JANUARY 1990

COMMISSION DECISIONS/ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JANUARY 1990

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

Kathleen Tarmann v. International Salt Company, Docket No. LAKE 89-56-DM. (Judge Weisberger, November 30, 1989)

Secretary of Labor, MSHA v. Medusa Cement Company, Docket No. SE 89-109-M. (Judge Maurer, December 14, 1989)

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

January 8, 1990

KATHLEEN I. TARMANN	:	
	:	
v.	:	Docket No. LAKE 89-56-DM
	:	
INTERNATIONAL SALT COMPANY	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). On November 30, 1989, Commission Administrative Law Judge Avram Weisberger issued an Order of Dismissal based on the failure of the complainant, Kathleen I. Tarmann, to respond to the judge's Order to Show Cause why the case should not be dismissed in view of its reported settlement. On December 18, 1989, following issuance of the dismissal order, Tarmann's counsel filed with Judge Weisberger a Brief in Opposition to Dismissal, requesting that the case be reinstated on the grounds that settlement had not, in fact, been reached and that counsel had "never ... communicated that it had been reached." On December 20, 1989, respondent International Salt Company ("International Salt") filed with Judge Weisberger a Memorandum in Response supported by an affidavit, asserting that a settlement had been reached and opposing reinstatement of the case. Under the circumstances presented, we deem complainant's Brief in Opposition to Dismissal to constitute a timely petition for discretionary review, which we grant. We vacate the judge's dismissal order, and remand for further proceedings.

On February 27, 1988, Tarmann filed with the Commission a discrimination complaint, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), alleging that she had been discriminatorily discharged by International Salt in violation of 30 U.S.C. § 815(c)(1). In an Order to Show Cause issued on November 15, 1989, the judge indicated that complainant's attorney had advised his secretary on November 6, 1989, that "the matters in dispute in this case had been settled by the Parties." Accordingly, the judge directed complainant

to show cause, within 10 days of the order, why the case should not be dismissed. On November 30, 1989, the judge issued the Order of Dismissal, stating that complainant had failed to respond to the show cause order and, accordingly, dismissing the proceeding.

The judge's jurisdiction in this matter terminated when his dismissal order was issued on November 30, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, complainant's brief in opposition to dismissal constitutes a request for relief from the judge's decision, and we will treat it as a timely petition for discretionary review. See, e.g., Secretary on behalf of Joseph DeLisio v. Mathies Coal Co., 9 FMSHRC 193, 194 (February 1987). Similarly, we deem International Salt's memorandum to constitute a statement in opposition to complainant's petition. See 29 C.F.R. § 2700.70(e).

"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). In this respect, the Commission has observed that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986).

Here, Tarmann's brief in opposition to dismissal and International Salt's opposition to that brief reveal a disagreement between the parties as to whether, in fact, a settlement agreement had been reached. 1/ Under these circumstances, further proceedings are necessary and we conclude that the issues raised by the parties should be considered by the judge in the first instance.

1/ Tarmann's brief alleges that counsel did not state to the judge's secretary during their telephone conversation of November 6, 1989, that the parties had actually settled the case (as recited by the judge in his show cause order), but only that "settlement negotiations were ... being pursued, ... that [counsel] was agreeable to settlement, but he had to first obtain the approval of his client." The official file in this case does not contain any contemporaneous note or memorandum from the judge's office detailing the contents of the conversation between counsel and the judge's secretary. The conversation appears to have been in the nature of a procedural status discussion rather than an ex parte communication (see 29 C.F.R. § 2700.82; 5 U.S.C. § 551(14) (definition of "ex parte communication" for purposes of the Administrative Procedure Act)), and the judge referenced the conversation generally in his show cause order. Nevertheless the risks of possible misunderstandings arising from telephone conversations with a party outside of the formal record suggest that the better general practice is to include in the official file a contemporaneous note detailing the contents of any such significant procedural status discussion. Cf. Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983).

Accordingly, the judge's dismissal order is vacated, this case is reopened, and the matter is remanded to the judge for appropriate proceedings.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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JAN 5 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-159-M A.C. No. 41-03455-05504
v.	:	
B & M SAND & GRAVEL COMPANY, Respondent	:	Ennis Plant

DECISION

Appearances: Mary E. Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
W. A. Keith, Dallas, Texas for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. The Secretary moved to vacate Citation No. 3281506 and proposed a reduction in penalty from $1,075 to $806.25 for the remaining citations. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $806.25 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 5 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 89-61-M A.C. No. 12-01389-05503
v.	:	
	:	Rockport Plant
EVANSVILLE MATERIALS, INC., Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Gene Hurm, Safety Director, Evansville Materials, Inc., Evansville, Indiana, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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 a civil penalty assessment in the amount of $58, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The respondent filed a timely answer denying the violation, and a hearing was held in Evansville, Indiana. The parties waived the filing of posthearing briefs, but 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 proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(a) of the Act, and (3) whether the violation was "significant and substantial."

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. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The Commission and presiding judge have jurisdiction in this matter.

2. The respondent's sand and gravel business affects commerce.

3. The respondent is a sand and gravel operator engaged in the business of dredging sand and gravel from the Ohio River.

4. The respondent's operation is located in Tell City, Indiana, and its plant is known as the Rockport Plant No. 6.

5. The respondent's Rockport Plant worked 45,941 manhours during the period March 9, 1987 through March 9, 1988.

6. The respondent worked 400,223 manhours at all of the mines which it operates during the period March 9, 1987 through March 9, 1988.

7. In the event the violation is established, the proposed $58 civil penalty assessment will not adversely affect the respondent's ability to continue in business.

8. The parties agree to the admissibility of copies of the citation, extension, and termination, and the computer print-out reflecting the respondent's history of prior violations (exhibits P-1, P-2).

Discussion

The contested section 104(a) S&S Citation No. 3260305, was issued by MSHA Inspector George Lalumomdiere on October 4, 1988, and he cited an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The cited condition or practice states as follows:

Safe access was not provided between the dredge work boat and the dredge. In order to enter or exit from the work boat to the dredge, a step up of about three feet was necessary with nothing available for a hand hold. This area is traveled on a daily basis.

Petitioner's Testimony and Evidence

MSHA Inspector George Lalumomdiere testified that he visited the respondent's dredging operation on the day in question and was taken to the dredge located in the middle of the Ohio River on a small flat bottom "john boat" approximately 12 feet long powered by a small motor. Mr. Gene Hurm, the respondent's safety director, was with him in the boat along with another employee who was operating the boat. He described the dredge as approximately 100 feet long, and confirmed that it is used to pump sand and gravel from the bottom of the river. Upon arriving at the dredge, the boat operator tied the boat up to the dredge timberheads which he identified from photographs as "two yellow posts sticking up on the edge of the dredge." He estimated that the deck of the dredge was 3 feet above the boat (Tr. 9-12).

The inspector stated that in order to get out of the boat he had to place his hand up on the deck of the dredge and pull himself out of the boat, and since it was a sunny day, the steel deck plate was "hot to the touch" as he grabbed the deck to pull himself up and onto the dredge. Although the photographs include some hand-holds or "D-rings" on the deck dredge, the inspector stated that they were not installed at the time of his inspection and he had to slide onto the slick deck in order to get out of the boat (Tr. 13-14).

The inspector stated that in the absence of any hand-holds, or some other means of getting out of the boat, one could slip and fall into the water while trying to get out of the boat and could possibly strike their head on the boat, particularly on a windy day. He stated that only the front end of the boat was tied to the post, and while this may prevent the boat from sliding out from under him, he still had to slide himself up onto the hot deck. Other than the hot deck, and the possibility of sliding off, since he is "agile and can get around," he had no problem getting out of the boat (Tr. 15).

The inspector confirmed that he cited a violation of section 56.11001, because he did not believe that there was a safe means of access for getting out of the boat onto the dredge. He believed that hand-holds would be "safer than having nothing at all" because someone would have something to hold onto without having to reach up to a hot deck and pull himself out of the boat. He did not consider the hand-holds to be tripping hazards, and he would probably consider the cavils to be adequate as a

safe means of access, but only if they were longer and closer to the boat shown in the photograph. He confirmed that another inspector abated the citation (Tr. 16-17).

The inspector believed that the lack of safe access from the boat onto the dredge presented a hazard, and that it was reasonably likely that anyone leaving the boat by reaching up and grabbing the deck with nothing else to hold onto could slip and fall and receive lost day or work injuries. He believed that it was reasonably likely that someone would receive face or head injuries, or be knocked unconscious if he struck his head in a fall, and even though he would be wearing a life jacket "there's still no guarantee that he'd come out a hundred percent safe" (Tr. 18). He believed that the violation was significant and substantial, and that the negligence was moderate because the safety director travels the area at least once a month and should have been aware of the condition. The citation was abated by providing hand-holds for persons to hold onto while leaving the boat (Tr. 19).

On cross-examination, the inspector confirmed that when he issued the citation he suggested that the respondent install a chain ladder to provide a means of access from the boat to the dredge, and that when he returned to see if the abatement had been completed, he suggested the installation of "A-frame" handles which were something different from the D-rings. He also confirmed that during his inspection visit, the boat was tied off to the timberhead with a rope, but he did not believe that the people in the boat could get out by using the rope because the boat operator was standing at the front end where the boat was tied off steadying the boat (Tr. 23-27). The inspector further confirmed that no one got out of the boat at the front by using the rope, and that everyone got out by putting their hands on the deck and sliding on to it. The person holding the boat steady by the rope also got out the same way (Tr. 32). The inspector confirmed that the use of a rope was better than nothing, but he did not consider the rope to be a safe means of access from the boat to the dredge because he believed there was a better way to provide a safe means of access (Tr. 33).

In response to further questions, the inspector confirmed that he had never worked on a boat or a dredge, but that he has inspected many similar dredging operations. These operations provide a chain ladder with a hand-hold which is dropped over the side of the dredge so that anyone getting out of the boat can step up the ladder and have something to hold onto and step off of (Tr. 36). The inspector confirmed that only the front end of the boat was tied up, and that given the fact that the deck was hot, and the back of the boat was not tied off, in the event of any drifting, the person attempting to get out of the boat would have no means of holding on, and there would be no safe means of access from the boat onto the dredge (Tr. 41). He also confirmed

that there were three persons in the boat on the day of the inspection, and that when there is a crew change, more than one person is in the boat. Normally, when there are no crew changes, only one man is in the boat (Tr. 41).

Referring to the photographs which were submitted by the respondent as part of its answer in this case, the inspector confirmed that the hand-holds shown in the photographs were welded to the dredge by the respondent to abate the citation, and if they were in place when he conducted his inspection, he would not have issued a citation because "they'd had something to hold onto besides the rope" (Tr. 42). It was his understanding that the boat would normally be tied up at the yellow posts shown in the photographs, and that the posts are also used to tie up any barges that are loaded from the dredge (Tr. 43-44). The inspector confirmed that he did not measure the distance between the top of the boat and the deck of the dredge, but estimated it to be 3 feet or "waist high" (Tr. 44).

Respondent's Testimony and Evidence

Neil Mulzer, respondent's president, testified that he believed that the timberheads and cavils which were installed on the dredge, as shown in the photographs, may be used as hand-holds. He stated that when there is a current in the river, only the front end of the boat is tied up because the current keeps the back of the boat against the dredge. In the event of a lack of any current, the back of the boat is also tied up to the dredge to keep it from colliding with any barges which may be loading (Tr. 47). He did not believe that the hand-holds which were welded on for abatement were as good as the timberheads or cavils because the timberheads are 18 inches high, and the cavils are 10 inches high, and provide better hand-holds (Tr. 48). He conceded that the boat shown in the photographs is some distance from the cavil, but that the boat could be tied up there, and in order for the cavil to function as a hand-hold, the boat would have to be docked close to it (Tr. 49, exhibit R-10). Mr. Mulzer confirmed that the cavil is an integral part of the dredge, and it is used to tie up the boat (Tr. 50).

