO SOLICITOR TO SUBMIT INFORMATION

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the violation involved in this case.

This case involves a violation of 30 C.F.R. § 75.1720-1 in that six miners were not wearing distinctively colored hard hats. The penalty was originally assessed at \$311 and the proposed settlement is for \$250. In her motion, the Solicitor asserts that, among other things, the reduction is warranted because gravity was less than originally thought. The motion states that the employees involved were maintenance personnel who were temporarily assigned to the mine to repair equipment. The motion further states that at all times these employees were accompanied by a superintendent who "was aware of their lack of experience and certification." According to the Solicitor's motion, there was little likelihood that these miners would be confused with experienced miners.

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

See S. Rep. No. 95-181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

Penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. Sellersburg Stone v. Federal Mine Safety and Health Review Commission, 736 F. 2d 1147 (7th Cir. 1984).

The Commission has recently reaffirmed the authority of its Judges to review and, where necessary, disapprove settlements, stating:

* * *. Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U. S. C. § 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See, e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480-81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

* * * * *

Secretary of Labor v. Wilmot Mining Company, 9 FMSHRC 686 (April 1987).

Based upon the Solicitor's representations set forth above, I cannot conclude that the recommended reduction in the penalty is warranted. If anything, the facts as set forth by the Solicitor make the violation appear more serious and highlight the operators negligence. The operator should have taken particular care because the miners were inexperienced. In addition, their inexperience and lack of certification put them at greater peril and therefore, increased gravity. Under the circumstances the original assessment seems modest indeed.

Accordingly, the Solicitor is ORDERED to submit additional information in support of her motion for settlement within 20 days from the date of this order otherwise this case will promptly be set for hearing.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 24 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 88-2
Petitioner : A.C. No. 34-01353-03509
v. :
: Welch Mine
PATCH COAL COMPANY, :
Respondent :

DECISION

Appearances: Michael Olvera, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner;
Marcus A. Wiley, Mining Engineer, Wiley
Engineering, Inc., Broken Arrow, Oklahoma, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$1,050, for five alleged violations of mandatory training standard 30 C.F.R. § 48.26(a). The respondent filed an answer denying the violations, and a hearing was held in Tulsa, Oklahoma. Although the parties waived the filing of posthearing briefs, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this case include the following: (1) whether the respondent violated the cited mandatory training standard; (2) whether the violations resulted from an unwarrantable failure by Patch Coal Company to comply with the requirements of the cited standard; and (3) whether or not the

violations were significant and substantial. Assuming the violations are affirmed, the question next presented is the appropriate civil penalties to be assessed pursuant to the penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 3-4):

1. The respondent's history of prior violations consists of two (2) citations issued during the twenty-four (24) months prior to the violations in this case, over a period of twenty-two (22) inspection days.

2. The respondent's annual 1986 coal production was 28,000 tons, with first-quarter 1987 production of 12,000 tons.

3. The respondent admits to "technical violations" of the training requirements of 30 C.F.R. § 48.26(a), but contests the inspector's gravity and negligence findings.

Discussion

The contested section 104(d)(1) citation and orders were issued by MSHA Inspector Johnny M. Newport in the course of an inspection which he conducted at the mine on April 13, 1987, and they are as follows:

Section 104(d)(1) Citation No. 2839121, issued on April 13, 1987, at 8:30 a.m., cites an alleged violation of 30 C.F.R. § 48.26(a), and the condition or practice is described as follows:

Mr. Gary Layton determined to be a newly employed experienced miner operating a 988-B front-end loader at pit 004-0 load rear dump trucks. A discussion with Mr. Layton revealed

he had received no newly employed experienced miner training. Mr. Layton had been working at this mine for approximately three weeks.

The inspector made gravity findings of "reasonably likely" resulting in "fatal" injuries, and he concluded that the violation was "significant and substantial." He also made a negligence finding of "reckless disregard," and included all of these findings on the face of the violation form by marking the appropriate places under Section II, "Inspector's Evaluation."

At 8:45 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839123, which states as follows:

Mr. Scott Bullard determined to be a newly experienced (employed) miner operating a caterpillar 769B rear dump truck at pit 004-0 had not received newly employed experienced miner training. Mr. Bullard had been working at this mine for approximately two weeks.

At 9:15 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839125, which states as follows:

Mr. Gaylin Rogers determined to be a newly employed experienced miner operating a caterpillar 769-B rear dump truck at pit 004-0 had not received newly employed experienced miner training. Mr. Rogers has been working at this mine for approximately three weeks.

At 9:15 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839127, which states as follows:

Mr. Rick Nash determined to be a newly employed experienced miner operating a Caterpillar 9-L bulldozer at pit 004-0 had not received newly employed experienced miner training. Mr. Nash has been working at this mine for approximately three weeks.

At 9:45 a.m., on April 13, 1987, the inspector issued section 104(d)(1) Order No. 2839129, which states as follows:

Mr. Larry Pitts, determined to be a newly employed experienced miner operating a Caterpillar 9-L bulldozer at pit 004-0 had not received newly employed experienced miner

training. Mr. Pitts has been working at this mine for approximately three weeks.

The inspector made gravity and negligence findings with respect to the aforementioned four orders identical to those made in connection with the initial section 104(d)(1) Citation No. 2839121.

Petitioner's Testimony and Evidence

MSHA Inspector Johnny M. Newport testified as to his experience and background, and he confirmed that he issued the citation and orders in question during his inspection of the respondent's mining operation on April 13, 1987. Mr. Newport described the respondent's mining operation as a surface pit coal mine utilizing a drag line, front-end loaders, and rear dump trucks. At the time of his inspection, the cited employees were removing overburden with bulldozers, and were operating endloaders and rear dump trucks. During the inspection of the equipment he asked each of the five cited miners whether they had received newly employed experienced miner training, and they replied that they had received no such training from the respondent (Tr. 8-11).

In response to a question as to why he concluded that the lack of the required training would "reasonably likely" result in injuries, Mr. Newport responded as follows (Tr. 11-12):

A. It would be reasonably likely that an accident would occur, based on their experience, the hazards involved with moving overburden, leaving the high wall, plus the general aspects of just the coal mine industry; it's a hazardous business.

Q. You've found, I guess in your experience, that as the amount of training of an employee goes down, the chance of accidents go up?

A. That's true; yes, sir.

In response to a question as to why he concluded that any injuries resulting from the lack of training could reasonably result in fatalities, Mr. Newport responded as follows (Tr. 12):

A. Basically, because of the hazards involved in the coal mining industry. If a person is not trained to notice certain aspects of high

walls, the patterns of equipment movement, where they dump, what method is being mined, there's a reasonable likelihood that it would result in a fatality.

Q. Was there anything in particular with the types of machines that they were using at this present time that would lead you to believe that a fatality could occur?

A. It's large equipment that's being used in the mining industry.

Q. Could you say that if the injury did occur, it would probably be of a reasonably serious nature?

A. Yes, sir, in my opinion, it would.

Mr. Newport stated that his negligence finding of "reckless disregard" was based on the fact that during the respondent's operation of a prior pit with a drag line, he discussed training with mine superintendent Doug Cook, and it was his understanding that depending on their experience, Mr. Cook knew the types of training required of miners. Mr. Newport stated that Mr. Cook has a copy of the "C.F.R." and the mine training plan. Mr. Newport confirmed that the respondent was cooperative during his inspection (Tr. 13).

On cross-examination, Mr. Newport stated that at the time he asked the employees whether they had received training, he had reviewed the respondent's training plan and asked about the location of the first aid station and first aid supplies, and no one could answer his questions in this regard. He also asked about communications, general mine policies, and accident reporting, and the only safety items that the employees were aware of were the need to wear hard hats and safety shoes. Mr. Newport identified copies of two training certificates for cited employees Gary Layton and Gaylin Rogers, and he confirmed that at the time of his inspection the employees could not produce copies of the certificates, and Mr. Newport confirmed that he could not find them among the mine records he reviewed (Tr. 13-16; exhibits R-1, R-2).

Mr. Newport confirmed that all of the cited employees were experienced miners, but were newly employed by the respondent for 1 to 3 weeks prior to his inspection. When asked to explain the basis for his conclusions that the lack of the required training pursuant to the respondent's approved plan

would expose each of the cited miners to "serious injuries" or that it was reasonably likely that each miner would likely be involved in an accident of a reasonably serious nature, Mr. Newport responded as follows (Tr. 19-21):

THE WITNESS: At the time that I made the inspection, it did have a high wall. The gentlemen working next to the high wall, or the spoil banks, comes, not in contact, but in that general area. Per se, just on a flat, as this floor, it's reasonably likely it could be less than that.

Going and coming from this pit, though, there's hills. You could have a flat tire, steering, blowing the hydraulic hose is a common occurrence in the coal mines with heavy equipment.

JUDGE KOUTRAS: I understand all that, but how would training this fellow keep those events from happening? You could have the best-trained miner in the world operating a front-end loader and all of a sudden, his hydraulic goes out because maybe the front-end loader is defective or it wasn't inspected for brakes or it had a broken hose or something like that. I suppose that's what Mr. Wiley is asking you.

THE WITNESS: In the portion of the training with trucks, front-end loaders, there's a mining method. It's either a left-hand method or a right-hand method.

If a certain person has been trained in a right-hand method and this company is doing the opposite, if he's not properly trained to his aspect, they could run into each other.

The size of the equipment could play a big importance on that gentleman getting hurt or hurt seriously, so it does play a big importance.

Some of the other coal companies, for example, that one truck -- you're sitting here, and it's anywhere from zero to maybe 15 feet.

We have some people that pass like on the highway, which is called the "left-hand method," whereas other people, for safety purposes -- they do that for --

JUDGE KOUTRAS: In this case, did you make those determinations individually for all these people or did you just assume that since they weren't trained, they would be exposed to all of these things that generally could happen at any operation?

THE WITNESS: Yes, it could generally happen.

JUDGE KOUTRAS: You didn't, for example, take each of these people and determine what their jobs were and all that business, whether it was left-hand or right-hand and all that business; did you?

THE WITNESS: Each is supposed to be incorporated in the Training Plan to go about it, sir.

Referring to his inspection report of April 13, 1987, Mr. Newport confirmed that he issued a citation for the lack of a front horn on a motor grader and inadequate brakes on mobile equipment. The citations were issued at a different pit than those where the untrained miners were working, and Mr. Newport conceded that no citations were issued for the work environment in which these miners were working. However, Mr. Newport took the position that the cited equipment travelled to the pit where the employees were working (Tr. 23-26).

In response to further questions concerning his gravity and negligence findings, Mr. Newport stated as follows at (Tr. 31-32):

JUDGE KOUTRAS: Did you, Mr. Newport, find any conditions at that mine when these fellows were working that would lead to any unusual circumstances in the form of hazards?

THE WITNESS: Not at that time, sir, but as far as the conditions during this inspection, it was during the winter and with the high walls, when the sun dries them out and then we have the rains, there's a possibility rocks could

fall from the high wall: There's people on foot cleaning coal.

JUDGE KOUTRAS: This would be true in any surface mining environment; wouldn't it?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So you would come to the same conclusion if you'd gone to the next one down the road? You would come to all these conclusions?

THE WITNESS: Even at the ones to the next mine, we asked them on their training. Once the initial time period that a person starts at a mine -- Some mines give training on a monthly basis for these same aspects. By law, they're required eight hours of annual refresher training to go over these things.

And, at (Tr. 39-40):

As far as I was concerned, Mr. Cook did know; he's an experienced mining engineer. He's been in the business for at least -- better than 20 years; he's familiar with this.

Unless him and this gentleman have some agreement, as far as I am concerned, yes, sir, it's just total disregard.

Mr. Newport confirmed that he did not have the mine training plan with him at the time he interviewed the employees by their equipment, and that he did not review the plan with them item-for-item to insure that they had received training in each of the subjects listed on the plan. He assumed that they were aware of these items, and aside from their knowledge of the requirements for safety shoes and hard hats, the employees told him that they had not received all of the training required by the plan (Tr. 42).

Mr. Newport confirmed that MSHA's training requirements require different degrees of training, depending on the experience of the miner. Pursuant to the respondent's training plan, newly employed experienced miners are required to receive 3 hours of training, and new miners with no experience are required to receive 40 hours of training. He confirmed that the type of training required of the cited miners in this

case appears at page 5 of the training plan (exhibit P-1, Tr. 42). He also believed that the "hazard training" indicated on the training certificates for Mr. Layton and Mr. Rogers is the type of hazard training given to mine visitors, rather than to newly hired experienced miners (Tr. 43).

Mr. Newport confirmed that all of the cited miners were withdrawn from the mine, and that the citations were timely abated after the miners received the requisite training from an individual who is on retainer with the respondent (Tr. 45). He also confirmed that the cited miners had worked at least 2 years at other mines (Tr. 51).

Mr. Newport stated that his prior conversation with Mr. Cook concerning training took place while he was on a spot inspection of another mine. Mr. Newport explained that this mine was along the same haulage road used by the respondent, and Mr. Cook advised him at that time that the respondent was considering opening up a new pit. During a conversation in the mine office, Mr. Newport stated that he advised Mr. Cook that "you need to remember the training," and Mr. Cook responded that "it would be taken care of." Since Mr. Cook was responsible for the entire mine, Mr. Newport believed that he was adequately informed about the training requirements (Tr. 53-54). Mr. Newport confirmed that he had no knowledge that Mr. Callahan had done any training. Assuming that he did, since he was not an MSHA certified trainer with a "blue card," Mr. Newport would still have issued the citations for improper training (Tr. 56-57).