Mr. Mulzer believed that the timberhead and rope used to tie up the boat are sufficient to provide a means of access from the boat to the dredge because the timberhead is high enough to allow anyone to pull themselves out of the boat using the rope. He demonstrated the difficulty one would have in grabbing the hand-holds and placing their feet up onto the dredge deck (Tr. 53). He believed it was easier for someone to hold onto the timberhead while stepping up and out of the boat (Tr. 54). He confirmed that the hand-holds shown in the photographs were not installed on the dredge at the time the citation was issued (Tr. 57). He also confirmed that photographic exhibit R-10 is not the same dredge cited by the inspector, but that exhibits R-2 through

R-9 are photographs of the cited dredge (Tr. 60). He stated that he has been in the dredging business since 1963, and has visited many dredges, but has never seen anything other than a cavil or timberhead and a rope used to get in and out of boats (Tr. 61).

On cross-examination, Mr. Mulzer stated that the boat in question is usually tied up at a "notch" in the dredge in order to keep it from swinging out and being struck by any barges being loaded. He conceded that the boat shown in photographic exhibits R-8 and R-9, is not tied on both ends, and he guessed that the prevailing current could not hold the untied rear end of the boat against the dredge. He conceded that the back end of the boat might come out, and that someone could lose their balance even if they were to use the hand-holds (Tr. 64).

Mr. Mulzer stated that the metal dredge deck could get hot in the summer, but that it would not be "searing hot" and would not "blister your hands." He believed that the hand-holds would be equally as hot to the touch (Tr. 67). Mr. Mulzer confirmed that there is no standard company procedure or safety rule in effect instructing employees as to how to get in and out of the boat while it is at the dredge. He stated that the rope and timberhead "is there for them to use," and "we didn't sit and watch everybody as they got out of the boat" (Tr. 67). He confirmed that the use of the rope and timberhead was discretionary with each employee, and that "you can't watch everybody" (Tr. 68). He confirmed that he was not with the inspector during the inspection and did not discussed the citation with him prior to the hearing (Tr. 68). Mr. Mulzer stated that prior to the issuance of the contested citation, other MSHA inspectors have inspected the dredge and never required any D-rings. He "guessed" that these inspectors used the rope tied around the timberhead to get out of the boat (Tr. 72).

Gene Hurm, respondent's safety director, was of the opinion that the hand-holds presented a tripping hazard, and MSHA's counsel alluded to a telephone conference during which Mr. Hurm raised this question (Tr. 22). Mr. Hurm took the position that the cavils, timberheads, and the rope could all be used for access from the boat to the dredge, and that the inspector could have gone to the front of the boat and used the rope to get out of the boat. He believed that anyone leaving the boat had an option to use the rope or "crawl up the sides," and that the hand-holds are not needed (Tr. 26).

Mr. Hurm testified that the cavils and timberheads have been in place on the dredge since it was new. He confirmed that he was under the impression from the inspector that the cavils and timberheads were insufficient to abate the citation, and that a ladder would have to be installed over the side of the dredge to abate the citation. He stated that had he known that hand-holds welded to the dredge deck would have been adequate to abate the

citation, this case "would never have gotten this far" and that he "would have said something right away" to the inspector (Tr. 69). He confirmed that MSHA Inspector Gene Upton suggested the hand-holds, and that Mr. Upton terminated the citation. Mr. Hurm could not recall anyone suggesting the use of a "roll-up chain ladder" (Tr. 70). He recalled discussing the use of the rope with the inspector, but could not recall exactly what was said (Tr. 73). He confirmed that there are no written instructions for the employees to follow, and that they normally leave the boat from the front end after tying it up by holding on to the timberhead, grabbing the rope, and just jumping off the boat (Tr. 74). He explained that "it's just one of those things that's overlooked . . . and you can't make a policy on getting out of a boat" (Tr. 75).

Inspector Lalumomdiere was recalled by the court, and in response to further questions, stated as follows (Tr. 75-77):

> BY THE COURT: I want to ask you this, you saw that little demonstration Mr. Mulzer gave us about putting the hand-hold there and if you grab it and you put your foot up, you're kind of in an awkward position there, do you lend any credence to that.
>
> A. I didn't really figure on getting off the boat that way. I figured if there was a hand-hold there or you've got something to hold onto so you can swing your leg up over the side of the boat and then come up partially in a kneeling position and then straighten on up after you get up on the deck.
>
> BY THE COURT: So I take it, your concern was that an employee that got off in the middle of the boat or the back of the boat with it not being tied off or nothing to hold onto to, there was a possibility of reasonable likelihood that if you try to get off there he'll probably fall and knock his head or fall in the water.
>
> A. I felt there was a chance of it.
>
> BY THE COURT: Now, what if the boat was secured at the both ends on the day you were there, the back end was tied snugly to the dredge and the front end was tied snugly to the dredge and you saw the first guy get off, grab that yellow telephone pole contraption there, used the rope to get off, and then the second guy did it and then the third guy did it . . .
>
> A. If this was the customary way of getting off . . .
>
> BY THE COURT: Right.

A. . . . and I directed you here, this is the way we get off . . .

BY THE COURT: Right.

A. . . . and you've got something to hold onto, I would have probably accepted it as a safe way to get off because you'd also be stepping up on the bow of the board which would put you up another foot closer to the dredge. And with no way of the boat slipping out from under you or anything, got something to hold onto to to steady yourself, I would say, you know, probably I would have accepted it as safe and would probably never issued a citation.

BY THE COURT: But on the day that you were there at the time that this happened, it's just that the circumstances of what happened, the back end wasn't tied and you had to get off at the middle and the deck was hot and it was slippery, you had to kind of shinney your way up, you came to the conclusion that this was the way they normally do it, right.

A. Right, because the guy that was operating the boat went off the same way we did.

BY THE COURT: Well, I mean, the operator's been very candid with me, he more or less admitted that he lets the employee decide how to get off the boat.

A. Right.

The inspector denied that he had required the respondent to install a ladder, but confirmed that he "suggested" that a chain ladder could be installed "where you could stand up on the edge of the deck and then drop it down when you get ready to get off the boat and you would at least have something to step off onto" (Tr. 78). Referring to photographic exhibits R-8 and R-9, the inspector confirmed that if the boat had been tied up at both ends, and the individual shown in the photographs had stepped out of the boat and onto the dredge in the manner depicted in the photographs, he would not have issued the citation and "probably would not have given it that much thought" (Tr. 78-79).

Mr. Mulzer pointed out that anyone leaving the boat from the bow or the middle would be approximately a foot higher in the boat because they could stand on the seats or the bow structure which is elevated above the bottom of the boat (Tr. 79). He further stated that his employee do not like the hand-holds because of the difficulty in using them (Tr. 80).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.11001, for failing to provide a safe means of access for employees to get out of the work boat which is used as a means of access to the dredge. Section 56.11001, provides as follows: "Safe means of access shall be provided and maintained to all working places."

The evidence establishes that the dredge is a working place where employees are required to be in order to perform certain duties in connection with the respondent's dredging operations. The inspector issued the citation when he and the two other individuals who were in the boat at the time of his inspection visit to the dredge got out of the boat by simply placing their hands on the deck of dredge and "sliding" out of the boat and onto the deck. The dredge deck was approximately 3 feet above the boat, and there were no hand-holds available for anyone to hold onto. Only the front end of the boat was tied to a post located on the dredge deck, and the steel deck plating was "hot to the touch" as the inspector placed his hands on the deck. Although there was a rope tied to the post, and the inspector understood that the boat is normally tied up at that post, and believed that the rope "was better than nothing," he did not consider the use of the rope to be a safe means of access to the dredge deck because he believed that there was "a better way" to provide such an access. His subsequent suggestion that a ladder be installed as a means of access from the boat to the dredge was not adopted because it was impractical, and another MSHA inspector abated the citation after the respondent welded hand-holds to the deck of the dredge.

The respondent does not dispute the lack of any hand-holds of the type which were installed to abate the citation. It takes the position that the cavils and/or the timberhead or post which was provided with a rope, provided an adequate means for safe access from the boat to the deck of the dredge, and that the hand-holds which were installed were impractical in that one had to contort his body after grabbing the hand-holds in order to get out of the boat, and that the use of the hand-holds would place the person in a rather precarious position while attempting to get out of the boat while holding on to the hand-holds. The respondent further asserted that the use of the rope tied to the post provided an adequate means of access from the boat onto the deck dredge.

Having observed the courtroom demonstration of the use of the hand-holds by Mr. Mulzer, I find some merit in his assertion that it would be difficult for anyone holding on to these hand-holds to climb up and on the deck of the dredge from the

boat. However, after viewing the photographic exhibits which show the hand-holds welded into position in close proximity to the timberhead where the boat would be tied up, I cannot conclude that one would have as much difficulty using the hand-hold in conjunction with the timberhead as a safe means of access from the boat.

With regard to the use of the timberhead and rope as a safe means of access from the boat, the facts in this case establish that the inspector and the other two individuals in the boat at the time of the inspection did not use the timberhead and rope while leaving the boat. They simply placed their hands on the deck and slid their bodies up and onto the deck. The inspector obviously believed that this procedure was the normal method used by employees to get out of the boat, and in the absence of anything to the contrary, I cannot conclude that the inspector's belief that a safe means of access was not provided was unreasonable, and I agree with it. With regard to the use of the cavils as a means of access from the boat, the facts here show that the boat was not tied up to any cavil, and that a cavil would only present a possible means of access if the boat were docked in close proximity to the cavil, and it was within reach of the person on the boat.

Further support for the inspector's belief that the normal method of leaving the boat was the method used by the inspector and the other two individuals in the boat at the time of the inspection may be found in the admissions by Mr. Mulzer and Mr. Hurm that the respondent had no established procedure or safety rule for the employees to follow when getting out of the boat. Although Mr. Hurm suggested that an employee leaving the boat would normally hold onto the timberhead and rope and simply "jump off the boat," he did not use the rope or timberhead when he was with the inspector, and I find no credible evidence to support any conclusion that the use of the rope and timberhead was an established procedure to be followed by all employees while getting out of the boat.

Although Mr. Mulzer suggested that the boat is normally tied up at a "notch" in the dredge, I find no credible evidence to support any conclusion that the respondent had any established fixed location for the boat to be tied up to the dredge, or that it had any safety procedures in place for the employees to follow while getting out of the boat at only one location alongside the dredge. Although the use of the existing cavils and timberheads, in conjunction with ropes may have provided a safe means of access, I am not convinced that the respondent had any clearly defined procedures instructing its employees to use these devices as a safe means of access. If it had, the respondent may not have been cited. Indeed, the inspector agreed that if there were an established and customary method of getting out of the boat while it was securely tied to the dredge, and the employees were

so instructed, he would have accepted the use of the timberheads and ropes as a safe means of access. On the facts of this case, it would appear to me that the tying up of the boat at the dredge and the use of any of the available devices as a means of access from the boat did not follow any established procedure or practice, and that each employee was left on his own. Under all of these circumstances, I conclude and find that the evidence establishes that no safe means of access was provided as charged by the inspector, and that a violation of section 56.11001, has been established. The citation is therefore AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 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).

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

The inspector's unrebutted credible testimony establishes that the failure by the respondent to provide a safe means of access for persons leaving the boat presented a potential slip and fall hazard and that in the absence of a readily available hand-hold for one to hold onto or steady himself while he is leaving the boat presented a reasonable likelihood of an accident, particularly in a situation where the boat may not be secured to the dredge at both ends, or on a rainy or hot day when the deck may be hot or slippery. Although one would expect that anyone in the boat would be wearing a life jacket, if he were to fall or slip while attempting to get out of the boat, he could strike his head on the boat or the side of the dredge, and if he were knocked unconscious, and landed face down into the water, the life jacket may not prevent him from drowning. I conclude and find that in the normal course of business, if a person working alone in the boat were to slip or fall while attempting to get out of the boat with no readily available safe means of access onto the dredge, and were to strike his head, he would likely sustain injuries of a reasonably serious nature. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

History of Prior Violations

A computer print-out of the respondent's history of prior violations reflects that the respondent paid civil penalty assessments in the amount of $90, for two section 104(a) "S&S" citations issued during the period March 9, 1987, through March 8, 1989. I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in the assessment of the civil penalty in this case.