Respondent's Testimony and Evidence

Marcus A. Wiley, Professional Engineer and President, Wiley Engineering Company, stated that he was designated by the respondent's mine superintendent, Doug Cook, to represent the respondent in this matter because his firm is on retainer by the respondent as a consulting firm. Mr. Wiley asserted that the respondent has an excellent compliance record and is concerned for the safety of its employees. He confirmed that the respondent's principal reason for contesting the violations was based on its desire to challenge the inspector's finding that the respondent exhibited a "reckless disregard" for MSHA's training requirements. He conceded that the complete training required by section 48.26(a), was not given to the five newly hired experienced miners cited by Inspector Newport. Mr. Wiley maintained that the employees did receive some "hazard recognition" training from one of his contractor employees, John Callahan, and he submitted copies of training certificates issued to two of the cited miners (Gary Layton

and Gaylin Rogers) which indicate that they received this training on March 30, 1987 (Exhibits R-1 and R-2; Tr. 6-8).

Mr. Wiley explained that Mr. Callahan was one of three employees of his firm who are certified by the State of Oklahoma as mine training supervisors, and that Mr. Callahan was a certified mine foreman assigned as the pit supervisor at the respondent's mine. Conceding that Mr. Callahan was not an MSHA "approved" training instructor, Mr. Wiley nonetheless maintained that the training given to the cited miners by Mr. Callahan concerned hazard recognition and avoidance, emergency and evacuation procedures, and health and safety standards, and that some of this training overlapped MSHA's training requirements for newly employed experienced miners.

Mr. Newport stated that he has never met Mr. Callahan and was not aware of his supervisory responsibilities. Mr. Wiley explained that this was not unusual since Mr. Cook was the individual identified under MSHA's mine ID number as the responsible person at the mine. Mr. Wiley assumed that Mr. Newport would have contacted Mr. Cook in regard to the citations which he issued and would not necessarily speak with Mr. Callahan. Mr. Newport confirmed that during his inspection he did not speak with Mr. Cook or Mr. Callahan, and he explained that Mr. Cook's name appears on the citation forms as the person to whom he served the citations because Mr. Cook had previously instructed him to put his name on all citations issued at the mine (Tr. 26-30).

Mr. Wiley pointed out that the respondent did have an MSHA approved training plan in effect at the time of the inspection conducted by Inspector Newport, and that after the withdrawal of the affected miners, they received immediate training in order to abate the violations, and that the respondent's training plan was amended to include mine superintendent Cook as one of three individuals certified by MSHA as approved training instructors. Prior to the inspection, Mr. Cook was not an approved trainer. Inspector Newport agreed that this was the case, and he stated that the citations could have been avoided if the respondent had upgraded its training plan to include Mr. Cook and Mr. Callahan as MSHA certified and approved training instructors (Tr. 26-27; 48-50).

Mr. Wiley candidly conceded that while the complete and proper MSHA training may not have been provided by the respondent in this case, he feels personally responsible for this, but believes that the severity of the inspector's conclusion that the violations were the result of the respondent's

"unwarrantable failure" to comply with MSHA's training requirements is not justified (Tr. 34-35).

Findings and Conclusions

Fact of Violations - 30 C.F.R. § 48.26(a)

The respondent is charged with five alleged violations of mandatory training standard 30 C.F.R. § 48.26(a), which mandates certain training for newly employed experienced miners. The standard requires that such miners complete a program of instruction in seven topical categories which are as follows:

1. Introduction to work environment.
2. Mandatory health and training standards.
3. Authority and responsibility of supervisor's and miners' representatives.
4. Transportation controls and communication systems.
5. Escape and emergency evacuation plans; firewarning and firefighting.
6. Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.
7. Hazard recognition.

Inspector Newport confirmed that he issued the violations during the course of an inspection and after interviewing the five miner equipment operators while they were engaged in work involving the removal of overburden at the surface pit mine in question. The miners confirmed to the inspector that while they were aware of the requirements for wearing hard hats and safety shoes, they had not received any newly employed experienced miner training as required by the respondent's approved training plan. The inspector also confirmed that the cited employees could not produce copies of any training certificates indicating that they had received the required training, and he could not find any copies of any such certificates during his review of the appropriate mine records.

The record establishes that while the cited equipment operators were experienced miners trained in the operation of

the equipment they were operating at the time of the inspection, they were newly employed miners at the respondent's mine and had worked there for several weeks prior to the inspection. Further, the respondent has stipulated and admitted that the employees in question had not received the required training specified in section 48.26(a), as well as its own MSHA approved mine training plan. Under all of these circumstances, I conclude and find that the failure by the respondent to provide the required newly employed miner training for the five cited employees in question constituted violations of the requirements of mandatory training standard 30 C.F.R. § 48.26(a), and the violations ARE AFFIRMED.

The Unwarrantable Failure Issue

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

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

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or

"inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

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

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

I take note of the fact that in this case the petitioner's proposed civil penalty assessments for the violations in question were processed by MSHA's regular assessment procedures, taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act. Although MSHA had discretion to waive the regular assessment formula in determining the amount of the proposed civil penalty assessments for the violations in question and to apply a more stringent "special assessment" procedure pursuant to 30 C.F.R. § 100.5, it did not do so in this case. Two of the categories listed among the guidelines for determining whether or not a "special assessment" is appropriate are found in section 100.5(b) and (h), and they are as follows:

(b) Unwarrantable failure to comply with mandatory health and safety standards;

* * * * *

(h) Violations involving an extraordinary high degree of negligence or gravity or other unique aggravating circumstances.

Notwithstanding the inspector's "unwarrantable failure" and "reckless disregard" negligence findings, MSHA opted not to levy "special assessments" for the violations in question, and its trial counsel could offer no explanation as to why MSHA did not choose to waive the regular assessment formula in connection with the violations in question.

The evidence in this case establishes that the respondent was aware of MSHA's training requirements for newly employed experienced miners, and had adopted an approved training plan pursuant to the appropriate MSHA regulations. The evidence also establishes that at least two of the affected miners received some hazard recognition training, and I have no reason not to believe Mr. Wiley's assertions that all of the miners received at least a minimum of training regarding hazard recognition. Mr. Wiley impressed me as a credible individual who readily accepted responsibility for the failure by the miners to receive the full 3-hour training required by MSHA's regulation. The evidence also establishes that the miners in question, who no longer are employed at the mine, were experienced equipment operators who knew how to operate their equipment, and were instructed to wear safety shoes and hard hats.

Inspector Newport confirmed that the respondent had always previously been in compliance with the required training regulations and had received no prior citations for violating MSHA's training standards. As a matter of fact, Mr. Newport stated that when he went to the mine for his inspection he was under the assumption that all of the miners had been trained because he had never experienced any prior training problems with the respondent, and as an example, he cited the fact that John Hare, an individual in the employ of the contractor, and who was listed in the approved training plan as an MSHA qualified training instructor, had always conducted the proper training pursuant to the respondent's plan (Tr. 51, 59).

Although the respondent's mine superintendent Doug Cook did not appear or testify at the hearing, I take note of, and find credible, the answer that he filed in this case. In his answer to the penalty assessment proposal filed by the petitioner, Mr. Cook conceded that he was aware of MSHA's training requirements, and has always made a sincere effort to comply with those requirements. This statement is supported by the inspector's testimony that the respondent has always been in compliance with the subject training requirements. Conceding the fact that Mr. Callahan, a contract employee of Wiley Engineering, was not listed as an MSHA approved training instructor in its approved training plan, Mr. Cook maintained

that this was an "oversight." This contention is supported in part by the fact that during the abatement process, the respondent's training plan was subsequently modified to include Mr. Cook as an MSHA certified training instructor, and Inspector Newport confirmed that had Mr. Cook or Mr. Callahan been included in the plan as qualified training instructors, the violations could have been avoided.

I also take note of the fact that in his answer, Mr. Cook asserted that all of the affected miners were familiar with the equipment they were operating at the time of the inspection, and that they had received "orientation (walk-around) training" from Mr. Callahan prior to starting work at the mine. Mr. Cook apparently believed that since Mr. Callahan was an experienced surface miner certified by the State of Oklahoma as a mine foreman, qualified to train miners, he also met MSHA's requirements as an individual qualified to train the respondent's miners pursuant to the contract with Wiley Engineering. This position by Mr. Cook was corroborated by Mr. Wiley who believed that Mr. Cook thought he was acting properly, and Mr. Wiley, in hindsight, candidly conceded that he should have insured that all of the training topics listed in MSHA's regulation were covered during the training of the miners in question (Tr. 61-62).

Inspector Newport testified that he based his negligence finding of "reckless disregard" on the fact that on a prior brief visit to another pit operated by the respondent, he reminded Mr. Cook about the need for training in the event the respondent were to open a new pit, and that Mr. Cook had the training plan and a copy of the "C.F.R." available for reference. Mr. Newport conceded that at the time of his inspection, he did not have the training plan with him, nor did he review it with the miner's who informed him that they had not received all of the required training, but had been instructed to wear safety shoes and hard hats.

In further explanation of his "reckless disregard" negligence finding, and in particular Mr. Cook's knowledge of the training requirements, Mr. Newport stated that "it was my understanding that he knew that depending on a person's experience on what type of training had to be given." Mr. Newport also commented that "I thought I covered it pretty good. Maybe I didn't; I'll say maybe there's something I left out" (Tr. 13). At another point during the hearing, Mr. Newport stated "As far as I was concerned, Mr. Cook did know; he's an experienced mining engineer. He's been in the business for at least -- better than 20 years; he's familiar with this" (Tr. 39-40).

On the facts of this case, and after careful review and consideration of the record, I find no credible support for the inspector's "reckless disregard" negligence finding. Nor can I find any credible evidence to support an "unwarrantable failure" finding. To the contrary, I conclude and find that at most, the inspector's rationale for making the disputed finding supports a negligence finding ranging from "ordinary" to "moderate," rather than one supporting any conclusion that the respondent's conduct was inexcusable, or egregious, or that it exhibited the absence of the slightest degree of care. In short, I find no evidentiary support for any conclusion that the respondent's failure to insure that the cited newly employed experienced miners received all of the required training was the result of any aggravated conduct of the kind described by the Commission in its recent holdings on this question. Accordingly, the inspector's unwarrantable failure findings for each of the violations ARE VACATED.

Modification of Citations and Orders

In view of my unwarrantable failure findings, the contested section 104(d)(1) citation and orders are modified to section 104(a) citations. See: Old Ben Coal Company, 2 FMSHRC 1187 (June 1980); Consolidation Coal Company, 3 FMSHRC 2207 (September 1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (July 1981).

The Significant and Substantial Violations Issue

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

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary

of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

Although I agree that any mining operation, whether it be a surface pit mine such as the one operated by the respondent in this case, or an underground mine, generally involves a working environment exposing miners to potential hazards and dangers, the question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., Docket Nos. WEST 85-148-M and WEST 86-83-M, decided by the Commission on April 20, 1988; Cement Division, National Gypsum Co., supra; Youghieny & Ohio Coal Company, supra.

With regard to the training requirements found in section 48.26(a), I agree that such training promotes mine safety by making miners aware of the hazards associated with their particular jobs tasks, and I have affirmed an inspector's "S&S" findings where the facts and circumstances clearly established that the lack of training presented a reasonable likelihood of serious injuries associated with such a violation, Secretary of Labor v. Highwire, Incorporated, 10 FMSHRC 22, 67-68 (January 1988).

On the facts of the case now before me for adjudication, the record establishes that the cited miners who lacked the training required for newly employed experienced miners were experienced equipment operators who were trained in the operation of the particular equipment they were operating at the time of the inspection. The facts also establish that at least two of the miners, as well as the others, received some minimum type of "orientation" and hazard recognition training, and were aware of the fact that they should wear hard hats and safety shoes. The respondent has conceded that all of the affected miners had not received the complete 3-hour training mandated by the respondent's training plan and the cited training standard, and the violations have been affirmed. The issue is whether or not these violations were significant and substantial, and whether the facts and evidence adduced by MSHA in support of the inspector's "S&S" findings support those findings.

In the instant case, Inspector Newport confirmed that he issued no citations for any other safety infractions for the work environment where the miners in question were working at the time of his inspection. He also conceded that the equipment operators were experienced and trained in the operation of their equipment, and he found no unusual mine conditions or hazardous circumstances present in the areas where the miners were working. Although he alluded to citations which he issued at the time of his inspection for the lack of a front horn on a motor grader and inadequate brakes on some mobile equipment, he conceded that these violations were found at a different pit location from that in which the untrained miners in question were working, and there is no evidence that any of the equipment being operated by the miners in question was unsafe or otherwise defective. The inspector also confirmed that he found no violations associated with the high wall or spoil bank located in the general area where the miners were working, and he confirmed that the miners would not be "in contact" with those areas (Tr. 19-21; 25).

Although Mr. Newport indicated that his inspection was "during the winter" and that there was a possibility that rocks could fall from the highwall when it dries out after a rain and that people would be on foot cleaning coal, (Tr. 31), the fact is that the citations were issued in April, and there is no evidence to establish that it had rained or that any of the miners in question were exposed to any rock fall hazards.

Inspector Newport alluded to the fact that the equipment which lacked a front horn or adequate brakes travelled to the

pit where the miners in question were working, and he took the position that "it's all one mine." However, there is no probative evidence that this equipment was in fact operated at the pit where the miners in question were working. Under the circumstances, I give little weight to this testimony and find it too remote and general to establish that the miners were in fact exposed to these equipment hazards, or that their lack of training would have contributed to any hazards associated with those violations.

In support of his conclusion that the lack of training would reasonably likely result in injuries to the experienced miners in question, Inspector Newport relied on the general hazards associated with moving overburden and the hazardous nature of the coal mining industry as a whole. In support of his conclusion that it was reasonably likely that any injury associated with the lack of training would result in a fatality, Mr. Newport relied on the fact that the miners were operating "large equipment," and "because of the hazards involved in the coal mining industry" (Tr. 12). He also believed that an individual who was not trained to recognize certain aspects of high walls, equipment movement and dumping patterns, and the method of mining being followed would reasonably likely to be exposed to fatal injuries. He further alluded to the fact that the operation of front-end loaders and trucks entails right-handed and left-handed mining methods and vehicle passing patterns, and that if equipment operators are not trained in these methods they could run into each other.

There is no evidence in this case that the experienced equipment operators who had worked at the mine for 2 or 3 weeks prior to Inspector Newport's inspection were oblivious to the mining methods and equipment passing procedures alluded to by the inspector as part of the basis for his "S&S" findings. Although it is true that the miners may not have been formally trained in these matters pursuant to general topical subject of "Transportation controls and communication systems" which is part of the respondent's training program, Mr. Newport conceded that he did not review the training plan with the miners with whom he spoke to determine their knowledge of these matters, nor did he make any determinations as to the mining method being utilized at the time of his inspection, or the specific equipment passing procedures being utilized by these operators.

Inspector Newport admitted that the miners told him that they were aware of the itemized training subjects listed in the training plan, but had not received all of the training listed herein (Tr. 42). Given the fact that at least two of them received some kind of hazard recognition training, and

that all of them knew about the wearing of hard hats and safety shoes and were experienced equipment operators who had worked at the mine for weeks before the inspection without any apparent difficulty or accident or injury incidents, I find it difficult to believe that they were totally ignorant of the appropriate work procedures associated with the operation of their equipment. Further, Mr. Newport conceded that he simply assumed that the lack of training exposed the miners to injuries and fatalities generally associated with any mining operation (Tr. 19-21).

On the facts of this case, and after careful review and consideration of Inspector Newport's testimony in support of his "S&S" findings as to each of the violations, I conclude and find that these findings were based on general and speculative assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any specific prevailing mining conditions from which one could conclude that the miners in question were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. In short, I conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were significant and substantial. Accordingly, the inspector's findings in this regard are rejected and they ARE VACATED.

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

Respondent's representative stated that the Welch Mine employs a minimum of 15 miners, and a maximum of 30. He confirmed that at the time the violations were issued, the mine employed 15 miners, and currently employs less than five. Petitioner's counsel agreed that the respondent is a small surface coal mine operator. Under these circumstances, and taking into account the respondent's coal production as stipulated to by the parties, I conclude and find that the respondent is a small mine operator. Further, absent and information to the contrary, I also conclude and find that the civil penalties assessed for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated to the respondent's history of prior violations. Based on that stipulation, I conclude and find that the respondent has a good compliance record, and

there is no evidence that it has been previously cited for any violations of MSHA's training standards.

Negligence

I conclude and find that the respondent knew or should have known about the training requirements found in section 48.26(a), and that its failure to exercise reasonable care to insure that this training was given to the newly employed experienced miners in question constitutes a moderate degree of negligence on its part.

Gravity

Although I have found that on the facts of this case the violations in question were not significant and substantial, I nonetheless conclude and find that the failure to adequately train the newly employed experienced miners in question constituted a serious violation of the training requirements of section 48.28(a). The failure to adequately train a miner could under certain conditions and circumstances, result in exposing a miner to potential and possible mine hazards.

Good Faith Compliance

Inspector Newport confirmed that the respondent exhibited good faith in timely abating the violations. He confirmed that after the miners were withdrawn from the mine, they received immediate training administered by a contractor who was an MSHA approved training instructor, and the orders were terminated. Under the circumstances, I conclude and find that the respondent exercised good faith compliance in abating the violations.

Civil Penalty Assessments

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

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2839121	04/13/87	48.26(a)	\$75
2839123	04/13/87	48.26(a)	\$75
2839125	04/13/87	48.26(a)	\$75

2839127	04/13/87	48.26(a)	\$75
2839129	04/13/87	48.26(a)	\$75

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 24 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. PENN 87-145
Petitioner : A.C. No. 36-00840-03606
v. :
: Docket No. PENN 87-155
BETH ENERGY MINES, INC., : A.C. No. 36-00840-03607
Respondent :
: Docket No. PENN 87-188
: A.C. No. 36-00840-03612
: 3
: Docket No. PENN 87-224
: A.C. No. 36-00840-03617
:
: Cambria Slope No. 33 Mine

DECISION

Appearances: William T. Salzer, Esq., and Evert VanWijk, Esq.
(on the brief), Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania for the Secretary of Labor;
R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corporation, Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" charging Beth Energy Mines, Inc., (Beth Energy) with five violations of regulatory standards. The general issues before me are whether Beth Energy violated the cited regulatory standards, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations are "significant and substantial". If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Docket Nos. PENN 87-145 and 'PENN 87-224

At hearing the parties moved to settle Order No. 2691012 proposing a reduction in penalty from \$850 to \$650. Based upon the documentation and representations presented post-hearing I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

Citation No. 2691218 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1704 and charges as follows:

The intake escapeway for 14 left G. West Mains and G. West Mains left sections was not maintained to insure passage at all times of any person, including disabled persons in that the first overcast inby S.S. 4979 in No. 5 entry of G. West Mains had steps to cross over it and the distance between the steps ranged from 16 inches to 8 inches through which a person could fall also the steps over the 2 overcast where the escapeway crosses from the left side of G. West to the right had spaces between the steps from 4 inches to 11 inches through which a person could fall. These overcast [sic] were from 66 inches to 72 inches high and had 6 or 7 steps each. Also from S.S. 1126 in No. 8 entry through a xcut to No. 9 entry and outby on No. 9 entry to S.S. 1240+50 feet. The travelway had piles of rock at least one-foot high across the escapeway.

Citation No. 2698137 similarly alleges a "significant and substantial" violation of the same regulatory standard and charges as follows:

The alternate escapeway for the E East left, E East right, 4LT E East and 5LT E East which is the left side return of E East is not being maintained to insure passage at all times of any person, including disabled persons. At 3 locations steps were built over overcast and gaped [sic] between the steps up to 9 inches were present that a person or a part of a person could fall through causing injuries in the event of an emergency. The 3 locations are (1) inby overcast in the 2nd set in the return both sets of steps the top set was 9 inches from the top of the overcast (2) inby overcast in the 3rd set in the return both sides steps were gaped [sic] from 4 to inches (3) inby overcast in the 4th set on the return inby side steps had gaps from 4 to 6 inches.

The Secretary maintains that the cited conditions constituted a violation of that part of the standard at 30 C.F.R. § 75.1704 which reads as follows:

At least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways... shall be provided from each working section... and shall be maintained in safe condition.

It is apparent that the language of this standard is expressed in general terms so that it may be adaptable to myriad situations affecting the safety of escapeways. See Kerr-McGee Corp. 3 FMSHRC 2496 (1981). Accordingly questions of liability for alleged violations of this standard must be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of this standard, would have recognized the hazardous conditions that the standard seeks to prevent. Ozark-Mahoning Co., 8 FMSHRC 190 (1986); Great Western Electric Co., 5 FMSHRC 840 (1983); U.S. Steel Corp., 5 FMSHRC 3 (1983); Alabama By-Products Corp., 4 FMSHRC 2128 (1982). Specifically the maintenance of escapeways in safe condition must be measured against the test of what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. The Commission has stated that the reasonably prudent person test contemplates an objective, and not subjective, analysis of all surrounding circumstances, factors and considerations bearing on the inquiry at issue. Great Western, supra., 5 FMSHRC at 842-843.

Citation No. 2691218 charges two categories of violation, namely, excess gaps between the steps over the overcasts in the intake escapeway and piles of rocks across the escapeway. The evidence on these issues is essentially undisputed. The first overcast was approximately 66 inches high. The gaps in the steps on one side of this overcast were uniformly 8 inches, except between the top step and the top of the overcast where the horizontal distance between the step and the top of the overcast was 16 inches. This step was level with the top of the overcast. The gaps on the other side of the overcast were nearly of uniform width of between 4 to 6 inches. The second overcast was approximately 72 inches high and the gaps were from 4 to 11 inches. The cited pile of rocks was about one foot high and two to three feet wide and continued across the entry.

The steps cited in Citation No. 2698137 had been in existence for several months to a year. At the second set of overcasts in E East the top step on each side was 9 inches from the overcast. At the third set of overcasts in the alternate escapeway there were gaps of 4 to 6 inches. These sets of overcasts were all approximately 4 1/2 feet high.

The horizontal gaps in the steps in both G West and E East were almost uniformly 4 to 6 inches with the exception of the gap between the top step and the top of the overcast. In three instances this gap exceeded 6 inches but the top step and the top of the overcast were in the same horizontal plane with no vertical rise between the steps. One set of steps had uniform gaps of 8 inches. All of the cited steps were constructed of wood and were six feet wide with treads of uniform width. The backs of the steps were open. The steps in E East had handrails.

MSHA Inspector Gene Ray, who issued these citation, opined that the existence of gaps of varied widths in the steps created a hazard because miners "could very easily not see the hole between the steps and fall into it and get injured." He further described the hazard as follows:

If people had to evacuate these ... sections in an emergency situation, and they would be in a hurry ... they would fall between--that they would slip into one of these gaps, that they could become injured ... they could receive a sprain or a broken leg. Also, in that they would be injured, it would slow them down in the process of evacuating the mine in case of an emergency.

Ray also observed that miners "could trip and injure themselves" over the rock piles while traveling the escapeway in an emergency situation.

Within this framework I conclude that a reasonably prudent person familiar with the factual circumstances surrounding the cited conditions would have recognized that the irregular gaps up to 16 inches wide in the steps over the overcast and the described pile of rocks created hazardous conditions in the escapeways such as to constitute violations of the cited standard.

I also find that the violations were "significant and substantial". The described violations contributed to the discreet safety hazard of tripping or slipping and/or falling through the uneven gaps in the steps and of tripping over the piles of rocks. It is reasonably likely to expect such a hazard to result in injuries such as sprains or fractures and that such injuries would be of a reasonably serious nature. See Mathies Coal Co. 6 FMSHRC 1 (1984). The hazards would also be greatly exacerbated by an evacuation through the cited areas during an emergency.

I find however that the operator is chargeable with but little negligence with respect to the violations charged in Citation No. 2691218. The evidence shows that although some of

the gaps in the steps had existed for up to ten years and in areas subject to MSHA inspections, no citations or other notice had been given that they constituted violations. Similarly with the respect to the rock piles, Beth Energy is chargeable with but little negligence. There is no evidence to show that Beth Energy officials had prior knowledge of the rocks in an area that is not subject to frequent inspections. However since the violations charged in Citation No. 2698137 were found on June 15, 1987, five months after notice of similar violations in Citation No. 2691218, it is clear that the operator should have corrected the cited conditions. Its failure to have done so constitutes negligence.

Docket No. PENN 87-155

On February 11, 1987, MSHA Inspector William L. Davis issued Citation No. 2691158 pursuant to Section 104(a) of the Act. the citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.202 and charges as follows:

The roof was found to be inadequately supported in that the 6" x 8" x 5' crossbars (2) of them were broke [sic] and several showed signs of excessive weight on them, therefore this entry is not safe for travel by a certified person for weekly examinations. Located in the No. 8 entry between the second and third crosscut inby survey station No. 7226 of the No. 10 entry of the F West Mains.

The citation was issued following an inspection of the F West Mains area by Inspector Davis and Foreman Roger McIntosh on February 11, 1986. The F West area was an inactive area where mining had not occurred for several years. The only persons who regularly entered the subject area were mine examiners who perform weekly examinations of the bleeder evaluation points and the return air courses. Such examinations were being made in the Nos. 8, 9, or 10 entries, depending on the condition of the particular entry, and these entries were in common.

The evidence shows that Davis had never previously inspected this area and neither he nor McIntosh knew the precise route followed by the mine examiner who traveled these entries. While Davis first testified that they were able to follow the precise route of the mine examiner by tracking footsteps in the coal dust, he later admitted that the footprints could have been made years earlier when the section was active.

Davis testified that he and McIntosh passed through the F West entries until they arrived at spad No. 7145 in the No. 8 entry. Just beyond that point, he noticed that 2 crossbars used

for roof support were broken. Davis and McIntosh then turned left in a crosscut and proceeded to the No. 9 entry. They looked down the No. 9 entry and observed that the bottom was heaved and there was roof pressure in the No. 9 entry beyond where they were standing. Davis thought it was not feasible to travel in the No. 9 entry so they traveled to the No. 10 entry and apparently proceeded down the No. 10 entry.

According to Davis, the citation was abated by marking a route of travel in the No. 8 entry between a row of timbers and the right hand rib. In issuing the citation, the inspector assumed that the mine examiner was traveling under the bad roof in the No. 8 entry but had no idea which entry the mine examiner actually traveled.

Ralph Keefe, a union mine examiner, testified that he made the weekly examination the week before the subject citation and had regularly made such examinations. His normal route of travel was to proceed down the No. 8 entry to spad 7145. Keefe would then turn left (as Inspector Davis did) and travel over one crosscut to the No. 9 entry. He would turn right down the No. 9 entry and travel two crosscuts. According to Keefe he would then turn right and travel in a crosscut back to the No. 8 entry thus avoiding all of the dangerous areas in the entries (See Exhibit R-2). He would then turn left through a crosscut to the No. 10 entry and travel three crosscuts in the No. 10 entry because of the fall in the No. 9 entry.

The route avoided bad roof in the No. 8 entry beyond spad 7145, it avoided bad roof beyond the crosscut where the examiner turned from the No. 9 to the No. 10 entry and it avoided the bad roof behind the area where the examiner entered the No. 10 entry. Keefe specifically testified that he did not travel under the cited bad roof in the No. 8 entry when making his weekly examination of the F West returns. He had been making examinations in this area for a year and a half before the citation and was aware of this area of bad roof. According to Keefe the route had also been marked so that the cited area in the No. 8 entry could be avoided.