Good Faith Compliance

The record establishes that the abatement time was extended to allow the respondent more time to install suitable hand-holds to abate the violation. It also establishes that the violation was ultimately abated by the respondent in good faith within the time allowed by the inspector.

Negligence

The inspector's finding of "moderate negligence" is affirmed, and I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care.

Gravity

For the reasons stated in my "S&S" findings, I conclude and find that the violation was serious.

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

I conclude and find that the respondent is a medium-size sand and gravel operator, and that its dredging operations at the Rockport Plant where the violation occurred was a small operation. I further conclude and find that the civil penalty assessment which I have made for the violation in question will not adversely affect the respondent's ability to continue in business.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of $58 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $58, for a violation of mandatory safety standard 30 C.F.R. § 56.11001, as stated in the section 104(a) "S&S" Citation No. 3260305, issued on October 4, 1988. Payment of the penalty is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of the payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 8 1990

BEAVER CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 88-207-R
v.	:	Order No. 3225158; 4/26/88
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Gordon Creek No. 7 Mine Mine ID 42-01814
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-339 A.C. No. 42-01814-03518
	:	
v.	:	Gordon Creek No. 7 Mine
	:	
BEAVER CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Thomas F. Linn, Esq., Beaver Creek Coal Company, Denver, Colorado, for Contestant/Respondent; Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., ("the Act") to challenge the issuance by the Secretary of Labor of two citations issued to respondent Beaver Creek Coal Company ("BCCC").

After notice to the parties a hearing on the merits was held in Salt Lake City, Utah.

The parties filed post-trial briefs.

Issues

The issues are whether any violations occurred. If so, what penalties are appropriate.

Citation No. 3225145

This citation charges BCCC with violating 30 C.F.R. § 75.1704. 1/

The citation reads as follows:

> The alternate escapeway belt entry located in the 3rd south section active was not being maintained in a condition to allow all persons, including disabled persons, to escape quickly to the surface, in the event of an emergency. The following condition did not comply with 75.1704 (1)(a) located approximately 40 feet inby survey station No. 2440, a belt check stopping undercast had been installed across the belt entry with a 35 inch by 35 inch man door in the wall, and there were two cinder blocks step platforms installed on each side of the stopping. These platforms measured 1st: leading into section 30½ inches wide and a 46 inch step down (high). 2nd: 31½ inches wide by 34½ inches high step down.

1/ The cited regulation reads as follows:

§ 75.1704 Escapeways

[Statutory Provisions)

> Except as provided in §§ 75.1705 and 75.1706, 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, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequestly tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

THE EVIDENCE

During an MSHA inspection LARRY RAMEY, an authorized representative of the Secretary, reviewed the Gorden Creek Mine map. One of the alternate escapeways was identified as a belt line coming out of the 3rd south section (Tr. 16-18).

When walking the belt line with John Perla, the operator's foreman, the inspector encountered an air course undercast located approximately forty feet inby survey station No. 2440. BCCC had installed a belt-check stopping over the undercast for ventilation purposes (Tr. 19). The inspector measured and sketched the installation (Tr. 14-24, 75, Ex. P-2).

The belt-check stopping had been constructed with 8 inch by 16 inch cinder blocks. As a person moves outby he first reaches four steps which give him access to a higher level. He then proceeds an additional 20 feet to the man door. The man door opens in the outby direction. After stepping over the door sill the person immediately encounters six steps which return him to a lower level.

The man door which permits access through the undercast measures 35 inches by 35 inches. 2/

In the inspector's opinion this alternate escapeway was not maintained to insure passage at all times, including passage for disabled persons (Tr. 24).

BCCC's witnesses, JOHN PERLA and LEVON L. TURPIN conducted a travelability test using two persons to carry an occupied stretcher through an identical man door and down the steps. The passage was virtually identical to the one cited by the inspector (Tr. 92, 93, Ex. B-7). The tests and photographs demonstrated the area was passable. The steps could be negotiated and according to BCCC the area in question was travelable thereby meeting the requirements of section 75.1704. In short, there was more than ample room to move a man on a stretcher through the man door (See photo Exhibits B-4, B-5, B-6, B-7 and B-9).

In view of his test results witness Turpin concluded the alternative escapeway was "well travelable" (Tr. 101).

2/ The drawing on the citation and Exhibits B-1, B-2 and B-3 (drawn to scale from the citation detail) shows the steps and their measurements, as well as the man door at the undercast (Tr. 23).

THRESHOLD ISSUE

As a threshold matter BCCC asserts that the Secretary was attempting to enforce the non-mandatory regulations contained in section 75.1704-1 3/.

In support of its view BCCC notes the inspector did not conduct a travelability test, also the operator relies on the wording of Citation No. 3225145, supra., where the citation recites, in part, that "the following condition did not comply with 75.1704-1(a) located, etc. ...."

BCCC also cites portions of the transcript, including a conversation between witness JOHN PERLA and the inspector. The conversation:

> Q. Can you tell us what happened on the 14th of March the circumstances surrounding the issuance of this citation?
>
> A. Mr. Ramey and I went into the mine and I always ask the inspectors where they would like to go. And he wanted to go into the active section, so we went into the third south section, and we walked around in the section for awhile and looked at different things. And then he wanted to walk out the belt line, and so, him and I -- Mr. Ramey and I started out the belt line and we got down to the overcast and we stood there for a minute on the in-by (ph.) side of the overcast -- or, undercast, went through the 35 by 35 inch man-door, went down the other side. And we looked back at the undercast, and he told me he was going to give me a citation because of it [sic] wasn't five by six.
>
> Q. Okay. And tell us what happened next?
>
> A. We were sitting there talking and we looked back at the undercast. And Mr. Ramey told me that he would have to give us a Citation because we didn't have our five by six opening on our escapeway. (Emphasis supplied) (Tr. 69, 78)

3/ On October 27, 1989, in Utah Power & Light Company, WEST 87-211-R, discussed infra, the Commission ruled that section 75.1704-1(a) was not enforceable. (Slip opinion at 6).

Later, in the mine office an additional conversation took place:

Q. Did you talk to Mr. Ramey about the citation?

A. We talked about it at the mine, and when we were looking at the undercast. And then we talked about it when we got outside and down at the office.

Q. What happened at the office?

A. I asked him why it was any different us getting a citation on this one here when these are just like this or something similar with the stoppings off of the undercast was accepted through the life of the mine. Since we opened the mine, we had done this.

Q. Go ahead.

A. He . . .

Q. What was his response?

A. Just that we didn't have our five by six opening and we had to take care of it. (Emphasis added) (Tr. 82).

Finally, Bccc contends the manner of abatement suggests the inspector was attempting to enforce the dimension standard in § 75.1704-1(a). The termination of the citation reads as follows:

> The operator has installed a six-foot walkway on each side of the undercast and hand rails on each side of the walk-ways. The operator has placed a [sic] order with Triune, Inc., located in Colorado, PO No. B10-9778 date 3/15/88 for a 64 x 80 W walk thru man door. The delivery date is 4/14/88.

On the other hand, by way of explanation, Inspector Ramey stated that his reference to § 75.1704-1(a) in the body of the citation was only to demonstrate BCCC's nonconformance and lack of District Manager approval. He stated:

> This is a guideline that is set out for the district managers to approve escapeways with less than what they can do. I cited this citation under § 75.1704, only referring to 1704-1, in that the operator did not maintain that. The reason that I used 1704 was that I felt like that it was unsafe.
>
> And if you will look, it says at least two separate and distinct travel passageways which are maintained to insure passage at all time of any person, including disabled persons, and which are to be designated. And then it goes down and it says including disabled disabled persons to escape quickly to the surface in the event of an emergency.
>
> In the beginning of my citation, I put that it was not being maintained in condition to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.
>
> (Tr. 35, 36)

Discussion

On the threshold issue I conclude BCCC was properly cited. The text of the citation initially incorporates the specific language of the regulation. Further, the citation on its face clearly alleges that BCCC violated 30 C.F.R. § 75.1704, not subpart § 1704-1(a). If the inspector intended to cite BCCC for violating § 1704-1(a) he could have recorded this regulation on the face of the citation.

It is true the inspector did not conduct a travelability test. But there is no requirement that such a test be made. A cursory glance should satisfy an inspector that an opening of less than three foot square would not insure passage of miners or disabled miners within the mandate of the regulation.

The abatement of the citation also does not establish the operator was cited under section 75.1704-1(a). The method of abatement is generally a matter left to the operator's discretion.

Was the Escapeway Passable Within the Meaning of the Regulation

This escapeway opening, i.e., the man door, measured 35 inches by 35 inches. In short, the passageway was less than a yardstick in height and width. Query: In passing through such a man door is a miner to proceed headfirst or feetfirst?

Since there is no dispute as to these measurements I conclude as a matter of law that such an opening could not insure passage of miners, including disabled miners.

BCCC's evidence and photographs show that a person on a stretcher could literally be passed through the 35 inch by 35 inch opening. But the ability to pass a stretcher through such an area does not "insure passage" as contemplated by section 75.1704. Passage is not insured because a miner in a smoke filled environment would have to reach the area, go up the cinder block steps, proceed an additional 20 feet and then locate, open and crawl through the man door. He would then immediately descend another flight of stairs of six steps on the other side. The passage of a disabled miner on a stretcher would be even more difficult.

All of the foregoing factors cause me to conclude that the described conditions would hinder rather than insure passage.

For these reasons I reject the contrary opinion of BCCC's witness Turpin.

BCCC, in support of its position, relies on Utah Power & Light Company, 10 FMSHRC 71 (1988), affirmed October 27, 1989.

The facts in Utah Power & Light (UP&L) support the Secretary and not BCCC. Specifically, in WEST 87-211-R, it was held that the escapeway regulation was violated because there were tripping hazards and the escapeway had been reduced to four feet in width. 10 FMSHRC at 83.

In the instant case the steps constituted a tripping hazard. Further, BCCC's escapeway was less than three feet in width, considerably less than the four foot width in UP&L.

For the foregoing reasons, I conclude that respondent violated 30 C.F.R. § 75.1704.

Civil Penalty

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

The parties stipulated the operator was of moderate size. The mine produced 400,000 tons last year.

The operator failed to offer any evidence that a penalty would adversely affect its ability to continue in business.

Exhibit J-1, a computer printout, indicated BCCC within the last two years was assessed 19 violations. This is a favorable prior history.

I consider the operator's negligence to be high. The company should have known this 35 inch by 35 inch door had been installed in an escapeway.

The gravity was likewise high. A miner, or a disabled miner attempting to escape, could have been seriously impeded.

The company demonstrated good faith in rapidly abating this violative condition.

On balance, I deem that a civil penalty of $200 is appropriate.

Citation No. 3225158

The citation charges BCCC with violating 30 C.F.R. § 75.402. 4/

4/ The cited regulation reads as follows:

§ 75.402 Rock dusting.

[Statutory Provision]

> All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

The citation reads as follows:

> The following underground areas of the 1st south working section had not been rock dusted. The two connecting crosscuts located between 1st right, 2nd right and 3rd right entries had not been rock dusted. No rock dust had been applied to the mine floor, coal ribs nor mine roof. These two crosscuts were more than 40 feet from the working faces the distances involved was approximately 80 feet in length and the height in these crosscuts were approximately 8 feet high. The miner had taken approximately 50 to 55 feet cuts out of the 2nd and 3rd right faces and was in the process of cutting and loading out of the 1st right face.

Inspector LARRY RAMEY has inspected BCCC's mine many times (Tr. 116).

The inspection party went to the 1st south working section and into the 3rd right area. The continuous miner was cutting and loading in the 1st right section. (See Exhibit P-5, a drawing attached to the citation.)