I find the testimony of Keefe to be entitled to significant weight as he clearly was the person most knowledgeable about the cited area, having been the mine examiner for the previous year and a half, and was the only witness having first hand knowledge of the actual route traveled during the mine examinations. On the other hand Inspector Davis was clearly not familiar with the cited area and was inspecting it for the first time. Moreover Davis did not question the mine examiner to determine the route he traveled or avail himself of the opportunity to accompany the examiner along his regular route. Davis also acknowledged that

it was difficult, it not impossible, because of the condition of the mine floor, to otherwise determine which path was followed by the mine examiner. Under the circumstances he could only speculate as to the route traveled. Davis also contradicted himself in a critical respect by first stating that bad roof prevented all passage in the No. 10 entry but later admitting that there was no area of bad roof along the route Keefe followed in the No. 10 entry.

Under the circumstances I do not find that the Secretary has sustained her burden of proving that a violation has occurred herein. Accordingly Citation No. 2691158 is vacated.

Docket No. PENN 87-188

Citation No. 2691708 alleges a violation of the regulatory standard at 30 C.F.R. § 75.1707 and charges as follows:

The isolated intake air escapeway, designated as such by the operator (no. 2 entry) and the "D" East Mains trolley haulage (no. 3 entry) were not separated. This area was developed after March 30, 1970 and this isolated escapeway is used by the 6 left active working section. The first crosscut between no. 2 and no. 3 entries inby survey station no. 5074 was open and air was passing from no. 3 entry into no. 2 entry. The air is in common at the first crosscut inby survey station no. 5074 and also for two crosscuts outby this area where the intake air and escapeway goes into the 6 left working section; however, the air traveling in towards the 6 left section was splitting at the mouth of this section with a small amount of air going inby in the no. 2 entry. The air passing inby in no. 2 entry is preventing the track/trolley air from entering 6 left section at this time.

The cited standard provides as relevant hereto that "the escapeway required by this section to be ventilated with intake air shall be separated from the belt in trolley haulage entries of the mine for the entire length of such entries to the beginning of the working section ..." The term "working section" is defined in the regulations as all areas of a coal mine from the loading point of the section to and including the working face. See 30 C.F.R. § 75.2(g)(3). In this case it is not disputed that the belt tail would be considered the loading point.

The Secretary argues that although the intake escapeway "curls" around in a "horseshoe" away from the working face, from the loading point to the faces would nevertheless be inby

and everything from the loading point in the other direction and, implicitly, doubling back, would be outby. MSHA Inspector Ronald Miller's testimony in this regard is not disputed. Accordingly, from the reference point at the belt tail of the 6 left section "any point traveling out the belt entry would be therefore outby". Under the circumstances it is clear that under the cited standard the operator was required to maintain a separation between the intake air and the trolley haulage entry in the cited areas.

Beth Energy maintains that it did provide such separation without permanent stoppings by use of a pressure differential. However the persuasive evidence in this case through the testimony of MSHA's expert witnesses is that pressure separation alone is not sufficient under the cited standard unless a specific exception is granted under the regulation or under the procedure for the approval of ventilation plans. According to Inspector Miller the "separation" that is required by industry standards is a physical barrier or stopping.

According to MSHA ventilation specialist Samuel Burnett, in mines where pressure separation is permitted a physical barrier such as a regulator must also be used in conjunction therewith to provide adequate control. Even Beth Energy Mine foreman Nick Carpinello acknowledged that he would not permit an air pressure differential between an intake escapeway and the track trolley for any of the crosscuts where the two directly parallel each other and that such separation would be in violation of the cited standard. Carpinello also acknowledged that if the air flow in the escapeway should reverse then the air from the track trolley would indeed enter the escapeway. This testimony corroborates that of the MSHA experts supporting the rationale of the regulation to avoid a potential hazard.

Under the circumstances I find that MSHA's construction of the standard to be consistent with accepted industry practice and the "reasonable person" test discussed supra. Under the circumstances the failure of Beth Energy to have erected permanent stoppings as cited constituted a violation of 30 C.F.R. § 75.1707.

I do not find however that the Secretary has met her burden of proving the necessary probabilities of an occurrence to establish the violation as "significant and substantial". See Mathies Coal Co., supra. The testimony of Burnett and Miller concerning the potential for an air reversal that could cause track air to flow onto the intake escapeway was speculative and based on presumptions of fact not established in the record. For the same reasons I do not find that the Secretary has proven that the violation was of high gravity.

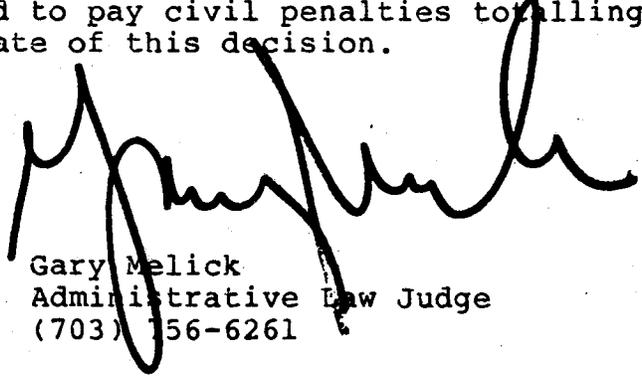
I also find that Beth Energy is chargeable but with little negligence in regard to this violation. This finding is based in part on the confusion caused by the unusual "horse-shoe" design of the escapeway. It is also based on the evidence that Beth Energy had previously utilized pressure separation without being cited and that a prior violation had been vacated by MSHA officials on the basis that a separation was in fact being maintained by positive air flow.

In determining appropriate civil penalties in these cases I have also considered that the mine operator is of moderate size and does not have a significant history of violations. I also have taken it into consideration that the violative conditions were abated in a good faith and timely manner.

Accordingly I find that the following civil penalties are appropriate: Docket No. PENN 87-145 - Order No. 2691012 (settled) \$650; Citation No. 2691218 \$75. Docket PENN 87-155 - Citation No. 2691158 (vacated). Docket No. PENN 87-188 - Citation No. 2691708 \$100. Docket No. PENN 87-224 - Citation No. 2698137 -\$250.

ORDER

Citation No. 2691158 is vacated. Order No. 2691012 and Citation Nos. 2691218, 2691708 and 2698137 are affirmed and Beth Energy Mines, Inc., is directed to pay civil penalties totalling \$1,075 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 56-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 27 1988

M.A.E. WEST, INCORPORATED, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEVA 87-234-R
: Citation No. 2909484; 5/14/87
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. WEVA 87-235-R
ADMINISTRATION (MSHA), : Citation No. 2909485; 5/14/87
Respondent :
: Docket No. WEVA 87-236-R
: Citation No. 2909486; 5/14/87
: :
: Docket No. WEVA 87-237-R
: Citation No. 2909487; 5/14/87
: :
: Docket No. WEVA 87-238-R
: Order No. 2909488; 5/14/87
: :
: Docket No. WEVA 87-239-R
: Citation No. 2909489; 5/14/87
: :
: MAE West Preparation Plant
: Mine ID 46-03755
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-92
Petitioner : A.C. No. 46-03755-03534
v. :
: M.A.E. West Preparation Plant
M.A.E. WEST, INCORPORATED, :
Respondent :

DECISIONS

Appearances: Mark M. Neil, Esq., Rist, Neil & Associates,
and William D. Stover, Esq., M.A.E. Services,
Inc., Beckley, West Virginia, for the
Contestant/Respondent;
Jack E. Strausman, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern six Notices of Contests filed by M.A.E. West Incorporated pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the validity of four section 104(a) citations, with special "significant and substantial" (S&S) findings, and two section 107(a) imminent danger orders issued at M.A.E. West's Preparation Plant on May 14, 1987. The citations and orders were issued after the conclusion of a fatal accident investigation conducted by MSHA (Exhibit G-27). A hearing was conducted in Beckley, West Virginia, during May 24-25, 1988, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these proceedings are as follows:

1. Whether or not the conditions and practices cited in the imminent danger orders constituted an imminent danger within the meaning of section 107(a) of the Act.
2. Whether or not the conditions or practices described in the citations issued pursuant to section 104(a) of the Act constituted violations of the cited mandatory safety standards, and if so, whether or not these violations were significant and substantial.
3. The appropriate civil penalty assessments that should be assessed against M.A.E. West for the violations in question, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1; Tr. 5-6):

1. MAE West, Inc. is a West Virginia Corporation located at 41 Eagles Road, Beckley, West Virginia 25801.

2. MAE West, Inc. operates a bituminous coal preparation plant at Uneeda in Boone County, West Virginia.

3. The federal mine identification number for the MAE West Prep. Plant is 46-03755.

4. MAE West, Inc., and the operation of the MAE West Prep. Plant, are subject to the jurisdiction of the Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq.

5. The Administrative Law Judge has jurisdiction over this proceeding.

6. The inspector who issued the subject 104(a) citations (numbers 2909484, 2909485, 2909487, and 2909489) and the subject 107(a) imminent danger orders (numbers 2909486 and 2909488) was a duly authorized representative of the Secretary of Labor.

7. The subject 104(a) citations (numbers 2909484, 2909485, 2909487 and 2909489) and the subject 107(a) imminent danger orders (numbers 2909486 and 2909488) were properly served upon the operator in accordance with sections 104(a) and 107(a) of the Acc.

8. Copies of the subject citations and orders, and the subsequent modifications or terminations issued, are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness of any statement therein.

9. A copy of Form R-17, the Assessed Violation History Report for the MAE West, Inc. Prep. Plant accurately sets forth the number and types of violations assessed for said plant

during the period from May 12, 1985 to May 11, 1987 and may be admitted into evidence.

10. For purposes of section 110(i) of the Act, MAE West, Inc. is a moderate-sized company.

11. The imposition of the proposed civil penalties will not affect the operator's ability to continue in business.

12. For purposes of section 110(i) of the Act, the operator demonstrated good faith in achieving compliance with the Act after being notified of the subject 104(a) violations (numbers 2909484, 2909485, 2909487, 2909489).

Bench Ruling

During opening statements at the hearing, MSHA's counsel moved for leave to amend and modify section 107(a) Order No. 2909486 to cite a violation of 30 C.F.R. § 77.404(c) rather than 30 C.F.R. § 77.516 (Exhibit G-3-a). Counsel also moved to amend and modify section 104(a) Citation No. 2909487 to cite a violation of section 77.404(c), rather than section 77.516, and to delete the sentence which originally appeared in item #8, "condition or practice" on the face of the original citation form, which read "The practice is contrary to the National Electrical Code section 430-86" (Exhibit G-4-a).

M.A.E. West's counsel filed a previously prepared written objection to the proposed modifications and amendments, and after further arguments on the record, MSHA's request was granted, and the objection was rejected (Tr. 8).

Discussion

The contested citations and orders, as modified and amended, are as follows:

Section 104(a) "S&S" Citation No. 2909484, 30 C.F.R. § 77.502 (Exhibit G-1):

The conduit provided for the 480 volt a.c. three phase circuit for the drive motor of the raw coal bypass belt, also called the breaker reject belt, included a junction box that was damaged to the extent that muck and water were allowed to accumulate in it. This resulted in

a power lead shorting to ground, and it shorted out the start-stop controls of the Koppers rotary breaker.

Section 104(a) "S&S" Citation No. 2909485, 30 C.F.R. § 75.516 (Exhibit G-2):

The No. 14 AWG control leads for the JDG switch of the Koppers rotary breaker were spliced 12 feet in by the large splice box located on the underside of the 2nd floor of the breaker building. The splice shorted to the conduit and shorted the start-stop switches for the Koppers rotary breaker. The splice was located inside a run of conduit tubing, not acceptable in the National Electrical Code, section 346-14 for rigid metal conduit, and section 345-14 for intermediate metal conduit.

Section 107(a) Imminent Danger Order No. 2909486, 30 C.F.R. § 77.404(c), (Exhibits G-3 and G-3-a):

During the investigation of a fatal accident, it was revealed that a practice of working on and inside the Koppers rotary breaker without locking out the circuit breaker which was the disconnecting device, existed.

Section 104(a) "S&S" Citation No. 2909487, 30 C.F.R. § 77.404(c) (Exhibits G-4 and G-4-a):

The investigation of a fatal accident revealed that a practice of not turning power off and locking out the circuit breaker for the Koppers rotary breaker existed when work was being performed on the machine. The circuit breaker was the power disconnecting device.

Section 107(a) Imminent Danger Order No. 2909488, 30 C.F.R. § 77.516, (Exhibits G-5):

During the investigation of a fatal accident it was found that some circuit breakers in the circuit breaker room of the breaker building which were the power disconnecting devices for the motor circuits were not provided with a means to be locked out when work was being performed.

Section 104(a) "S&S" Citation No. 2909489, 30 C.F.R.
§ 77.516, (Exhibit G-6):

Some circuit breakers used as the power disconnecting devices for motor circuits in the breaker building were not provided with a means to be locked out when work was being performed on the machines. This is contrary to the National Electrical Code section 430-86. These circuit breakers included the rock bin undercut gate, the 2-48 inch slope conveyor, and the main.

MSHA's Testimony and Evidence

In support of its position in these proceedings, MSHA presented the testimony of Federal Mine Inspectors James E. Davis and Roy W. Milam. Inspector Davis prepared the official report of investigation concerning the accident in question, and he testified as to his findings which were included in the report, as well as to certain information developed during interviews with certain witnesses in the course of the investigation (Exhibits G-27 and G-30). Inspector Milam, the individual who issued the contested citations, testified as to the facts and circumstances concerning his electrical inspections, and the reasons for the issuance of the citations in question.

During the second day of the hearing, and during a break in the cross-examination of Inspector Milam, the parties advised me that they had reached a proposed settlement in all of these matters, and MSHA's counsel requested some additional time to contact his office for the purpose of discussing and clearing the proposed settlement with his supervisor. Counsel's request was granted, and the hearing was recessed to accommodate the parties in their further settlement negotiations. The hearing was subsequently reconvened, and the parties advised me that they had reached an agreement and proposed settlement of all of the cases, and they were afforded time to present their settlement motions, including supporting arguments on the record. MSHA's counsel confirmed that Inspectors Davis and Milam agreed with the terms of the settlement, which are as follows (Tr. 55-60):

1. Docket Nos. WEVA 87-234-R, WEVA 87-235-R, and WEVA 87-239-R. With regard to section 104(a) "S&S" Citation Nos. 2909484, 2909485, and 2909489, the parties are in agreement that the citations may be affirmed as issued and modified by the inspector. M.A.E.

West agreed to pay the full amount of the proposed civil penalty assessments for the violations in question, and agreed to withdraw its contests in this regard.

2. Docket No. WEVA 87-238-R. The parties agreed that the contested section 107(a) Imminent Danger Order No. 2909488, may be affirmed as issued and modified by the inspector, and M.A.E. West agreed to withdraw its contest in this regard.

3. Docket Nos. WEVA 87-236-R and WEVA 87-237-R. With the concurrence of Inspector Milam, the parties agreed to amend and modify section 107(a) Imminent Danger Order No. 2909486 and section 104(a) "S&S" Citation No. 2909487, so that the "condition or practice" described by the inspector will read as follows:

During the investigation of a fatal accident it was concluded that Chester Asbury entered the Koppers Rotary Breaker for the purpose of repairs and maintenance without the power being off in violation of 30 C.F.R. § 77.404(c).

The inspector's "high" negligence finding with respect to Citation No. 2909487 is reduced to "moderate," thereby justifying a reduction of the original civil penalty assessment.

The parties agreed that the contested order and citation, as amended and modified above, may be affirmed as issued, and subsequently amended and modified. M.A.E. West agreed to withdraw its contests in this regard.

With respect to MSHA's proposed civil penalty assessment of \$8,000, for the Citation No. 2909487, MSHA agreed to reduce its proposed penalty assessment for this violation to \$7,000, and M.A.E. West agreed to pay that amount in satisfaction of the violation.

Conclusion

After careful review and consideration of the pleadings, and the arguments presented by the parties in support of the proposed settlement disposition agreed to by the parties in these proceedings, the proposed settlements were accepted and approved from the bench. Further, pursuant to the requirements of Commission Rule 30, 29 C.F.R. § 2700.30, I conclude and find that the settlement agreements are reasonable and in the public interest, and my bench decisions in this regard ARE REAFFIRMED.

ORDER

All of the citations, orders, and violations in issue in these proceedings ARE AFFIRMED. M.A.E. West IS ORDERED to pay the following civil penalty assessments for the violations in question, within thirty (30) days of the date of these decisions and order:

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2909484	05/14/87	77.502	\$ 255
2909485	05/14/87	77.516	\$ 255
2909487	05/14/87	77.404(c)	\$7,000
2909489	05/14/87	77.516	\$ 180

IT IS FURTHER ORDERED that the Notices of Contests filed by M.A.E. West in connection with the contested violations in issue in these proceedings ARE DISMISSED. Upon receipt of payment of the aforesaid civil penalty assessments by the petitioner, the civil penalty proceeding is likewise dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 28 1988

FMC WYOMING CORPORATION, : CONTEST PROCEEDINGS
Contestant :
 : Docket No. WEST 86-43-RM
v. : Citation No. 2647693; 11/23/85
 :
SECRETARY OF LABOR, : Docket No. WEST 86-44-RM
MINE SAFETY AND HEALTH : Order No. 2647694; 11/23/85
ADMINISTRATION (MSHA), :
Respondent : Docket No. WEST 86-45-RM
 : Order No. 2647695; 11/23/85
 :
 : FMC Trona Mine
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 86-110-M
Petitioner : A.C. No. 48-00152-05535
v. :
 : FMC Trona Mine
FMC WYOMING CORPORATION, :
Respondent :
and :
UNITED STEEL WORKERS OF :
AMERICA, :
Intervenor :

DECISION

Appearances: James H. Barkley, Esq., Margaret A. Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Respondent/Petitioner;
James Holtkamp, Esq., VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Contestant/Respondent;
Stan Loader, Staff Representative, United Steel-
workers of America, Rock Springs, Wyoming,
Intervenor.

Before: Judge Cetti

Statement of the Case

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1982) ("Mine Act"). The Secretary on behalf of the Mine Safety and Health Administration (MSHA) charges the FMC Wyoming Corporation ("FMC") with violating three regulatory safety standards.

The three violations charged are based upon MSHA's mine inspector Robert Scheneman's November 19th inspection of FMC's Trona mine surface facility.

Factual Background

FMC operates a trona mining and processing facility near Green River, Wyoming. The trona is found in thick underground seams. FMC extracts the trona from its natural deposits by using underground mining and in situ leaching methods. Adjacent to the mine is a large surface plant where the trona is processed into various products.

The citation and orders in these proceedings arise not from extracting or processing trona but from maintenance work done by FMC's maintenance crew on the No. 3 turbine in the "Sesqui" powerhouse, located in the surface plant. The turbine is one of three turbines which are used to generate electricity for use at the surface plant. The turbines and associated boiler are enclosed in the powerhouse which has large doors on the west side for heavy equipment access.

STIPULATIONS

The parties stipulated as follows:

1. FMC is a large operator.
2. The violations were abated within the period proscribed.
3. Payment of the amended penalties will not impair FMC's ability to continue in business.
4. The operator's history of prior violations is average for an operator of its size.

Citation No. 2647693

This citation was issued under section 104(a) of the Mine Act on November 23rd by MSHA Inspector Robert Scheneman.

The citation alleges a violation of 30 C.F.R. § 57.5002 which mandates the following:

Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

In the citation MSHA inspector Robert Scheneman correctly states the facts as follows:

The company Industrial Hygienist was not notified when work was being started to remove the asbestos type in-

sulation from the No. 3 turbine in Sesqui Powerhouse. There were no surveys taken to determine if the people working were overexposed to asbestos. The Industrial Hygienist did take samples after the work was done and they were cleaning up.

This citation was modified from a 104(a) citation to a 104(d)(1) citation on December 12, 1985.

On November 4, a maintenance crew supervised by FMC foreman John Wilfong began the process of dismantling the No. 3 turbine for its scheduled 5-year overhaul.

The dismantling work began with the removal of the turbine covers and blanket insulation. The blanket appeared to be made of "grayish" fiberglass cloth 2 inches thick. It extended only along the flange area of the turbine cover. The blanket insulation was placed over the handrail behind the control room which is near the turbine.

Next the maintenance crew removed the flange bolts using a hydraulic wrench and separated the halves of the turbine. This process took approximately three days and entailed the chipping away of insulation around the bolts.

The insulation in the bolt area appeared to be a hardboard type mortar. As the insulation was chipped away, the pieces fell on either side of the turbine down to the first floor below. The mortar was enmeshed in chicken wire. Underneath the mortar were bricks of insulation, held in place by baling wire. The removal of the mortar insulation entailed cutting the chicken wire with pliers and chipping some of the mortar to loosen it from the bricks. The chicken wire with the mortar then fell underneath the turbine to the floor below. The brick insulation was removed by cutting the baling wire, allowing the bricks to fall to the floor beneath the turbine. The brick insulation was a soft chalky substance that would stick under a thumb nail if scratched. The mortar and brick insulation removal required approximately two to four hours of work. The total time taken to remove the insulation was about three days. The insulation debris was left scattered about the area for approximately two weeks.

It is undisputed that FMC did not take dust surveys during the three day period the maintenance crew removed the insulation nor during the following two weeks. It is also undisputed that MSHA never took any air samples at any relevant time.

During the bolt removal process, some dust was kicked up into the air. Before the bolt could be removed the crew had to use hammers to remove the second layer of insulation. This plaster like insulation was held together with chicken wire. It

was soft and would crumble when hit. As the material was broken up it was dropped or thrown to the floor below. As the insulation was dropped to the floor it created dust. One maintenance employee described the dust as a heavy flour type dust that would fly up when hit.

The maintenance foreman in charge of the crew was John Wilfong. He had been assigned the task of overhauling the No. 3 turbine by his immediate supervisor, Mike Hruska. Foreman Wilfong was asked by three members of his crew whether insulation they were handling contained asbestos, and whether it was safe to handle it. The foreman gave them vague assurances that it was safe. Hruska as well as Wilfong saw the insulation being removed from the turbine.

On November 18, 1985, FMC's industrial hygienist Carl Watson came to the Sesqui powerhouse to check on the work of an independent outside contractor who had a crew that specialized in removal of material containing asbestos. This crew wore protective clothing and equipment. This crew was engaged in removing insulation containing asbestos from the 61 foot high upstairs ceiling of the facility. The building was properly posted with warning signs. This ceiling insulation removal is unrelated to the citation and orders in this case except to show FMC awareness and attention to airborne hazards. During his November 18th check of the Sesqui powerhouse, FMC's industrial hygienist first became aware that insulation had been removed from turbine No. 3. He indicated to the foreman Mr. Wilfong that the insulation blankets could contain asbestos and asked that they be properly bagged. He also directed that the insulation on the floor below the turbine be cleaned up by wetting the insulation and putting it into plastic bags. Two employees cleaned up the insulation after it had been wetted down. Those engaged in the cleanup wore protective clothing with canister masks.

On the following day, November 19, 1985, MSHA Inspector Robert Scheneman was making a regular inspection at the FMC facility. The inspector came to the powerhouse to check on FMC personnel cleaning up insulation material taken off the turbine. When the inspector arrived at the No. 3 turbine he saw Carl Watson, FMC's industrial hygienist taking samples and observed the cleanup crew wearing protective clothes and masks cleaning up the insulation.

The mine inspector took a "grab" sample out of one of the bags of insulation, which he sent to Denver MSHA Tech Support for analysis. The report, petitioner's exhibit 1, indicates that the sample contained 4.4 percent amosite and .3 percent crysotile by weight.

FMC presented evidence that it had in place at the time of the issuance of the citation a policy regarding asbestos identification and cleanup (Ex. P-2, P-6). I am satisfied from the evidence presented that if the foreman Wilfong had been aware that the insulation contained asbestos or that had Mr. Watson the industrial hygienist had been aware that the insulation was being removed, that the appropriate policy guidelines would have been implemented.

Approximately 17 months before the issuance of the current citation and orders FMC's Industrial Hygienist, Mr. Watson, had distributed a memorandum dated July 1, 1985 to senior managers at the FMC plant. (Ex. P-3). This memorandum showed the results of sampling and analysis for asbestos in various materials located throughout the facilities. Included in the memo was the analysis of the No. 3 turbine insulation which showed that it contained asbestos. Mr. Hruska, the general maintenance foreman, an immediate supervisor of Wilfong, testified that he does not recall seeing the July 1, 1985, memorandum before the turbine overhaul began and consequently did not advise Mr. Wilfong that the No. 3 turbine insulation contained asbestos.

The cited safety standard, § 57.5002, mandates that dust surveys be conducted as frequently as necessary to determine the adequacy of control measures. It is a broad general standard. Such a standard should be evaluated by reference to an objective standard of what actions a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, and the protective purpose of the standard, would have taken to provide the protection intended by the standard. Section 57.5002 is broadly written so as to be adaptable to myriad circumstances. This safety standard is of central importance in the crucial regulatory area of avoiding overexposure to airborne hazards.

Upon review of the entire record I'm satisfied and find that a reasonably prudent person familiar with the facts including those peculiar to the mining industry and the protective purposes of the standard would have conducted dust surveys to determine what control measures would be adequate to prevent the possible overexposure of the employees working with the insulation. Dust surveys should have been conducted during the three days the maintenance crew removed the insulation from turbine No. 3. Since respondent took no dust surveys during that period of time respondent violated and thwarted the protective purposes of the standard.

Without air samples there is no way to determine whether any employee in the maintenance crew was overexposed.

Respondent's contention that the application of § 57.5002 is conditioned on a finding of exposure to airborne contaminants in

excess of the permissible limit defined in § 57.5001 is rejected. The rationale of the Commission's decision in Tammsco, Inc., and Schmarje, 7 FMSHRC 2006 [3 MSHC 2026] (December, 1985) is not applicable to the facts and the safety standard charged in this case.

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based 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, 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 safety 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.

The Commission has explained that the third element of the Mathies formulation "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) (emphasis deleted). They emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). Applying these principles to the instant case. It is concluded that the cited violation is not of a significant and substantial nature.

The Review Commission has ruled that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." It based this conclusion on the ordinary term "unwarrantable failure". The purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history and judicial precedence. The Commission stated that whereas negligence is conduct that is "inadvertent," "thoughtless," "or

inattentive," conduct constituting unwarrantable failure is conduct that is "not justifiable" or "inexcusable". The Commission pointed out that by construing unwarrantable failure by a mine operator to mean aggravated conduct constituting more than ordinary negligence, can unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. See Emery Mining Corp., 9 FMSHRC 1997, 2001, 2004 (December 1987) and Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). Applying these principles to the facts of this case I find that the violation of Section 56.5002 was not the result of FMC's unwarrantable failure to comply. The violation was caused by ordinary negligence. For purposes of determining the appropriate penalty, I would evaluate the degree of negligence at the upper range of ordinary negligence.

The evidence shows that FMC was not indifferent to the hazard of airborne asbestos. It had shown an awareness and attention to this hazard. As previously stated FMC had in place at the time of the issuance of the citations a policy regarding asbestos identification and cleanup (Exs. P-2 and P-6). FMC's industrial hygienist Mr. Watson distributed a memorandum dated July 1, 1985, to senior managers at the FMC plant regarding the results of various sampling and analysis for asbestos, including an analysis of the No. 3 turbine insulation (Ex. P-3). There is no evidence indicating that had the maintenance foreman been aware that the insulation contained asbestos or that had the industrial hygienist been aware that the insulation in the No. 3 turbine was being removed, that FMC's asbestos policy guidelines would not have been implemented.