No rock dust had been applied to the two open crosscuts. These crosscuts were from 3rd to 2nd right and 2nd right to 1st right. The crosscuts were on 60 foot centers (Tr. 118, 120, Ex. P-5).

When he arrived in the section the roof-bolting machine was headed into the 3rd right. After the roof bolts were installed the inspector used a dust kit to take samples from the right lower rib, the upper left rib and the mine floor. The sample was taken from the crosscut to the left of 3rd right (Tr. 120-122).

The sampled material was then filtered through a mesh screen into a catching pan. It is then bagged and sent to the lab for analysis. The lab is located in Mt. Hope, West Virginia [5/] (Tr. 123, Exhibit P-6).

5/ The judge excluded Exhibit P-6 because of inconsistencies. The exhibit on its face states it was taken on the 27th but the inspector testified he took the sample on the 26th. Further, the witness indicated he took the sample from 3rd right (Tr. 121-126). The critical weakness in the Secretary's evidence is that the record fails to disclose the precise point where the dust sample was taken. Based on the approximate distances shown in Exh. P-5 the sample could have been taken approximately 50 to 55 feet from the nearest crosscut (The XC between 3rd right and 2nd right). In the alternative, the sample could have been taken as far as 200 feet from where the crosscut broke through into 1st right.

In the inspector's opinion the crosscuts were not safe to manually rock dust but a rock dusting machine could have been used. A rock dusting machine applies rock dust in a more even fashion than by a manual application. (Tr. 127, 128).

In the inspector's opinion the two crosscuts were not inaccessible if the rock dusting was done by machine (Tr. 129).

Rock dusting improves underground visibility (Tr. 130-132).

Turpin stated it was BCCC's practice to roof bolt the crosscuts and then apply rock dust. The inspector gave the company adequate time to hook up the electrical rock duster (Tr. 135, 158).

The inspector tested a coal dust sample and placed it in a baggie. The sample was dry (Tr. 139 - 140).

The crosscuts were on 60 foot centers. It was 120 feet from the center line of 1st right to the center line of 3rd right (Tr. 144, 145, 164).

The 3rd right and 2nd right didn't have any rock dust in them from the outby corner to the inby face (Tr. 145). The entry openings were 20 feet wide (Tr. 147).

The area lacking rock dust measured 184 square feet (Tr. 147, 148). However, Exhibit P-5 does not show this figure. Exhibit P-5 shows the two crosscuts were not rock dusted (Tr. 148).

When the citation was issued the roof bolter had installed one row of permanent support from the lower third right rib to the upper third right rib. The inspector had the roof bolter back the machine out and he then collected a sample of dust (Tr. 152). [Inspector Ramey also stated the bolter was in the process of entering the crosscut to bolt the area when the citation was issued (Tr. 152)].

The inspector had no complaints about the company's mining sequence. The inspector told the company's representatives that it was unsafe to manually rock dust the crosscuts. He also indicated he would give them enough time to either support the area and rock dust it manually or by machine. It is not unlawful to use hand dusting (Tr. 155 - 156).

Dusting people out, i.e., mechanically liberating dust, creates some health hazards. Except for the two crosscuts and the immediate face areas in the entries, all other portions of the section were rock dusted (Tr. 157).

BCCC's cleanup plan states that "rock dusting shall be done during the bolting cycle by the bolters. As the bolter bolts in the entry, they catch up the rock dust. When they pull out, it is rock dusted." (Tr. 161, 162).

An operator's obligation to apply rock dust arises when the continuous miner breaks through into the next entry. At that point the newly mined area becomes a crosscut (Tr. 165, 167).

In the inspector's view the Beaver Creek clean-up plan should include a statement that all crosscuts should be immediately rock dusted after they are cut through and before roof bolting (Tr. 174). BCCC needs a system where they machine dust those areas (Tr. 175).

There were several ignition sources in the vicinity (Tr. 177).

LEVON L. TURPIN identified Exhibit B-11 as the BCCC cleanup and rock dust plan. Parts 3 and 4 for the plan have been in effect since 1984.

Discussion

The writer is bound by Commission precedent including cases decided by the Interior Board of Mine Operations Appeals. The controlling precedent here is The Valley Camp Coal Company, 1 MSHC 1051, 1 IBMA 243. (1972). See also Hall Coal Co., Inc., 1 IBMA 72-16; 1 MSHC 1037 (1972).

In the above cases it was held the Secretary must prove the dust was combustible (1 MSHC at 1051). Further, the Secretary must prove the area to be rock dusted was safe to enter.

Concerning the initial issue: There was no proof as to the combustibility of the dust. No doubt this proof failed since the judge excluded the Secretary's exhibit (see footnote 5, supra.)

Concerning the second issue: the evidence is unclear whether the double-headed roof bolter was entering or withdrawing from the crosscut when the dust sample was taken. But it is quite clear it was not safe for miners to manually rock dust the crosscuts. The inspector contends the rock dusting could have been done by machine. However, the regulation does not mandate machine rock dusting.

For the foregoing reasons I conclude the Secretary's proof failed in two essential aspects. In view of this, Citation No. 3225158 should be vacated.

Briefs

The parties have filed detailed briefs which have been most helpful in defining the issues herein. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

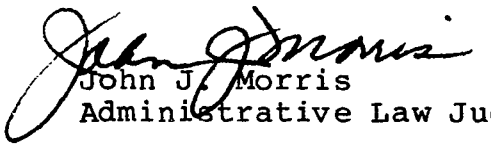
ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. In WEST 88-207-R: Contestant's contest is sustained.

2. In WEST 88-339: Citation No. 3225158 is vacated.

Citation No. 3225145 is affirmed and a penalty of $200 is assessed.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 89-46-M
	:	A. C. No. 18-00275-05521
v.	:	Branchville Mine
A. H. SMITH STONE COMPANY, Respondent	:	

DECISION OF DEFAULT

Before: Judge Merlin

This case is before me pursuant to the Commission's order dated November 20, 1989.

On October 24, 1989, I entered an Order of Default because the operator failed to answer or otherwise comply with a show cause order issued on August 10, 1989. The operator appealed and the Commission returned the case to me for evaluation of the operator's explanations. On November 29, 1989, I directed the operator to explain what circumstances justified its failure to comply and I directed the Solicitor to state her position.

The Solicitor has taken the position that there are insufficient reasons to excuse the operator's failure to timely respond to the show cause order. In particular, the Solicitor argues that the operator's contention that the order to show cause was misfiled and overlooked is not an adequate reason to reopen the case. The Solicitor notes that the operator's representative, while not attorney, has routinely participated in MSHA cases and her failure to meet filing deadlines has been excused in the past.

For its part, the operator first asserts that an answer was not timely filed because the research necessary to complete the answer would be time-consuming and possibly impossible. Its representative alleges that the persons who were the plant supervisor and the safety director at the time of the alleged violations are no longer employed by the company and are either not cooperative or not accessible. However, she does not elaborate on the reasons or circumstances surrounding these

individuals, merely stating that the only other person who "may" have knowledge is one of the company owners who has numerous responsibilities and other demands on his time.

These statements are not sufficient to justify the failure to answer. 29 C.F.R. § 2700.28 provides that the operator's answer shall contain a short and plain statement of the reasons why the violations are contested. In Docket Nos., VA 89-3, VA 89-4, VA 89-28, VA 89-44 and YORK 89-24, YORK 89-35, YORK 89-36, YORK 89-40, YORK 89-43, and YORK 89-44, the operator's representative failed to answer timely and received show cause orders which specifically advised her that an answer is nothing more than a short and plain statement of the reasons why the operator disagrees with the alleged violations. In response to the show cause orders in the York dockets supra, the operator's representative filed a one line answer for all of them, which I accepted. Accordingly, detailed research is not necessary for an answer, and the operator has been told this repeatedly. Although some employees may have left the company's employment, no explanation is offered why they were not accessible or cooperative or whether they were diligently pursued. Furthermore, there is no showing that the operator's president did not have the time to furnish the minimal information necessary to answer.

In addition, if the operator did in fact, believe it could not file an answer on time, it could have requested an extension. 29 C.F.R. § 2700.9. This operator has had many cases before the Commission and its representative has requested extensions to answer in other cases, which requests I granted. See, e.g., VA 89-3-M and VA 89-4-M. There is no reason why in this case the operator could not have requested an extension of time as provided for by Commission rules.

The operator's second assertion that it did not answer the show cause order because it was misfiled and therefore, overlooked is inadequate. As stated in my November 29 order, since the operator's representative is well versed in the practices and procedures of this Commission, a bare allegation of misfiling standing alone would not be sufficient and therefore, she was directed to explain in full the circumstances. She has, however, not done so. Her letter dated December 18, 1989, merely states the show cause order was misfiled.

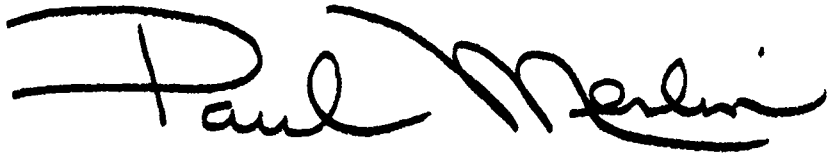
In Docket No. VA 88-44-M the Commission remanded the case to me, where a default had been entered because this operator failed to answer although two show cause orders had been issued. In that case, however, there was some confusion over the identity of the proper individual to receive the operator's mail. 11 FMSHRC 796 (May 1989). In response to my order to submit information, the operator's representative advised that the case "fell through the cracks" and was not handled properly. But she asserted this

was not usual and that the operator's legal identity reports had been updated. Acknowledging the Commission's admonition that default is a harsh remedy, I vacated the default in that case. In the instant case there was no confusion over mailing and there is no reason to yet again excuse the operator's failure to timely file her responses.

It must be borne in mind that as the November 29 order points out, and as the Solicitor now argues, this operator and its representative have appeared in many Commission cases. As noted, several of these cases have been before me. A review of the files discloses that in all my cases the operator was late in filing its answer.

As previously stated, I bear in mind the Commission's oft stated view that default is a harsh remedy. Accordingly, upon remand to me for reconsideration of default orders I have heretofore, after reviewing the files and additional information submitted by the parties, vacated defaults in every such case. But there comes a point where the conclusion is inescapable that Commission process and leniency are being so abused that relief from default is not warranted. Regrettably, this is a case where that point has been reached.

Accordingly, it is ORDERED that the operator be held in Default and that this case be DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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JAN 9 1990

RANDY J. COLLIER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-198-D
GREAT WESTERN COAL, INC., Respondent	:	

DECISION

Appearances: Charlie R. Jessee, Esq., Abingdon, Virginia, for Complainant; Joshua Santana, Esq., Brown, Bucalos, Santana & Bratt, Lexington, Kentucky, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his position as heavy equipment operator with Respondent Great Western Coal, Inc. (Great Western) because of complaints of unsafe working conditions, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Great Western contends that he was discharged because of physical inability to perform the duties of his job. Pursuant to notice, the case was heard in Abingdon, Virginia, on October 5, 1989. Randy J. Collier, Tim Moore, and Henry Frank Doan testified on behalf of Complainant and Jerry Wayne Brown and Ben Scearse were called by Complainant as adverse witnesses; Linda Downs testified on behalf of Great Western. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. Complainant Randy Collier, 35 years of age, worked for Great Western for 12 years until he was terminated on March 30, 1989. During eleven of the twelve years, he worked as a heavy equipment operator.

2. Great Western was the operator of a coal mine in or near Coalgood, Kentucky, apparently having both surface and underground facilities. The operation of the mine affected interstate commerce.

3. At some time in 1979, Complainant was employed driving a Caterpillar rock truck. He attempted to move by hand a rock which had fallen in front of his truck, and injured his back. He had surgery for a ruptured spinal disc.

4. At some time in 1983, the two lower steps of Complainant's rock truck were missing, having been torn off by contract drivers. Complainant and his immediate supervisor, Ben Scearse complained about the broken steps for about a month but they were not repaired. (Scearse testified that he did not recall any such complaints and denied that the steps were broken. I am accepting Complainant's testimony on this matter.)

5. One evening in 1983, Complainant jumped to the ground (4 or 5 feet) from the bumper of the rock truck resulting in another back injury. Complainant underwent surgery for a second ruptured disc.

6. On several occasions Complainant complained to construction superintendent Jerry Brown, of extreme heat inside the cab of his truck or dozer. An operating air conditioner was not provided, although some of Great Western's equipment had air conditioners. Complainant also complained of excessive dust which affected a skin condition he had called hyperhydrosis.

7. At some unknown times in the past Complainant complained of a defective steering clutch on a John Deere dozer and defective windshield wipers on equipment which he operated.

8. In early 1987, Complainant was assigned to drive a truck carrying a crew of workmen from the mine offices to the job site, a distance of 3 or 4 miles. The truck had defective doors, both on the driver's side and the passenger's side.

9. Complainant and his immediate foreman Ben Scearse complained to the Superintendent Jerry Brown about the condition of the doors, but Brown declined to have them repaired. The last time Complainant discussed the condition with Brown was about March 1, 1987. Both Brown and Scearse denied that Complainant made such complaints, and Complainant's testimony is not supported by his coworkers Tim Moore and Henry Frank Doan. Nevertheless, I find as a fact that Complainant did in fact make such complaints to Brown and related them to safety.

10. On April 7, 1987, Complainant struck the door twice to open it and again injured his back and neck. He was taken to the hospital. He was x-rayed and treated with medication and remained off work 4 or 5 days.

11. He returned to work but continued to have pains in his neck, chest and arm. In September 1988, Great Western told him that he could not continue to work unless he promised he would run the equipment without taking pain pills and muscle relaxers.

12. He continued working until December 1988. A myelogram was performed on December 29, 1988, and showed nerve root compression in the cervical spine. A spinal fusion was performed in February 1989. He has not worked for Great Western since that time.

13. Complainant's physician was of the opinion that Complainant was disabled for the work of heavy equipment operator or truck driver.

14. On March 30, 1989, Great Western terminated Complainant's employment "because of [his] unavailability for work." (R. Ex. 2.)

15. At the time his employment was terminated, Complainant was paid at the rate of $13.45 an hour. He also had company-paid health insurance, retirement benefits, vacation pay and "coal bonuses," amounting to from $1.50 to $1.75 an hour.

16. In April 1989, Complainant filed a workers' compensation claim in which he stated he was totally disabled from performing his work. At the time of the hearing in the instant case, a decision had not been rendered in the workers' compensation case.

ISSUES

1. Was Complainant discharged from his employment for activities protected under the Mine Act?

2. If so, to what remedies is he entitled?

CONCLUSIONS OF LAW

1. Complainant Collier and Respondent Great Western are subject to and protected by the provisions of the Mine Act, Complainant as a miner and Respondent as a mine operator. I have jurisdiction over the parties and the subject matter of this proceeding.

2. Under the Act, a miner establishes a prima facie case of discrimination if he proves that he was engaged in protected activity and was subjected to adverse action which was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. If the operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it was also motivated by the miner's unprotected activity, and would have taken the adverse action for that activity in any event.

3. Complainant's complaints in 1983 of the absence of steps on the rock truck which he was operating (Finding of Fact No. 4); his complaints of extreme heat and excessive dust inside the cab of the truck and dozer he was operating (Finding of Fact No. 6); his complaints of a defective steering clutch and defective windshield wipers on equipment he was operating (Finding of Fact No. 7); and his complaints of defective doors on the truck used to convey miners to the worksite (Finding of Fact No. 9) were all activities related to safety and protected under the Mine Act.

4. Complainant's discharge on March 30, 1989, constituted adverse action.

5. There is no evidence that Complainant's discharge was motivated in any part by the safety complaints referred to in conclusion of law No. 3, nor is there evidence from which I could infer that his discharge was motivated by such complaints. I conclude that his discharge was motivated by his inability to perform the duties of his job. Complainant worked for many years after the 1983 complaints and for almost 2 years following the 1987 complaints. The evidence is clear that none of these complaints were factors in his discharge.

6. Complainant's injuries were due in part to defective equipment at work (broken steps on the rock truck in 1983; defective door on the miner carrying truck in 1987). These facts do not establish a discrimination case under section 105(c) of the Mine Act.

7. Complainant has filed for state workers' compensation benefits, and Great Western has contested his claim. The discharge of an employee with a pending workers' compensation case does not state a case of discrimination under section 105(c) of the Mine Act.

8. I conclude that Complainant has failed to establish a prima facie case of discrimination since he has not shown that the adverse action was motivated in any part by protected activity.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 10 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 89-50-M
	:	A.C. No. 38-00626-05502 AIR
v.	:	
	:	Ridgeway Mine
MORGAN CORPORATION, Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Carl B. Carruth, Esq., McNair Law Firm, Columbia, South Carolina, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 a civil penalty assessment in the amount of $2,000, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.9005. The respondent filed a timely answer denying the alleged violation, and a hearing was held in Columbia, South Carolina. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(a) of the Act, and (3) whether the violation was "significant and substantial."

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. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. At the time of the issuance of the violation, the respondent was an independent contractor performing certain construction work at a gold mine. The respondent is subject to the jurisdiction of the Act.

2. The respondent presently employs 25 employees. At the time of the issuance of the violation the respondent had 56 employees, and its annual production manhours was 53,912.

3. The respondent's history of prior violations is reflected in an MSHA computer print-out, exhibit P-1.

Discussion

The respondent is an independent contractor who was in the process of constructing waste settlement ponds at an open pit gold mine on August 18, 1988. Two or three pan scrapers were being used to construct or build up a strip or barge ramp approximately 200 feet long and 45 feet wide, and three employees of the respondent were involved in this work. Mr. Roosevelt Williams and Mr. Boykin Durham were operating pan scrapers bringing soil to and dumping it on the ramp under construction. Mr. James Wise was assigned as a spotter to direct the pan scrapers where to dump their loads of soil and to serve as a flagger to assist them in backing up because the ramp was too narrow to permit the scrapers to turn around on the ramp and drive out in a forward direction. At approximately 11:00 a.m., after unloading his load of soil, Mr. Williams put his scraper in reverse and began backing up, and the audible backup alarm on the machine was operating and sounding. After backing up for a distance of approximately 100 feet, Mr. Williams looked around and saw Mr. Wise laying approximately 98 feet in front of his machine. Mr. Wise had been run over by the machine, and died at the scene.

MSHA conducted an investigation of the accident (exhibit P-2), and on August 20, 1989, MSHA Inspector Robert M. Friend

issued a section 104(a) "S&S" Citation No. 3254881, citing an alleged violation of mandatory safety standard 30 C.F.R. § 56.9005. The condition or practice cited by the inspector states as follows: "An accident resulting in a fatality occurred on 8-18-88 when a spotter was backed over by a pan scraper. A signal from the spotter, sight of the spotter, or other means was not used to insure that the person was in the clear before moving backwards."

Petitioner's Testimony and Evidence

Roosevelt Williams testified that he last worked for the respondent in August, 1988, as a pan scraper operator. He confirmed that he knew the accident victim James Wise, and stated that his job was to act "something like a flagman" to instruct the drivers where to dump their loads of dirt. Mr. Williams stated that on the day of the accident there were two or three pan scrapers operating at the site, and he explained the work that was being performed. He stated that after dumping his load he had to back his scraper up for a distance of approximately 100 feet along the strip that was being constructed in order to turn around and leave for another load. After backing up, and before leaving to get another load, he observed Mr. Wise going to the water cooler. Upon his return with a load of dirt he observed Mr. Wise walking toward the strip area where the load was to be dumped, and Mr. Wise waved him to go ahead. Mr. Williams then proceeded to drive approximately 100 feet along the strip, dumped his load, and backed out for approximately 100 feet when he observed Mr. Wise laying in front of him (Tr. 5-11).

Mr. Williams stated that while he was backing up after dumping his load he did not see Mr. Wise. He stated that from the driver's seat, the visibility to the left of the pan scraper is no problem. With regard to the visibility to the right side of the scraper, he stated that the scraper he was operating on the day in question did not have a right rear view mirror, and as he looked back from his operator's position he could not see any objects that are within 30 feet of the scraper (Tr. 12-14).

Mr. Williams stated that he has operated backhoes, pan scrapers, and small dozers for approximately 4 years, and he confirmed that a pan scraper is normally operated in a forward direction, and that under normal operating conditions he does not generally back it up for 100 feet (Tr. 14). He confirmed that he was instructed at safety meetings "to look out for each other." He also confirmed that he could not see Mr. Wise while backing up on the day in question, and that he had not been instructed not to operate the scraper in reverse without seeing Mr. Wise (Tr. 15). Mr. Williams also stated that part of Mr. Wise's duties were to station himself in a position where he could be seen so

that he could help him back out. Mr. Williams explained further as follows (Tr. 16):

> Q. Well, what happened on this particular day?
>
> A. Just like I said, he was walking up beside me when I was coming in. He was on the left-hand side. I looked back on my left side to back out. I did not see him.
>
> Q. You didn't see him on the left side?
>
> A. When I looked back on the right-hand side, I did not see him, and the right-hand wheel ran over him.
>
> Q. Was it the instruction of the spotter . . . to the instructions to the spotters, were they told to . . . was it their job just to show you where to dump the dirt and then just stay out of your way?
>
> A. Ask me that one more time?
>
> Q. As far as you know, was it the instructions to the spotters to show the pan scraper operators where to dump the dirt and then just stay out of the way?
>
> A. Yes, sir, as far as I know it was his instructions.

On cross-examination, Mr. Williams stated that he was not certain that Mr. Wise was in the clear before he started backing up, and that he had no idea that he was behind the scraper. He also stated that he would not have backed up if he thought that Mr. Wise was behind him (Tr. 17). Mr. Williams confirmed that the scraper was equipped with a back-up alarm which starts sounding as soon as it is put in reverse, that it was operating on the day in question, and that he heard it sounding while the machine was in reverse (Tr. 18).

Robert M. Friend, MSHA supervisory inspector, testified as to his background and experience, and he confirmed that during his prior employment at a quarry he operated a 631 Caterpillar pan scraper similar in size to the one operated by Mr. Williams, and also operated dozers and front-end loaders. He confirmed that he conducted the accident investigation on August 19 and 20, 1988, and that the accident occurred on August 18, 1988. He described the accident scene, and he explained that it was a "barge ramp" approximately 45 to 46 feet wide and 200 feet long, and that it was used as "some kind of pumping facility, perhaps covering a pipeline" (Tr. 21-22). He explained that the respondent was a subcontractor engaged in the construction of pond settling basins used to collect water used in the milling and extraction of gold (Tr. 22).

Mr. Friend stated that his investigation confirmed that Mr. Wise had received hazard recognition and task training (Tr. 25). He identified the scraper operated by Mr. Williams as a model 623 manufactured in the 1970's, and stated that it was similar in size and dimensions as the Caterpillar 623-E scraper depicted in exhibit P-3 (Tr. 27). Referring to a photograph of the machine found on page 5 of the exhibit, Mr. Friend stated that from the operator's seat, visibility to the left of the machine is good, but very poor to the right side. In view of the size of the tires and the structure itself, visibility to the right rear corner of the machine would be extremely poor (Tr. 28).

Mr. Friend confirmed that he issued the citation citing a violation of section 56.9005, because scraper operator Williams failed to make certain by signal or any other means that Mr. Wise was in the clear before moving the scraper. Mr. Friend interpreted "signal or other means" to mean any hand or verbal signal, or knowing by visual observation that Mr. Wise was in the clear (Tr. 29). He confirmed that the reverse signal alarm was working. He stated that mandatory standard section 56.9087 covers back-up alarms, and that section 56.9058 covers the use of spotters while trucks are backing up and dumping. He explained that a scraper is not a truck, and that he cited section 56.9005 because "it covers all equipment and all people" (Tr. 30). He did not believe that the use of a back-up alarm in compliance with section 56.9087 was sufficient to comply with section 56.9005 because Mr. Wise had been assigned to a confined area for several days and Mr. Williams was never instructed to insure that he had Mr. Wise in view before backing up, or to use any kind of signals to make sure that he was in the clear (Tr. 30).