The record also shows FMC was not indifferent to the hazards of airborne asbestos dust. At the time of the current inspection FMC had an independent contractor with a crew wearing protective clothes and equipment removing insulation containing asbestos from the ceiling of the building that housed the turbine. While ceiling insulation removal was unrelated to the citation and orders in this case it indicates FMC's awareness and attention to the hazard of airborne asbestos dust. These efforts to eliminate the hazard of airborne asbestos dust tend to support the conclusion that FMC's failure to comply with the safety standard in question was due to ordinary negligence rather than to aggravated conduct exceeding ordinary negligence.

For purposes of determining the appropriate penalty FMC's degree of negligence in violating the safety standard is evaluated as reaching the upper range of plain ordinary negligence. Considering FMC's large size, that the payment of appropriate penalties will not impair FMC's ability to continue in business, that FMC's history of prior violations is average for an operation of its size, and the potential seriousness of the violation it is found that the appropriate penalty for FMC's violation of § 57.5002 is \$600.00.

Order No. 2647694

This Order was vacated at the hearing upon motion by the Secretary of Labor. The Secretary's counsel stated he had reviewed the applicability of the standard and the sufficiency of the evidence and determined not to proceed with Order No. 2647694 (failure to provide special protective equipment and clothing). The Secretary's motion to withdraw the proposal for penalty and vacate the citation was granted over the objection of the Intervenor.

Order No. 2647695

This Order was originally issued by the mine inspector as a citation under section 104(d)(1) of the Act. The order alleges a violation of 30 C.F.R 57.18002(a)(b) which provides:

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

The MSHA inspector, in the citation alleges:

The people responsible for setting up this maintenance [sic] job failed to notified [sic] the people doing the work that they would be working with asbestos. Their company memo section 3-(B) states that when they do work of this type, removing asbestos insulation while making repairs. The Industrial hygienist [sic] will be notified when this type of work is being done so he can observe the job and recommend protective equipment. They have a list of all places that have asbestos present. The place where [sic] the violation occurred was documented [sic] on the list. They did not clean up after every shift. And placed in the proper container for disposal. This is a failure of the operator to take appropriate safety measure [sic] to insure that the employees were adequately protected. While working in this area. There were eight (8) people doing the work plus the foreman, and supervisor in this area. This job took from Nov. 4 to Nov. 18, 1985 with no protection provided. For the employees involved. There is no records [sic] showing off [sic] examinations of this area.

On December 12, 1985, Inspector Scheneman modified this citation to a 104(d)(1) order.

To establish a violation of 30 C.F.R. § 56.18002 the Secretary must prove by a preponderance of the evidence that a competent person failed to make an examination of the working place or that no record of the examination was made. Upon careful review of the record I find that the Secretary failed to prove that there was no examination of the working place by a competent persons or that no record of the examinations were made.

The log of the examination of the Sesqui powerhouse during the period of the No. 3 turbine overhaul shows the date and shift on which the examinations were conducted and the name of the person conducting the examinations and the work places examined. This log was introduced into evidence by FMC as its Exhibit D-27.

FMC also introduced into evidence an MSHA program directive, dated November 20, 1979, in which MSHA clarified the record keeping requirements of the safety standards (Ex. D-26). The program directive specifies that the items that must be recorded in order to comply with record keeping requirements are:

- (a) the date and shift;
- (b) the person(s) conducting the examination; and
- (c) the working places examined.

The MSHA's program directives also specifies that:

Citations for violations of this standard are to be issued only where there has been a failure to conduct an examination of a working place or a failure to record that an examination has been done. The standard is not to be used to cite an operator for a hazard that is not specifically covered by another standard, or for a hazard that is already covered by another mandatory standard, or for imminent danger.

I'm satisfied that the program directive as it relates to this case correctly interprets the safety standard in the manner intended by its promulgator. On careful review of the record I find that the evidence presented at the hearing does not establish a violation of 30 C.F.R. § 57.18002.

Conclusions of Law

1. The Commission has jurisdiction to decide this case.
2. Respondent violated the mandatory safety standard 30 C.F.R. § 57.5002 as alleged in Citation No. 2647693. The appropriate civil penalty for this violation is \$600.00.
3. FMC's violation of § 57.5002 was not significant and substantial and was not caused by FMC's unwarrantable failure to comply.

4. FMC did not violate 30 C.F.R. § 57.18002(a)(b). Order No. 2647695 is vacated and the proposed penalty set aside.

5. Order No. 2647694 and its related proposed civil penalty, upon motion by the Secretary of Labor, are each vacated.

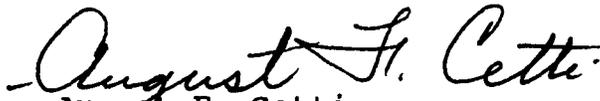
ORDER

Docket No. WEST 86-43-RM
Docket No. WEST 86-110-M

Citation No. 2647693 as modified to a citation issued pursuant to Section 104(a) is affirmed and the respondent is ordered to pay a civil penalty of \$600.00 to the Secretary within 30 days of the date of this decision.

Docket No. WEST 86-44-RM
Docket No. WEST 86-45-RM
Docket No. WEST 86-110-M

Order Nos. 2647694 and 267695 and their related proposed penalties are each vacated.


August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 30 1988

WESTERN FUELS-UTAH, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 87-166-R
v.	:	Order No. 2835325; 3/21/87
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 87-167-R
MINE SAFETY AND HEALTH	:	Citation No. 2835326; 3/22/87
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 87-168-R
	:	Citation No. 2835327; 3/22/87
	:	
	:	Docket No. WEST 87-169-R
	:	Citation No. 2835328; 3/22/87
	:	Mine I.D. 05-03505
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-251
Petitioner	:	A.C. No. 05-03505-03540
	:	
v.	:	Deserado Mine
	:	
WESTERN FUELS-UTAH, INC.,	:	
Respondent	:	

DECISION

Appearances: Karl F. Anuta, Esq., Boulder, Colorado,
for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner.

Before: Judge Lasher

The penalty case was consolidated with the four contest proceedings at hearing---which as reflected in the caption involve a Section 103(k) withdrawal order and 3 citations. The 5 dockets arise under and the Commission has jurisdiction pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq. (1982) (herein the Act).

The four enforcement papers (order and 3 citations) were issued by MSHA Inspector Dale L. Hollopeter subsequent to the occurrence of a serious accident which occurred at approximately 9:25 a.m., on March 20, 1987, near the Deserado mine, an underground coal mine operated by Contestant/Respondent (herein Western Fuels) in Rio Blanco County, Colorado.

One of the citations (No. 2835327) charged that the alleged violation described therein was "significant and substantial". The other 2 Citations (numbered 2835326 and 2835328) did not contain "S&S" designations.

A. General Findings

The Deserado Mine is an underground coal mine located near Rangely, Rio Blanco County, Colorado. Coal is taken from the mine to a preparation plant from which it is transported for several miles to a train loadout area by an overhead conveyor (T. 27, 55, 153).

The parties, in addition to stipulations as to jurisdiction, admissibility of underlying documentation and mandatory penalty assessment criteria, also submitted the following written stipulations:

- a. On Friday, March 20, 1987, at about 9:25 a.m., a non-fatal powered haulage accident occurred on the County Road 78 at the Beltline Conveyor Overpass (CNV-2). Dale J. Ackerman, truck/light equipment operator, and Michael G. Smith, heavy equipment operator, were seriously injured when the Euclid, RD-50, end dump haulage truck, with the bed raised, struck the overpass, causing the truck to overturn onto its left cab side. The accident occurred because the haul truck operator failed to lower the truck bed after dumping refuse material at Pit 2/3 1/
- b. The accident was reported by the (mine) operator to the MSHA office in Glenwood Springs at approximately 12:00 noon on March 20, 1987.
- c. The No. 2 Beltline conveyor overpass is above County Road No. 78 and is used as a haul road by Western Fuels with express permission of Rio Blanco County and Bureau of Land Management.
- d. The No. 2 Beltline Conveyor overpass was not at the time of the accident marked and did not contain warning signals.

1/ The evidence of record also overwhelmingly established that the driver of the truck, Ackerman, for whatever reason, failed to lower the truck bed and then drove the truck approximately 2 miles from the pit to where the bed struck the overpass as the truck attempted to proceed underneath.

Inspector Hollopeter, who is stationed in Denver, was advised of the accident by his supervisor sometime after "noontime" on Friday, March 20, 1987. After packing, he drove from Denver to Craig, Colorado that afternoon. That night he prepared his equipment, etc. for the ensuing investigation, and the following morning traveled from Craig to the mine where he met with company and union officials at approximately 8 a.m. (T. 28-32). He was advised by Mine Superintendent John Trygstad that the haulage truck--with the bed thereof in the raised position-- had struck the overland conveyor structure. At the conclusion of the meeting, Inspector Hollopeter issued the Section 103(k) Order-- based on what he was told at the meeting-- to insure the safety of the miners (T. 33-38, 55). Following the meeting, Inspector Hollopeter, accompanied by Western Fuels' Safety Director Jerry Kowlok, went to the accident scene, and then to Pit 2-3, i.e. the refuse pile (T. 40, 59).

It was Inspector Hollopeter's understanding, and I so find from the entire record, that Dale Ackerman, the driver of the 50-ton capacity truck on the trip in question, his second of the day (T. 132), started out from the preparation plant on March 20 with a load of refuse, proceeded down the 2-lane haul road (County Road 78) to the refuse pile (pit) where he dumped the refuse material, picked up passenger Smith, and was traveling back down the gravel-dirt haul road to the preparation plant when the accident occurred as above noted about 9:25 a.m. at a point about 1.75 miles from the pit (T. 41, 44-48, 132, 256-257). The speed limit on the haul road from the refuse pit (dump) is 30 m.p.h. (T. 256).

The accident occurred when the right side of the front of the "headache rack" (a protective part of the bed extending out over the cab to keep falling objects from striking the cab and the truck operator) struck the overpass structure (T. 60-61, 71, 362; Exs. M-11, 12 and 13).

The truck ended up on its left side following the accident; Michael G. Smith, an "authorized" passenger (T. 243, 260, 294, 295) was removed from the truck at 10:40 a.m. and Ackerman, whose lower left leg had to be amputated at the scene, was removed from the truck at 12 noon (T. 52-53, 116; Ex. M-14).

After his arrival at the accident scene (and the refuse pit), Inspector Hollopeter took various measurements and photographs of the truck, overpass structure, and accident scene (Ex. M-6 through M-13) (T. 41, 50-58).

The overpass structure (sometimes referred to as an overhead conveyor) extends over the haul road in an arch, the lowest point of which is 20.16 feet and highest point being 27 feet; there was a clearance of approximately 26 feet at the point where the truck struck it (T. 65, 68, 138, 141). The conveyor is in the center

of the structure itself with walkways on either side. One effect of the withdrawal order was to prohibit persons from walking on these walkways (T. 78). When the bed of the truck is raised it extends upward at a 60 degree angle and is about 28 feet 4 inches in height. The truck thus failed to clear the overpass by about 18-24 inches (T. 69). With the bed raised, there was thus no place the truck could have cleared the overpass (T. 70). In its travel position, i.e., with the bed lowered, the height of the truck is 14 feet 5 inches (T. 72).

B. Docket No. WEST 87-166-R

Validity of Withdrawal Order No. 2835325

The Order was issued pursuant to Section 103(k) of the Act which provides:

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

Subsequent to its issuance at 8:50 a.m. on March 21, 1987, the Order was modified four times by Inspector Hollopeter.

Western Fuels contends that the Order as modified, was improperly issued since its purpose was not to insure the safety of persons in the mine, but rather was intended to preserve evidence (T. 202). The Order itself charges no violation and MSHA seeks no penalty in connection therewith (T. 9).

The "Condition or Practice" involved in the Withdrawal Order was set forth by Inspector Hollopeter in Section 8 thereof as follows:

The mine has experienced a nonfatal powered haulage accident on the surface haul road (County Rd. 78) at No. 2 Beltline Conveyor overpass. This order is issued to assure the safety of persons until an examination or investigation is made to determine the area is safe. An investigation party of company officials, state and county officials, safety committeemen are permitted to enter the area.

Section 15 of the Withdrawal Order, wherein the "Area or Equipment" to be withdrawn is to be described, was filled in by Inspector Hollopeter as follows:

"The No. 2 Beltline Conveyor overpass structure 150 feet each side of the haul road and the haul road 150 feet easterly and westerly of the structure, except the southern portion of the haul road to permit traffic to pass."

Inspector Hollopeter issued the Order to ensure the safety of persons until an investigation could be conducted (T. 34-36, 142).

At 1:40 p.m. on March 21, 1987, the Inspector issued the following modification:

103(k) Order is modified to allow the operator to move the Euclid R-50 (Company No. 4) from the accident area to the shop area. Also, the closure of a section of this haul road is now removed from this order.

At 7:35 p.m. on March 21, 1987, this second modification 2/ was issued:

The 103(k) Order is modified to show the area of the No. 2 Beltline Conveyor (overland conveyor) closure from the 150 feet on each of the haul road changed to just the No. 2 Beltline Conveyor Overpass structure and belt at the main supports north of the haul road to the main supports south of the haul road.

At 11:39 a.m. on March 22, 1987, this third and final modification was issued by Inspector Hollopeter:

The 103(k) Order is modified to allow repairs to the No. 2 beltline conveyor overpass and operation of the conveyor belt this being based on the Chief Engineer opinion which was given and to allow repairs on the Euclid R-50 (Company No. 4) haulage truck, with stipulation that the District Office, MSHA, CSMH&H, Denver, Co., be notified of any defective item found and that we get a report of the damage and repairs done to the truck. If an independent shop is to do the repairs, we are to be notified so that we might be present during examination or testing.

One effect of the Withdrawal Order, as previously noted was to prohibit persons from walking on the walkways alongside the conveyor. The operation of the conveyor was also "closed" by the

2/ Upon the issuance of this second modification, the coverage of the Order would have remained on the "curved arched portion of the overpass structure", the truck, and the conveyor belt (T. 153).

order (T. 85, 86). The order did not prevent traffic on the haulage road (County Road 78) from traveling under the overpass structure, and thus would not have the effect of preventing the same kind of accident from happening had another Euclid truck proceeded under the overpass with its bed raised (T. 80-85). This is a moot point, however, since there was only one such truck operating at the time-- the one involved in the subject accident (T. 87). The Inspector testified he also put an order on the truck to "prevent people from being in or around" it (T. 87-88) although this is not specifically reflected in Section 15 (Area or Equipment) of the order itself.

At the time of his initial investigation, Inspector Hollopeter did not know the truck was being driven-- why/or what caused the truck to be driven-- with the bed in a raised position (T. 73, 77). He considered the possibility that there was a malfunction which would have caused the bed to be in a raised position (T. 77, 151).

Inspector Hollopeter issued the first modification of the Withdrawal Order because the County wanted the truck moved and so that the truck could be moved off the road to the shop area allowing traffic to move in both directions (T. 151). At the time of its issuance he had not checked out and cleared the overpass structure for safety (T. 74-76, 142, 189). He described his concerns relating to the overpass as follows:

"Just underneath, looking at the conveyor, I saw where -- the side which the truck had contacted, initially, and -- at the initial contact point, I saw, on the lattice work, where there was (sic) braces broken out, bent out. And, also, the I-beams were bent, twisted underneath it."
(T. 77)

The Inspector was also concerned about the cracking of paint around the bolts of the overpass which may have been caused by the accident (T. 147-149). ^{3/}

Following issuance of the first modification which permitted removal of the damaged truck from the accident area, the Inspector again examined the conveyor structure. He testified as to what he observed:

"On the easterly side of the structure, which was the side, which the haulage truck had initially contacted, I saw

^{3/} Although not well articulated by the witness, I infer that this concern was directed toward the possible traumatic effect the impact of the collision had on the structure.

the lattice work bent, braces broken out completely on one end, and bent out. The metal, which was bent. For a distance along the bottom of the conveyor, I observed some of the I-beams going across underneath this structure, bent. Also, I notice on the opposite side of the impact area, paint which appeared to be cracked, which was apparently caused by the impact.

Q. But, it was on the opposite side of the conveyor?

A. Yes." (T. 89)

Surface Area Foreman Jack L. Monfrada described what he saw when he arrived as follows:

"There was some beams and lattice work that was -- one lattice work was broke and pokin' up on the air, and you could see where these beams had been bent. They were horizontal beams, across the bottom of the structure.

(T. 342)

After this visual examination and conducting interviews (T. 89-91) Inspector Hollopeter issued the second modification at 7:35 p.m. on March 21, 1987. He explained what led to issuance of the second modification:

"Mainly, my understanding was that the company were (sic) havin' security people stay at that area to prevent people from goin' in the accident area -- or, under the 103K Order area. And, they'd have to keep people -- they said they was going to keep people there all the time. And, at that particular time, I didn't feel the Order should be lifted, because I had concern on the structure, but I felt the Order could be modified to bring the distances in from 150 feet just to -- just so the Order would pertain to the overland conveyor structure, that went across the road. And, that -- that way you wouldn't need to have a -- anyone secure the area, or -- as far as havin' a person there all the time."

(T. 90-91)

XXX

XXX

XXX

XXX

I was concerned about the amount of metal, which was damaged -- your braces, your I-beams, which were bent; the cracking of the paint, walkway, everything.

I was concerned about if the conveyor was operated, how much -- this metal was fatigued -- there could have been maybe an accident, shortly thereafter, if it was turned on. Just -- I had concern.

Q. And, concern about the safety of anyone who might walk up on that conveyor belt?

A. Yes.

(T. 92)

The third modification was issued at 11:34 a.m. on Sunday, March 22, 1987, to permit Western Fuels to repair the conveyor belt, it being the opinion of Western Fuels Chief Engineer Mike Weigand that upon completion of such the conveyor belt could be safely operated (T. 92-94) Inspector Hollopeter remained concerned about the safety of the structure and wanted MSHA "technical support people" to examine it. The third modification thus continued MSHA control over this aspect of the matter. By letter he requested them to examine it and subsequently received a written report back indicating the structure was safe which led to issuance of a fourth modification of the Order in May, 1987 (T. 93-96, 98) which removed the structure from the effect of the Order (T. 97). At this point only the truck remained under the control of the Order (T. 98). Following further investigation of the truck and the Inspector's receipt of information that the truck had no indications of defective parts, malfunction, etc., Inspector Hollopeter terminated the subject Section 103(k) withdrawal order (T. 98-100).

Michael J. Weigand, Western Fuels' Chief Engineer at the Deserado Mine, testified that when he inspected the overpass structure on the day of the accident he observed that one of the diagonal braces had broken loose and there was "some damage" to the ends of some I-beams which run "roughly parallel to the road" underneath the structure (T. 363). He felt that the photographs in the record as exhibits C-5, 10, 16 and 17 accurately depicted the damage to the structure immediately after the accident (T. 362-368). Mr. Weigand indicated that his inspection disclosed a 5-inch deflection of the structure the existence of which "was possible" before the accident (T. 371). He conceded that "there could be some effects from that accident" that could "weaken" the structure over the "longterm" (T. 373-374) and the relatively extensive repairs made to the structure after the accident were done because such were reimbursed by insurance, it took a shorter time to perform the repairs in that manner, and it was decided to do it "right" so that the structure would last its projected 30-year term (T. 374-376).

During the MSHA investigation in the 2-day period following the accident, Mr. Weigand participated and gave his opinion to Inspector Hollopeter that the structure "was safe" (T. 377-378). It was also his opinion that the structure was not a "dangerous overpass" either before or after the accident (T. 386).

On cross-examination, this exchange, of some significance, between Mr. Weigand and MSHA's counsel occurred:

Q. All right. And, you did tell Mr. Hollopeter, as I understand, that it was your opinion that there were some braces that should be replaced on this overpass?

A. I felt that if immediate work was done, that that's the part that should have been done, yes. (T. 392)

Mr. Weigand also conceded the possibility that the cracked paint on the structure occurred as a result of the truck's impact with it (T. 396).

Maintenance Superintendent Anthony Lauriski described the damage to the overpass structure as follows:

A. There was two trusses tore loose, and the hand rail was sort of bent in one spot, and there was some damage to the supports that go across and hold the walkway up (T. 410).

Western Fuels' Safety Instructor/Inspector David G. Casey, who in the beginning took charge of the rescue operation, described the damage to the structure this way:

"We had a couple of cross-beams that were tore loose- they were vertical beams, and a few I-beams that had been bent."
(T. 450)

Mr. Casey expressed the opinion that the overpass was not dangerous, perilous or risky either before or after the accident (T. 452, 461) for persons or vehicles to travel under or near (T. 461-462).

As to that part of the Order pertaining to the truck, Mr. Laruiski testified that he first "knew" there was no malfunction which would have caused the bed to raise (and thus cause the accident) when the valve was disassembled after the truck was taken to the repair shop (T. 419). This is supportive of the Inspector's judgment.

Although Western Fuels, in its Brief, repeats several times the charge that Inspector Hollopeter's issuance of the Section 103(K) Order was to "preserve evidence"- an allegedly unauthorized purpose, I find no direct or substantive support in the record, arguments or briefs for making such a finding. Inspector Hollopeter testified that he issued the subject order so that could "go in and look at the area to insure the safety of the miners" (T. 34). Scrutiny of the actions of the Inspector, from the time of his notification of the accident through his ensuing investigation and issuance of the Order and its three primary modifications, supports the contention of the Petitioner that "Throughout the course of the investigation, as Mr. Hollopeter learned more of the accident and investigated the

which an Euclid R-50 (Co No. 4) End dump haulage truck contacted the No. 2 Beltline Conveyor overpass and the two miners in the cab were seriously injured. MSHA Glenwood Springs, CO. field office was notified of the accident 12 p.m. on 3/20/87."

The standard alleged to have been violated was, 30 C.F.R. 50.10 (entitled "Immediate Notification") which is placed in the codification system of the regulations under Subchapter M (entitled "Accidents, Injuries, Illnesses, Employment, and Production in Mines"), under Part 50 thereof (entitled "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines") and lastly under Subpart B thereunder (entitled "Notification, Investigation, Preservation of Evidence"). Section 50.10 provides:

"If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

The issue posed by Western Fuels in connection with this Citation is:

"Does an operator violate the immediate reporting obligation of the regulations where he delays advising MSHA for 2 hours while devoting full attention to the rescue of injured miners, and where the delay does not exacerbate the rescue efforts or hinder the subsequent accident investigation?" 6/

It has been stipulated, and the record also reflects, that the accident occurred at 9:25 a.m. and that Western Fuels reported it to MSHA's Glenwood Springs Office at 12 noon (T. 107, 109, 448). This coincides with the 2 1/2 hour period of the

6/ It is initially noted that the questions whether the delay (1) exacerbated rescue efforts, or (2) hindered MSHA's investigation, would relate more directly to the penalty assessment factor of seriousness, rather than to the occurrence of an infraction of the standard cited. Obviously, at the time of delay in notification, the ultimate effects thereof may not be recognizable and the elements of proof inherent in the phraseology of the regulation contain no such exception for situations where there is no prejudicial effect. A roof-control requirement, for example, is not self-abnegating where the violation of such does not cause an injury - causing fall.

site, he was able to modify the order to keep in line with what he knew, while still ascertaining that no further injuries would occur." The nature of the possible hazards which the impact might have sustained to the structure (See Ex. C-2) and the possible problems with the truck which could have caused the bed to raise without operator negligence, all adequately evidenced in this record, would have made it irresponsible for the Inspector to have (1) proceeded without issuing the Order, or (2) to have terminated the Order prematurely. I find no support in the record for the proposition that the Order was issued either routinely or for the sole-or primary-purpose of preserving evidence pending a post-accident investigation. 4/

Western Fuels' contention (Brief, p. 22) that "The inspector used a club when a simple 'please' would have been sufficient," ignores the responsibility placed on the Inspector by the Mine Act to insure safety in such circumstances. 5/

There being no admissions or substantive or probative evidence upon which to conclude otherwise, it is found that the exercise of discretion by the Inspector in issuing the Order and its modifications was appropriate in the circumstances and that such Order and its modifications should be affirmed.

C. Docket No. WEST 87-167-R

Citation No. 2835326

The "Condition or Practice" deemed a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The operator did not immediately contact the MSHA District or Subdistrict office having jurisdiction over its mine of an accident which had injuries to two miners which had reasonable potential to cause death. A non fatal powered haulage accident occurred on 3/20/87 about 9:25 a.m. in

4/ The Inspector, under Section 103(j) of the Act, certainly does have an independent obligation and responsibility to take appropriate measures "to prevent the destruction of any evidence which would assist in investigating the cause or causes" of an accident.

5/ The responsibility for determining structural damage to the overpass and conveyor, any truck malfunction, and any patent or latent safety hazards stemming therefrom, is recognized as a considerable one. Any question in the mind of the sole person bearing this burden in mine safety enforcement would necessarily be resolved on the side of safety.

rescue operation (T. 111). Evidence of record (Ex M-5) indicates that passenger Mike Smith called in the accident on his two-way radio (hand-held pack-set) at approximately 9:23 a.m. The first a.m. The first individual on the scene was a Coca-Cola delivery man. When he first arrived at the scene he thought no one was in the truck but upon investigation he saw and heard Mike Smith calling on the radio for help. When he heard no response to the first call for help, he got on Mike's radio and repeated the call for help. Immediately upon receiving the call that two miners were trapped in an overturned haul truck, the Western Fuels ambulance was dispatched and the Rangely District Hospital was notified at approximately 9:27 a.m. that their ambulance was also needed. The Rangely Rural Fire Protection District was also notified at this time. A Western Fuels Security Guard was dispatched immediately to the scene and arrived at 9:26 a.m. This security guard and the preparation plant foreman arrived in a Ford pickup (security vehicle).

Western Fuels' Safety Director at the time, Jerry Kowlok (T. 406), who did not testify, reported to Inspector Hollopeter that he contacted the Glenwood Springs office at about 12 noon and that he was "the only person designated to contact MSHA on an accident" (T. 109, 110, 339, 421, 447, 466-467). Mr. Kowlok did not make this report until after he had left the accident scene (T. 448, 459, 460). Mr. Kowlok had a radio at the scene of the accident, was in contact with his security base which had a telephone, and thus had the means by which to immediately notify MSHA of the accident (T. 335-336, 406, 429-430, 434, 459-460, 468-469).

Some of the general purposes of immediate notification are (1) determination of the type of accident, (2) getting the nearest available MSHA inspectors to the accident site, (3) allowing MSHA the opportunity to supply expertise to the situation as well as special equipment and special rescue teams, and (4) prevention of future accidents (T. 109-110). According to the Inspector, however, no such rescue teams, etc. were actually available for use in rescuing the two miners trapped in the truck in the instant situation (T. 176-180). On the other hand, MSHA was deprived of any opportunity to immediately investigate or be present at the accident site to assist in rescue or attempt to prevent further injuries. There was no allegation or evidence that notifying MSHA would have been a futile act i.e., that based on past inept performances by MSHA in accident situations, that Western Fuels was justified in believing a 2 1/2 hour delay would make no difference.