Mr. Friend stated that he based his moderate negligence finding on the fact that the back-up alarm was operating quite well and that Mr. Wise had been instructed that after he signaled the scraper operator where to dump he was to get out of the way (Tr. 31). He also confirmed that he considered the violation to be significant and substantial because the criteria for an "S&S" violation "was met in this case in that an accident did occur and it was a fatality" (Tr. 31).

On cross-examination, Mr. Friend could not recall whether or not he observed a right rear-view mirror on the pan scraper in question during his investigation, but that he did recall that a left rear view mirror was on the machine (Tr. 34). He confirmed that he measured the noise level of the back-up alarm and found it to be quite loud at 120 decibels measured 6 inches from the alarm, and 97 decibels as measured 10 feet from the alarm. He also confirmed that the alarm was located at the very rear of the scraper, and if anyone were standing behind the machine as it backed up the alarm would sound louder and louder as the machine

approached the individual. Mr. Friend agreed that the pan scraper is a heavy piece of equipment with an obstructed view to the rear (Tr. 36).

Mr. Friend believed that he reviewed the coroner's autopsy report in the course of his investigation, and that it indicated that Mr. Wise had a serious heart condition. However, the heart condition was not the cause of death. Respondent's counsel read from the report which quoted the coroner as stating that Mr. Wise may have suffered a heart attack, thereby preventing him from moving out of the path of the machine as it backed up. However, Mr. Friend could not recall receiving a copy of the report, but did confirm that he received a copy of the death certificate (Tr. 39).

Mr. Friend confirmed that Mr. Wise was found approximately 45 feet behind the point where Mr. Williams began backing up his scraper. Mr. Friend stated that even if Mr. Williams had been told not to back up or move the scraper unless he had Mr. Wise in sight, it would not have made any difference insofar as the violation is concerned, but it would have resulted in a low negligence finding as opposed to a finding of moderate negligence (Tr. 46-47).

In response to further questions, Mr. Friend was of the opinion that section 56.9005 was the proper standard to cite in this case, and that it required Mr. Williams to have "line of sight vision" of Mr. Wise before he backed up. He confirmed that this standard is commonly used for all kinds of equipment, including conveyors, regardless of when they are initially started up, and that anytime the equipment is moved, operators must make certain that everyone is in the clear, particularly on the facts in this case where Mr. Williams knew that Mr. Wise was in the immediate area all of the time. Mr. Friend stated further that it is common industry practice that a loader operator does not load a truck if the truck driver gets out of the truck and the loader operator cannot see him (Tr. 48).

Mr. Friend confirmed that pan scrapers do not normally back up, and are usually operated in a forward cycle while loading and dumping. The instant case is unique in that the scrapers were operating in a constricted ramp area, and the scraper operator had to back out after dumping a load. Since the respondent knew that Mr. Wise had 100 percent exposure, Mr. Williams was required by section 56.9005, to insure that Mr. Wise was in the clear before moving the machine (Tr. 51).

Respondent's Testimony and Evidence

Boykin Durham testified that he has been employed by the respondent for approximately 18 months and was hired the same day as Mr. Williams. He testified that they both received safety

training when they were hired, and he explained the training received. With regard to any training concerning keeping spotters in view while operating a piece of equipment such as a pan scraper, Mr. Durham stated as follows (Tr. 57):

> Q. What were you told about that?
>
> A. We was told to . . . if you got a spotter out there to keep him in your eyesight. If you don't see him anywhere, stop and blow your horn and look around for him, you know. If you still don't see him, just get off the machine until you locate him.
>
> Q. Were you told anything about whether or not it would be permissible to move your equipment before you located the spotter?
>
> A. No, you wasn't supposed to move until you located him.
>
> Q. Was Roosevelt there when that was said?
>
> A. Yes, yes, sir.

Mr. Durham stated that he also received additional training during weekly safety meetings, and that the instruction for keeping the spotter in view was discussed or mentioned two or three times a month during these meetings, continuously through the time of the accident (Tr. 58).

On cross-examination, Mr. Durham stated that the training was given by a supervisor, and he confirmed that he has operated a pan scraper for 10 to 13 years, and was operating one on the day of the accident at the same site (Tr. 59). He stated that after dumping a load of dirt on the ramp in question, he would not have backed up without having the spotter in view. If he could not see him, he would have stopped before backing up to look around for him. If he did not see him, he would "just look all around good before I'd back up." He confirmed that this was his understanding of the instructions given him by the respondent, and that he would not have backed up without having Mr. Wise in view (Tr. 60-61).

Mr. Durham confirmed that he is still employed by the respondent as a scraper operator. He further confirmed that spotters are not always used, that it would depend on the work being performed, and stated that "sometimes we don't have them because we don't have to, you know, be in these areas where you can't, you know, see too good" (Tr. 61). He confirmed that Mr. Wise's job at the time of the accident was to show him where to dump the dirt, and that he did not see Mr. Wise go to use the water cooler (Tr. 61).

In response to further questions, Mr. Durham stated that the scraper would not operate too fast in reverse, and although he did not know how fast it would operate in reverse, he estimated that it would not go faster than 2 miles an hour (Tr. 63). He confirmed that he and Mr. Williams would take turns going in and out of the ramp area while dumping their loads, and that Mr. Wise was serving as a spotter for both of them. He estimated that he would make seven trips in and out of the ramp during his shift, and that Mr. Wise would show him where to dump the loads. He confirmed that he always had Mr. Wise in sight while going and coming from the area, and that he had no occasion to ever look for him or to blow his horn and get out of his equipment to look for him (Tr. 64). He confirmed that the person who trained him, and who conducted the safety meetings, would read the instructions from a "safety sheet" and discuss them. He also confirmed that he went to school a few times and was given books and instructional materials (Tr. 65).

Respondent's Arguments

The arguments made by the respondent in its posthearing brief are essentially the same as those made by its counsel during the course of the hearing. Respondent takes the position that section 56.9005, did not require a scraper operator such as Mr. Williams to dismount from his machine to determine Mr. Wise's position to the rear of the machine before he started to back-up the machine. Respondent argues that section 56.9005, has to be interpreted with some common sense, and that it must be read in conjunction with section 56.9087, which requires a back-up alarm on machinery which has an obstructed view to the rear. Counsel argues that a piece of equipment which does not have an obstructed view to the rear need not be equipped with a back-up alarm because the operator can visually determine that everyone has cleared before he moves the machine. However, if the machine operator's view to the rear is obstructed, counsel concedes that section 56.9087, requires a back-up alarm, but he takes the position that by inference, the machine operator must be allowed to rely on the use of the back-up alarm, and he should not be required to dismount from the machine to search about for anyone who may be to the rear of the machine (Tr. 40). Counsel further explained the respondent's position as follows at (Tr. 41):

> THE COURT: But he was also assuming that . . . carrying your argument further, then, that's all the equipment operator has to do because he then will assume that once he puts that backup alarm on, number one, the fellow to the rear is going to hear it, and is going to get out of the way and number two, that fellow would follow company policy that you get out of the way of heavy equipment. Is that true? That's your theory of the case, isn't it?

MR. CARRUTH: Yes, Your Honor, the MSHA standards do not require an equipment operator, operating a piece of equipment, which has an obstructed view to dismount his equipment and go around and look behind him before he moves it. That's the purpose of the back up alarm. The standard which says that the operator shall assure that everybody is clear before he moves his equipment is assuming that the operator can see in his position. The fact that he has an obstructed view, which would prevent him from being able to see to ascertain that everything was clear, is the reason for the back up alarm Standard. These two, I think, have to be read together. Now, clearly, Your Honor, an operator could not rely on a horn or an alarm and intentionally run somebody down . . . .

Respondent's counsel argued further that the respondent is not required to have both a spotter and a back-up alarm because the language found in section 56.9087, with respect to an obstructed view to the rear of the equipment states that a back-up alarm or a spotter may be used, and it does not state that a back-up alarm and a spotter must be used. Counsel concludes that the operator is entitled to rely on his back-up alarm while backing up his machine, and requiring both a spotter and a back-up alarm would require the operator to always know the whereabouts of the spotter (Tr. 42-43). Counsel's position is further states as follows at (Tr. 52-53):

THE COURT: The issue on this standard is, as I see it, and you may correct me if I'm wrong, is that MSHA's theory is that the equipment operator, which is a pan scraper operator here, Mr. Williams, shall be certain . . . in other words they said that Mr. Williams had a responsibility by signal or other means. Obviously there wasn't a signal and the other means, I suppose is that Mr. Williams should not have backed up this piece of equipment until he knew precisely where this guy was because he had passed him on the road going in, the man waved him on, they were in a restricted area; they were in a narrow zone; they were on the ramp, they had been doing that for a couple of days and they're holding Mr. Williams accountable for knowing or at least presuming that he should have known that this man was back there someplace and he shouldn't have backed up that equipment without making sure of where he was.

MR. CARRUTH: That's their position.

THE COURT: That's their position. Your position is, well that standard really is not appropriate here because we were complying with the other standard which

says that, you know, you have the audible back up alarm and we had one. According to the testimony in this case it was clearly loud and clear that this machine was backing up, this man should have seen it. It backed up for "X" number of feet before it ran over him. We did everything reasonably possible to prevent the accident, not only that, we were in compliance because we had a back up alarm.

MR. CARRUTH: Hopefully, Your Honor, we would take the position that the back up alarm is a signal. In this case, there is a signal to anybody that may be in the area that when I'm backing up, get out of the way.

THE COURT: But I'm sure that Mr. Welsch and the inspector would argue then, that the operator shall be certain by signal or other means that all persons are clear, meaning that the signal there means a personal signal of some kind, either a wink or a nod or the normal signals that they use because certainly if the operator simply puts his reverse signal on and backs up, that he really doesn't know where the guy is.

MR. CARRUTH: Your Honor, you cannot read that standard without also reading it in conjunction with the other standard and the other standard says you have either/or the back alarm or a signal person, a spotter.

THE COURT: Spotter, right.

MR. CARRUTH: Somebody to signal.

THE COURT: Right.

MR. CARRUTH: Either/or, not both.

THE COURT: Right.

MR. CARRUTH: We had the backup alarm. What they're saying is, we should have had both.

MSHA's Arguments

In its posthearing brief, MSHA takes the position that it is undisputed that equipment operator Williams had an obstructed view to the rear of the pan scraper, particularly on the right side, and that he estimated that this obstruction would be up to 30 feet behind the scraper on the right side. MSHA asserts further that Mr. Williams never made certain that Mr. Wise was clear from behind the scraper, and that it was his understanding that the respondent's instructions required him to make certain that Mr. Wise was in the clear before placing the equipment in

reverse. MSHA's assertion in this regard is incorrect. Mr. Williams testified that he never received any such instructions from the respondent (Tr. 15).

MSHA argues that the cited standard clearly requires certainty before the movement of any equipment, and that this certainty is the equipment operator's responsibility. On the facts of this case, where it is clear that the scraper operator Williams knew that Mr. Wise was behind him, but was not certain that the area was clear while the scraper was operated in reverse, and where there was no signal or other means between Mr. Williams and Mr. Wise to assure this clearance, MSHA concludes that a violation of section 56.9005, had been established. In support of its position, MSHA cites a decision by the U.S. Court of appeals for the Fifth Circuit, affirming a decision by Commission Judge John J. Morris in Texas Industries, Inc., 4 FMSHRC 352 (1982); 2 MSHC 1687 (1982).

In the Texas Industries, Inc., case, a miner was killed when he became entangled in a log washer machine while beating on the machine screen to unclog it while standing on a catwalk. The miner had been observed by the supervisor who was at the scene, and the supervisor left the area after telling the miner that he was going to engage the washer. The supervisor started the washer without any signal to the miner, and after returning to the scene, he found that the miner had become entangled and killed by the machine. Judge Morris found that the evidence established that the supervisor was unsure whether the miner knew that he would turn on the machine immediately, whether he thought there would be a warning signal, or whether he heard the supervisor at all. Judge Morris concluded that the supervisor could not have been sure that the miner would be clear of the machine when it was started, and that certainty was an exactitude demanded by the standard.