Further, there was no evidence presented that it was impossible- or even difficult- for Western Fuels to have notified MSHA immediately (T. 335-340, 341, 361, 406-408, 420, 428-432, 460, 466-468). There clearly was available the means of

communicating with MSHA and various management and other personnel available to do it. It is thus concluded that the violation as charged in the Citation occurred and that Western Fuels was negligent in the commission of such. The regulation infringed constitutes a highly important aspect of mine safety process and enforcement in terms of both accident investigation and assistance and is eroded only at considerable cost in the perspective of future accidents and tragedies. The importance of this regulation is related to the role Congress has mandated for inspectors in the Act itself (See Sections 103(j) and (k) thereof). Although the probability that the delay did not affect rescue or investigation processes, the humanitarian interests of Western Fuels' personnel, and the emotionally traumatic aspects of the incident itself are to be inferred from the record overall and stand in some mitigation of the considerable seriousness and culpability to be attributed to the violation, ^{7/} the \$20 penalty sought by the Secretary, being but a token sum, is not considered appropriate. A penalty of \$150.00 is assessed.

D. Docket No. WEST 87-168-R

Citation No. 2835327

The "Condition or Practice" charged to be a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The equipment, Euclid R-50 (Co. No. 4) End dump haulage truck, being driven from the Pit 2-3 Refuse dump to the preparation plant was not secured in the travel position. A nonfatal powered haulage accident occurred, severely injuring the operator and passenger of the truck, when the raised truck bed struck the No. 2 Beltline Conveyor Overpass. Through interviews it was determined that it is the Company policy to have the bed of the truck lowered when traveling."

The standard allegedly violated was subsection (s) of 30 C.F.R. § 77.1607 pertaining to "Loading and Haulage Equipment; Operation", which provides:

7/ The parties, as part of their written stipulation (Court Ex. 1) concurred that Western Fuels is a large bituminous coal mine operator and that it proceeded in good faith in attempting to achieve rapid compliance after notification of all the alleged violations. As part of the same stipulation, the parties submitted into evidence a computerized history of prior violations (Ex. M-1) indicating that Western Fuels had 129 previous violations in the 2-year period preceding the issuance of the subject Citations.

"When moving between work areas, the equipment shall be secured in the travel position." 8/

Inspector Hollopeter designated this to be a "significant and substantial" violation on the face of the Citation, giving rise to what appears to be the contention raised by Western Fuels: "Should an operator be charged with a significant and substantial violation where a driver, contrary to common sense, company policy, and specific operational instruction, operates a dump truck without lowering the bed" (Western Fuels Brief, p. 33). It is noted parenthetically at this juncture that the phraseology of this contention appears directed more to the mine safety concepts of "liability without fault" and mitigation of the penalty assessment criterion of negligence than to the "significant and substantial" formula.

I first find that it is a violation, whether or not a "significant and substantial" one. Thus, in reaffirming the strict liability or "liability without fault" doctrine's application in mine safety matters in Western Fuels-Utah, Inc., 10 FMSHRC 256 (March 25, 1988), the Commission pointed out that the principle of liability without fault requires a finding of liability even in instances where the violation results from unpreventable employee conduct. It thus rejected the notion of an exception to the rule even for unforeseeable employee misconduct. 9/ The parties have stipulated, and the record is clear, that the accident occurred because the truck operator failed to lower and secure the truck bed. The bed was raised when the accident occurred (T. 408, 418-419). The truck thus was not in "travel position" as the standard requires and Ackerman was driving the truck between work areas when the accident occurred. This constitutes a violation of the pertinent standard. For purposes of liability- as distinguished from penalty assessment purposes-- a miner's negligence or misconduct is properly imputed to the mine operator. Secretary v. A.H. Smith Stone Company, 5 MSHRC 13 (1983). The question of negligence imputation for penalty purposes will be taken up subsequently herein.

In a recent decision Secretary v. Texasgulf, Inc., 10 FMSHRC _____ (April, 1988) the Commission reaffirmed its position as to proof of significant and substantial violations:

8/ "Travel position" for the truck in question required the bed to be secured in its lowered position (T. 113, 242, 253-254). As noted in the Citation itself and established at the hearing, Western Fuels' policy required the truck, when moving, to have the bed in the lowered "travel" position (T. 112-115, 226-227, 310).

9/ I conclude elsewhere herein that the accident in question occurred as a result of Mr. Ackerman's unforeseeable negligence.

"Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based 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, 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 safety 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.

The Commission has explained further that the third element of the Mathies formulation "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) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1574 (July 1984)."

In the circumstances of this case, the infraction of the safety standard was clearly established, as well as the fact that the violation contributed to the creation of a discrete safety hazard. Not only was there a reasonable likelihood that the hazard contributed to would result in an injury, but the hazard actually occurred, that is, it came to fruition when the raised truck bed struck the overpass structure, the direct result of which were the serious injuries to Ackerman and Smith (T. 115-118, 408; Ex. M-5). This is found to be a "significant and substantial" violation.

We turn now to the questions of negligence and mitigation. Mr. Ackerman was a full-time employee whose primary job was to

drive the Euclid R-50 haul truck and another haul truck whose dumping mechanism was similar to that of the Euclid. Ackerman would normally (at least since December, 1986) make 8-13 trips a day from the preparation plant to the refuse dump (T. 220-222, 286). Ackerman was familiar with the road-and by inference-the presence of and characteristics of the overpass he was to travel under (T. 283-286; See also "General Findings", supra).

Western Fuels established that in December, 1986, Mr. Ackerman had been trained in the operation of the Euclid R-50 truck by its Surface Area Foreman, Daniel J. Rideout (T. 216-218).

This training covered proper dumping procedures which Rideout described as follows:

"The proper dumping procedures would be to make sure your area -- where you're backing on up to --- that there's no obstructions or anything in the way, like that. Try to be on as level ground as possible, and set your dump bed; put your truck in neutral, sound the horn, dump your load; lower your bed; sound your horn, again; release your dump brake; put it in gear, and that's basically it; you're done."

(T. 220) (emphasis added)

Rideout described the Euclid R-50 as an "easy-to-drive", stable truck which had no tendency to tip over, and said there was no occasion on which it should be driven with the bed raised (T. 225-226). Rideout reiterated the company "policy" of not driving the truck with the bed raised and pointed out that such is set forth also in the "Operator Handbook" for the truck, Ex. C-7, at p. 33-35, (T. 227, 253, 293). Truck drivers were directed to keep a copy of the Handbook in the truck and to read it in their idle time (T. 228, 289). Rideout had never seen Ackerman driving with the bed up and would have disciplined him had he done so (T. 232-233). Rideout was certain that in meetings with his drivers, which I conclude would have included Mr. Ackerman, that the need for lowering the truck bed before traveling was discussed (T. 248, 258, See also T. 288). The drivers, however, were not specifically advised that the haul truck with the bed up would not clear the overpass, nor were they specifically advised what the height of the truck was with the bed raised (T. 258). Nor were they specifically advised what the clearance of the overpass was (T. 259). This was the only overpass the truck drivers would have occasion to drive under (Tr. 259).

The overpass was constructed in 1982 and would have been in existence throughout Mr. Ackerman's tenure as truck driver (T. 251).

At the time of the accident there was no sign or notice in the cab of the truck to remind the driver to lower the bed (T. 270) although such notice was apparently installed thereafter (T. 270, 323). There was an "indicator" (depicted in Exhibit C-11) which comes down in front of the truck's windshield from which the truck driver can determine if the bed was raised or lowered (T. 255-256, 262-263, 296).

Jack L. Munfrada, a Surface Area Foreman, described the bed indicator in the following examination sequence:

"Q. Is there any other way, when you're sitting in the driver's seat, or in the passenger's seat, that you can see that the bed is in the air?

A. Yes. There's a bed indicator on the bed of the truck. If the bed is lowered, it is in the right-hand corner, visually through the eight-inch window, and it is a round -- in diameter, approximately five inches, with a decal -- a red and white decal, with a black figure, pointing back towards the dump box. Also, you can see it through the driver's mirror, very plainly.

Q. You can see the bed through the driver's --

A. Yes. You could see it out the passenger door window -- you could see the headache rack. And, also, if the bed was up in the daytime, you'd notice the change in light." (T. 296-297). 10/

Based on its maintenance records and "Pre-shift Operator's Check Lists", Western Fuels had no indication to believe that the subject truck was not functioning properly in proximity to the accident (T. 402-406, 410-413) and in the absence of any other evidence to the contrary, and in light of the evidence indicating operator failure as the cause of the bed not being lowered to travel position, it is inferred and found that the truck was in proper operating condition at the time of the accident.

The record in this proceeding indicates that the cause of the accident was the operator's failure to lower the bed before proceeding on to the haul road and moving the vehicle to its point of impact with the overpass structure.

10/ From this dialogue as well as other evidence (T. 255-259) indicating other reasons why a truck driver would normally know or be aware of the raised bed, I find and infer that for a driver of the truck in question to proceed along the haul road with the truck bed raised and not have such fact enter the stream of his consciousness would be an unusual occurrence and one which would not be foreseeable by his foreman or other management (T. 471).

David G. Casey, Western Fuels' Safety Instructor, testified that he visited Mr. Ackerman in the hospital on the day of the accident and recounted this conversation concerning what had happened:

Q. And, did he explain to you what happened?

A. Yes. And -- and he said that he spaced it -- he couldn't believe that he'd spaced it out.

XXX XXX XXX

"The Witness: He couldn't believe that he'd spaced it out -- referring to the dump bed being up."

(T. 455-456)

When pressed to develop his understanding of Ackerman's use of the phrase "spaced out", Mr. Casey stated:

"The Witness: -- and he said "spaced out", and then we -- he said "I can't believe I f----- up", and he repeated it again, "I can't believe I did that", you know."

(T. 471)

From this and other evidence of record indicating Ackerman was a "good" employee who had received safety training (T. 439-445) it is concluded that the accident resulted from Mr. Ackerman's negligent oversight in not lowering the bed of the truck, and that such negligent conduct was not foreseeable by Western Fuels' responsible management personnel. Southern Ohio Coal Co., 4 FMSHRC 1459, at 1463-1464 (1982). In this connection, it is further noted that there is no evidence of prior accidents having occurred at the overpass (T. 465).

While a mine operator is not necessarily shielded from imputations of negligence even where non-supervisory employees such as Mr. Ackerman are concerned, A.H. Smith Stone Co., 5 FMSHRC 13 (1983), for the negligence of the miner to be attributed to the operator, consideration must be given the foreseeability of the miner's conduct, the risks involved, and the operator's supervision, training and discipline of its employees. Here, the record indicates that the mine operator fulfilled its obligations as to training and in the establishment of its policy as to not operating the truck with the bed raised. MSHA, in its brief does not contend (or discuss) imputation. Mr. Ackerman's negligence in the commission of the violation will not be imputed to Western Fuels, Southern Ohio Coal Co., supra, at 1465.

In view of the seriousness of this violation, and upon evaluation of the other general mandatory penalty assessment

factors previously discussed in connection with Citation No. 2835326, a penalty of \$300.00 is determined to be appropriate and assessed.

E. Docket No. WEST 87-169-R

Citation No. 2835328

The "Condition or Practice" deemed a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The No. 2 Beltline Conveyor Overpass above the haul road (County Rd. No. 78) was not conspicuously marked or warning devices installed when necessary to insure the safety of the workers. A nonfatal powered haulage accident occurred when an Euclid R-50 End dump (Co. No. 4) raised bed contacted the overpass while traveling on the haulage road. The operator of the truck and passenger were severely injured. At the time of the investigation the overhead clearance was not marked.

The standard allegedly violated was Subsection (c) of 30 C.F.R. 77.1600 (entitled "Loading and haulage; General") which states:

"Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers."

Although the Inspector originally charged that this was a "significant and substantial" violation, the Citation was subsequently modified to delete such designation upon further investigation (T. 158-160).

Western Fuels contends that the Conveyor (CNV-2) overpass was not "hazardous to mine workers" and thus warning signs (or devices) were not required.

Evidence in the record establishes that other than speed limit signs (T. 448) there were no signs, warnings, "clearance" signs or flashing lights on the overpass structure or conveyor (T. 118-121, 189-192, 245-246, 259, 463), or on the road on either side of the structure (T. 189, 448). Specifically, there was no sign on the overpass which said what the clearance was (T. 259). Inspector Hollopeter was of the opinion a hazard existed because there was no sign warning of the clearance of the overpass structure either on the structure itself or back along the haul road (T. 121-125).

There are no regulations applicable in mine safety matters which establish height requirements for structures such as the subject overpass (T. 382).

The U.S. Department of Transportation's Manual on Uniform Traffic Control Devices (Ex. C-14) requires signs when less than 12 inches clearance is provided over the highest vehicle being used on the roadway (T. 380-381).

Chief Engineer Weigand expressed the opinion that prior to the accident the overpass structure was not "dangerous" "perilous" or "risky" (T. 386). As noted previously, there had been no prior accidents at the overpass, and in view of (1) the significant clearance height of the overpass (ranging from 20-27 feet approximately), (2) the general compliance of the structure with requirements other governmental agencies (T. 380-384)), (3) the general opinions of Western Fuels witnesses that the overpass was not "perilous" or dangerous, (4) the vagueness of MSHA's evidence and theory that the overpass was hazardous, and (5) the fact that the accident under scrutiny herewas caused by the forgetfulness of a truck driver who broke the rule against driving with the bed raised and who had been passing under the overpass some 20 times a day for months, it is concluded that the overpass clearance was not "hazardous" within the meaning of the regulation cited and that no violation occurred.

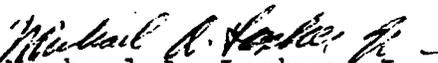
ORDER

(1) Withdrawal Order No. 2835325 and its modifications are affirmed.

(2) Citations numbered 2835326 and 2835327 (including its "Significant and Substantial" designation) are affirmed.

(3) Citation No. 2835328 is vacated.

Contestant/Respondent Western Fuels shall pay the Secretary of Labor the total sum of \$450.00 as and for the civil penalties hereinabove assessed on or before 30 days from the date of this decision.


Michael A. Lasher, Jr.
Administrative Law Judge

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/bls