In affirming Judge Morris' decision, the Fifth Circuit rejected the mine operator's assertion that in large industrial plants operators could never assure that everyone was a safe distance away from machinery before start-up, and that the standard must therefore be interpreted to require only some signal before the equipment is started. The court concluded that the difficulty of assuring that no one was dangerously near the open tub of the machine was minimal because the supervisor had only to look before starting the machine, and that the only person in the vicinity was the miner. The court stated as follows at 2 MSHC 1915, 1916 (1983):

> The regulation must be given a rational and reasonable interpretation. The certainty referred to must be viewed in light of the danger the machinery poses. As the danger increases, the operator's duty to assure clearance of persons also increases. But in any

instance, the operator must be certain that no one will be endangered by the equipment start-up.

MSHA rejects the respondent's assertion that because the scraper operated by Mr. Williams had an operable back-up alarm as required by section 56.9087, Mr. Williams had no other duty or responsibility to Mr. Wise. MSHA concludes that such a narrow construction of section 56.9005, would negate its application. MSHA agrees that section 56.9005, must be read in conjunction with the back-up alarm requirements of section 56.9087, where there is an obstructed view to the rear, and it concedes that the scraper complied with this requirement. MSHA argues that Mr. Williams knew that Mr. Wise was on the ramp behind his scraper, and that he should have observed the greater duty of certainty to assure himself that Mr. Wise was in the clear before backing up the scraper. Without this certainty, MSHA concludes that Mr. Wise was put in jeopardy in that he may have been incapacitated because of a severe heart condition, and that a back-up alarm would have provided him with no protection. MSHA finds support for the duty owed Mr. Wise by Mr. Williams pursuant to section 56.9005, in the testimony of respondent's own witness, pan scraper operator Boykin Durham, who testified that he had received training and instructions from the respondent that he should not move his equipment before locating the spotter, and that if he could not see the spotter, he was to get off the machine until he located him (Tr. 57). Mr. Durham confirmed that his understanding of the respondent's instruction required him not to back-up his machine without having the spotter in view, and if the spotter were not in view he had to "look all around good before I'd back up" (Tr. 60-61).

Finally, MSHA argues that regardless of who was at fault with respect to the accident, the Commission has consistently held a mine operator liable for a violation without regard to fault. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 896, 893 (5th Cir. 1982); Miller Mining Co. v. FMSHRC, 713 F.2d 487, 491 (9th Cir. 1983); Asares, Inc.-Northwestern Mining Dept., 8 FMSHRC 1632 (1986).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 56.9005, because the pan scraper operator Roosevelt Williams did not make certain that Mr. Wise, who was acting as a spotter, was clear of the machine before backing the scraper out of the ramp area in question. Although section 56.9005, was subsequently revised and promulgated as section 56.14200, effective October 24, 1988, 53 Fed. Reg. 32525, August 25, 1988, it was in effect at the time

of the accident and the issuance of the citation on August 20, 1988, and it provided as follows: "Operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment."

The revised standard, section 56.14200, provides as follows: "Before starting crushers or moving self-propelled mobile equipment, equipment operators shall sound a warning that is audible above the surrounding noise level or use other effective means to warn all persons who could be exposed to a hazard from the equipment."

I take particular note of the fact that the newly revised section 56.9005, now promulgated as section 56.14200, does not contain language requiring an equipment operator to be certain that all persons are in the clear before starting or moving his equipment. The current standard only requires an equipment operator to sound a warning that is audible above the surrounding noise level, or to use other effective means to warn all persons exposed to an equipment hazard. Consequently, although section 56.9005, which was in effect at the time of the accident, required an equipment operator to determine with some degree of certainty that all persons are in the clear before moving the equipment, this requirement was deleted from the revised standard, and it now only requires that warnings be given. In short, instead of requiring the operator to be certain of the whereabouts of persons who may be exposed to a hazard of being run over by the machine, the standard now only requires that warnings be given. However, since section 56.9005, was in effect at the time the citation was issued, I conclude and find that it is applicable in this case.

With regard to the safety of spotters, section 56.9058, which was in effect at the time of the accident, provides that if a truck spotter is used, he is required to be well in the clear while trucks are backing into dumping positions. This standard only applies to truck spotters, and since MSHA concedes that a pan scraper is not a truck, I can only conclude that this standard does not apply in this case. Although the newly revised truck spotter standard, now section 56.9305, does contain a provision that requires a truck operator to stop his truck if he cannot clearly recognize the spotter's signal, which comes close to MSHA's belief that section 56.9005 requires a scraper operator to stop the scraper if he not certain that the spotter is in the clear, the spotter standard clearly applies only to truck drivers, and not to mobile equipment operators in general. I have difficulty understanding why MSHA chose to limit vehicle stopping requirements found in this particular standard to trucks and not to mobile equipment in general, particularly in a surface mining operation where heavy equipment such as pan scrapers, loaders, and bulldozers, which often present problems for an operator in terms of clearly seeing to the rear of the machine

from his cab because of the physical configuration of the machine.

Although it appears from the comments of the rule makers considering the promulgation of section 56.14200 (53 Fed. Reg. 32514), that the sounding of an audible warning with respect to self-propelled mobile equipment means back-up alarms or other appropriate mechanical devices which are an integral part of the machine, there is absolutely no guidance or clarification as to the meaning of the language other effective means. I would venture a guess, however, that in any future cases litigated under this standard as now written, MSHA will probably advance the argument that the "other effective means" language in a situation where a piece of equipment is not equipped with a back-up alarm, requires the equipment operator to stop his machine and then look around for spotters or other persons who could be exposed to a hazard in order to warn them to stay in the clear.

The evidence in this case establishes that the pan scraper operated by Mr. Williams was in compliance with the back-up alarm requirements of section 56.9087. The scraper was equipped with an operational back-up alarm which gave a loud and clear signal while the scraper was operated in reverse, and it was sounding when Mr. Williams backed the scraper up and ran over Mr. Wise. However, the respondent here is charged with a violation of section 56.9005, and not section 56.9087. Section 56.9005, as applied to the facts of this case, required pan scraper operator Williams to be certain, by signal or other means, that Mr. Wise was in the clear before he proceeded to back-up the scraper.

Although I find some merit in the respondent's observation with respect to the term "warning" found in the caption to section 56.9005, the language of the standard, and not the caption, is controlling. Although the revised standard, section 56.14200, clearly contemplates that warnings be given by equipment operators before moving the equipment, no such language is found in cited section 56.9005, and I reject the respondent's suggestion that the standard contemplated and required only a warning by the equipment operator, rather than actual first hand knowledge by the operator that all persons are in the clear.

The evidence in this case further establishes that Mr. Williams was operating the scraper along a rather confined and restricted strip or ramp area approximately 200 feet long and 45 feet wide. In addition to Mr. Williams, scraper operator Durham was also operating along the strip hauling in dirt, and due to the restricted area, once the scraper dropped its load after being driven in to the dumping location in a forward position, it could not be turned around and driven out in a forward position, and it had to be backed out and operated in reverse. Mr. Wise was continuously exposed to a potential hazard when the scrapers were backing out along the strip area in question.

Mr. Williams testified that before returning to the strip area with another load he observed Mr. Wise walking towards a water cooler, and that another employee remarked to him that Mr. Wise was "acting funny" and appeared to be over-heated. Upon his return with another load, Mr. Williams passed by Mr. Wise as he was walking toward the unloading area, and Mr. Wise waved at him to proceed along to the unloading area (Tr. 9-11). Under these circumstances, and given the fact that Mr. Wise may had a serious heart condition, and indeed may have suffered a heart attack shortly before he was run over, I believe that scraper operator Williams had a duty to ascertain the whereabouts of Mr. Wise before backing up his machine. Given the fact that Mr. Wise was the only person on foot, and was clearly observed by Mr. Williams when he passed him on his way in to dump his load, I do not believe it would have been difficult for Mr. Williams to stop his machine to make certain that Mr. Wise was in the clear, nor do I find it unreasonable to expect him to do so, particularly where the evidence establishes that the respondent had trained and instructed the scraper operators to stop their machines and ascertain the whereabouts of a spotter such as Mr. Wise before moving the machine any further.

The respondent's assertion that the use of a back-up alarm on the scraper satisfied the requirements of section 56.9005, that a signal be given before the machine was backed up is rejected. While it may be true that the rationale requiring the use of a back-up alarm pursuant to section 56.9087, when the equipment operator has an obstructed view to the rear, is based on the fact that the operator may be prevented from ascertaining that persons are clear from the rear of the machine from his position in the operator's cab because of the configuration of the equipment which may obstruct his view to the rear, I cannot conclude that the same rationale applies with respect to section 56.9005.

In my view, section 56.9087, places a burden on the mine operator to insure that all equipment which has an obstructed view to the rear is equipped with a back-up alarm which can be activated automatically or by the operator of the equipment by simply sounding the alarm. In these circumstances, the equipment operator is not obliged by the standard to be certain that all persons are clear before he moves the machine. All he need to is to sound the alarm. Section 56.9005, however, imposes a higher personal duty on the equipment operator to make certain that all persons are clear before moving the equipment. On the facts of this case, where it is clear from the evidence that Mr. Williams had an obstructed view to the rear and to the right of the machine and could not see any objects to the rear for a distance of some 30 feet from his position in the machine, where there was no right view mirror on the machine, and where he could not see Mr. Wise anywhere, there was clearly no way that Mr. Williams

could be certain that Mr. Wise was clear of the machine from his position at the controls at the time he moved it into reverse and began to back out of the strip area. Under these circumstances, while the use of the back-up alarm as a "signal" to Mr. Wise may have complied with section 56.9087, I cannot conclude that it complied with section 56.9005.

The respondent's suggestion that no violation of section 56.9005, occurred because the scraper had been started for some time before the accident occurred and that Mr. Wise was obviously in the clear when it first started backing up because it backed up approximately 49 feet before striking Mr. Wise is rejected. On the facts of this case, it seems clear that Mr. Williams had no idea where Mr. Wise was positioned after he dumped his load and placed his scraper in reverse and began moving it to back out of the dumping area. At that point in time, and before moving his machine any further in reverse, Mr. Williams had a duty to ascertain the whereabouts of Mr. Wise, and to personally have him in view before backing up for any distance.

The respondent's argument that when read together, compliance with section 56.9087, satisfies the "other means" language found in section 56.9005, and that it is entitled to rely on either a back-up alarm or a flagman to be certain that all persons are in the clear before any equipment is backed up in a situation where the operator's view to the rear is obstructed, is rejected. Without stopping the scraper and looking around for Mr. Wise, there was no way that Mr. Williams could have been certain with any degree of exactitude that Mr. Wise was in the clear by relying solely on the back-up alarm. Given the court's decision in Texas Industries, Inc., and the obvious intent of the cited standard, I conclude and find that the degree of certainty mandated by section 56.9005, is one of exactness and something that is free of any doubt. The use of a back-up alarm as a means of ascertaining whether anyone is free or clear from equipment which is being backed up with an obstructed view to the rear of travel falls short of compliance.

In view of the foregoing findings and conclusions, I conclude and find that a violation of section 56.9005, has been established and the citation is therefore AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 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).

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

It seems clear to me that the failure of an equipment operator to comply with the requirements of section 56.9005, and in particular the operator of a pan scraper which has an inherent obstruction of the view to the right rear of the machine from the operator's compartment, to make sure that anyone who may be behind the machine is in the clear, presents a reasonable likelihood of an accident which one may conclude would result in injuries of a reasonably serious nature. On the facts of this case, the failure by the scraper operator to ascertain the whereabouts of the spotter resulted in a fatality when the scraper ran

over him after the scraper operator placed his machine in reverse and began backing up without first ascertaining that the spotter was free of the hazard. Under the circumstances, I conclude and find that the inspector's "S&S" finding was correct, and IT IS AFFIRMED.

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

I conclude and find that the respondent is a small independent construction contractor and that the civil penalty assessment which I have made for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

A computer print-out of the respondent's history or prior violations (exhibit P-1) reflects that the respondent paid civil penalty assessments in the amount of $227, for eight violations which occurred during the period December 29, 1986, through December 28, 1988. Two of the violations were section 104(a) "S&S" citations issued on July 14, 1988, and six were section 104(a) "single penalty" non-"S&S" citations issued on July 14, and August 23, 1988. Although four of the violations were for violations of the back-up alarm requirements of section 56.9087, none of the violations concerned section 56.9005. I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increases in the civil penalty assessment which I have made for the violation which has been affirmed in this proceeding.

Good Faith Compliance

The record reflects that abatement of the violation was timely achieved by the respondent in good faith after a meeting was held by the MSHA inspector with all equipment operators and spotters during which the operators were instructed to sound their back-up alarms before moving their equipment, and the spotters were instructed to be aware of the equipment working in the area, and that when back-up alarms are used, they were to observe the direction in which the equipment is moving. The operators were also instructed that if they lose sight of the spotter, they were to stop their equipment and remain stopped until the spotter was located.

Gravity

For the reasons stated in my "S&S" findings, I conclude and find that the violation was serious.

Negligence

The inspector's "moderate" negligence finding was based on the fact that the back-up alarm on the scraper which ran over Mr. Wise was activated and sounding loud and clear while the scraper was operating in reverse, and that the accident victim Mr. Wise had been instructed that after he signaled the scraper operator where to dump, he was to get out of the way. Although Mr. Williams testified that he was not specifically instructed to keep Mr. Wise in view in backing up his scraper, the credible testimony of scraper operator Durham, who was hired at the same time as Mr. Williams, reflects that they received training from the respondent and were specifically instructed not to move their scrapers unless they had the spotter in view, and if the spotter was not in sight, they were to blow their horn. If the spotter still did not appear, they were instructed to stop their equipment until they could locate the spotter and have him move to an area where he could be seen. Mr. Durham confirmed that this company rule was discussed two or three times a month during regular safety meetings held continuously up to the time of the accident.

In addition to Mr. Durham's testimony, I take note of the fact that the inspector believed that pan scrapers usually are operated in a forward cycle while loading and unloading, and that the circumstances under which the scraper in question was operating in a constricted ramp area where it was required to back-up for some distance were unique. I also take note of the inspector's accident investigation findings that the respondent had an MSHA approved training plan in effect at the time of the accident, that it was in compliance with the training requirements of Part 48, Title 30, Code of Federal Regulations, and that the accident victim had received hazard training and the dangers of the job had been explained to him. Although the cause of the accident may have been the failure of Mr. Williams to determine that Mr. Wise was clear of the scraper before he backed it up, and his negligence may be imputed to the respondent who is liable for the violation without regard to fault, I take further note of the inspector's finding that a contributing factor to the accident may have been the victim's lack of alertness. Under all of these circumstances, the inspector's moderate negligence finding IS AFFIRMED, and I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

On the facts of this case, where the evidence establishes that the respondent had trained and instructed its equipment operators and spotters to avoid the kind of hazard which led to the unfortunate accident in question, I believe it is appropriate to take these factors into consideration in mitigating any civil penalty which should be assessed against the respondent for the

violation in question. See: Allied Products Company v. FMSHRC, 666 F.2d 890, 896 (5th Cir. 1982); Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981); Marshfield Sand & Gravel, Inc., 2 FMSHRC 1391 (June 1980); Old Dominion Power Co., 6 FMSHRC 1886 (August 1981); Secretary of Labor v. Marion County Limestone Company, LTD., 10 FMSHRC 1683 (December 1982).

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $1,000 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $1,000, for a violation of mandatory safety standard 30 C.F.R. § 56.9005, as stated in section 104(a) "S&S" Citation No. 3254881, August 20, 1989. Payment of the penalty is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of the payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 11 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-121 A.C. No. 41-01900-03526
v.	:	
	:	Monticello Mine
TEXAS UTILITIES MINING, CO., Respondent	:	

DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Chris R. Miltenberger, Esq., Worsham, Forsythe, Sampels & Wooldridge, Dallas, Texas for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty 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 the Texas Utilities Mining Company (Texas Utilities) with one violation of the regulatory standard at 30 C.F.R. § 77.404(a) and proposing a civil penalty of $850 for the violation. The general issue before me is whether Texas Utilities violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At the conclusion of the Petitioner's case-in-chief the Respondent filed a Motion for Directed Verdict which was granted at hearing in a bench decision. That decision is set forth below with only non-substantive corrections:

> All right. I'm prepared to rule. I'm going to grant the Motion for a Directed Verdict as to Citation No. 2932036 insofar as it was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. The citation charges as follows: "The Delta 24BE2570 dragline (G area) was not maintained in a safe operating

condition and the walkway inside the revolving frame and tool room was cluttered with extraneous material, paper, hoses, metal, rope, and a five-gallon container, also, a rope was tied crisscross across the access ladder rendering it unsafe for travel."

Now, the mine operator does admit that the violation did occur and that it was a "significant and substantial" violation. It argues only that it was not the result of an "unwarrantable failure" and that, accordingly, the citation should be one under Section 104(a) of the Mine Safety Act, rather than under Section 104(d)(1).

Now, the Commission two years ago redefined the term "unwarrantable failure" and apparently this definition has not been disseminated to all MSHA personnel. In the Emery Mining Corporation decision, 9 FMSHRC 1997, issued in December 1987 the Commission held that "unwarrantable failure" means aggravated conduct constituting more than ordinary negligence by the mine operator in relation to a violation of the Act. The Commission further stated that while negligence is conduct that is inadvertent, thoughtless or inattentive, conduct constituting unwarrantable failure is conduct that is aggravated or inexcusable. The Commission went on to say that only by inexcusable, aggravated conduct constituting more than ordinary negligence can unwarrantable failure be found.

Now, in the case today, I do not find evidentiary support for such a finding of aggravated conduct. The testimony by Inspector Coleman - and, of course, I accept his testimony at this point as being completely credible - on the unwarrantable failure issue was, essentially, that he overheard the mine operator's area supervisor, a man named Alan Atkinson, say to somebody that he should have already had the area cleaned up. Mr. Coleman also testified that he was told by somebody else from management - he wasn't sure who, but it was someone from management - that the cited rope had been used to hold a pan to catch oil drippings but that, after the condition had been corrected, they had failed to take it down. Inspector Coleman also observed that the cited condition was within the area subject to inspection by the mine operator under the regulations.

The problem in this case is that there is no evidence to establish how long these conditions existed. Indeed, on the basis of the evidence before me, it could be concluded that the conditions had all occurred that very same morning before the citation had been issued at 10:15 a.m. There is insufficient evidence from which a person might even infer that the cited conditions had existed long enough to have been subject to the required examination under the regulations. So, the statement attributed to Alan Atkinson that he should have already had the area cleaned up is not sufficient to meet the aggravated conduct test required by the Commission in its Emery decision. Nor is there sufficient evidence outside of that for a conclusion of aggravated conduct to be reached.

Therefore, I modify the citation to a section 104(a) citation with "significant and substantial" findings and modify the penalty to $250. This decision is not final and will not be final until issuance of a written decision. The operator will then have 30 days in which to make payment on the penalties. These proceedings are, therefore, concluded at this time.

ORDER

Texas Utilities Mining Company is hereby directed to pay a civil penalty of $250 with 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 12 1990

MICHAEL J. GRAFTON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 89-72-DM
NATIONAL GYPSUM, Respondent	:	MD 89-34
	:	Shoals Mine

DECISION

Appearances: Ron G. Spann, Independent Workers of North America, Paducah, Kentucky, for Complainant; Dennis C. Merriam, Esq., Gold Bond Building Products, a Division of National Gypsum, Charlotte, North Carolina, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this action Complainant alleges that Respondent discriminated against him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, a hearing was held on this matter in Indianapolis, Indiana, on October 11, 1989. Michael J. Grafton, Charles Dant, Leon Joseph Brothers, Norman D. Mundy, and John Mathias testified for Complainant. James Allan Houston and Mark Allen testified for Respondent. Subsequent to the Hearing, time was reserved to allow the Parties to file Post Hearing Briefs and Proposed Findings of Fact. Complainant filed a Brief on November 21, 1989. Respondent filed Proposed Findings of Facts, and a Memorandum of Law on December 11, 1989.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Findings of Fact and Discussion

Michael J. Grafton was employed by Respondent as a roof bolter in December 1988. On December 18, 1988, Grafton's supervisor, Rick Magstadt, asked him to operate a Number 4 Loader. Before Grafton used the loader he let it run 5 minutes, and then checked the oil pressure and water temperature gauges and both "checked out all right" (Tr. 26). He indicated that he started to drive and use the loader, and at about 7:30 a.m. it started to loose power. He got off and checked behind him and did not see any steam and did not smell anything. He also indicated that he checked the gauges, and ". . . they seemed to rest all right" (sic) (Tr. 102). He informed Norman Mundy, another truck driver, that he was going to take the loader to the maintenance shop to have it checked out. When he was approximately 200 to 500 feet away from the shop, he looked over his shoulder and saw flames "shooting out of the motor," and "shooting out the sides of that loader on the motor" (Tr. 75). He indicated that he did not attempt to put it out as he was afraid, and his main concern was to alert other miners to the danger. He indicated that when he saw the loader on fire, Walter Dages came by and he yelled that the loader was on fire.

Grafton then went to the shop and yelled to the mechainic, Bryan Newland, that the loader was on fire, and Grafton turned on the fire alarm. Magstadt then came by and talked with Dages at the maintenance area. Grafton indicated that he asked Magstadt "don't you think we should go North to the main air shaft to get us some fresh air?" (Tr. 31). Magstadt then went to the air shaft along with Grafton, but according to Grafton, he did not act like he knew where the air shaft was.

Grafton testified, in essence, that he told Magstadt that he (Magstadt) did not know the safety procedures. In this connection, Grafton testified that he had been told by his co-workers that once an alarm has been sounded the procedures is to shut off the machinery, and wait to be picked up by the supervisor who is to take the workers to the air shaft. Grafton indicated that, to the contrary, Magstadt stopped at the shop, and stayed there for approximately 2 to 5 minutes, if not longer.

Grafton indicated that the following day he met with Mine Superintendent Mark Allen along with Charles Dant and Leon Brothers. At that time Grafton questioned whether Magstadt was properly trained in evacuation procedures, and Allen indicated that he would try to train him in the proper procedures. On December 20, 1988, Grafton was served with a warning notice informing him of "defective work" which occurred on December 18, 1988. It was alleged that on December 18, 1988, he did not check the appropriate gauges that would have indicated a high operating temperature on the loader, and "continued to operate it while it was running hot rather than shutting the machine down." (Joint Exhibit 1). It was also alleged that he failed to check the

loader before operating it. His conduct was termed "negligence," and it was indicated that further problems of this nature would lead to disciplinary action.

On February 7, 1989, Grafton was assigned to work on a roof bolter along with Gary Jones, who had been working on the bolter for only two days. Grafton was told by the foreman, Edgar Quinn, to put up roof hooks, and was further told that the electrician would tell him where to place the hooks. Ron McKibben, the electrician, told Grafton where to place the hooks. Grafton testified he then asked McKibben if he thought there was enough cable, and McKibben answered "I believe you will have more than enough" (Tr. 55). Grafton asked Jones to watch the cable while he moved the bolter. When moving the bolter from the third to the forth hooks, Grafton heard a bang and the lights went out. Grafton saw that the electrical box had been pulled off the wall. He indicated it had been attached with two bolts, and was not anchored. He described the method of attachment as a temporary attachment.

On February 9, 1989, Grafton attended a meeting with Allen, Magstadt, and Plant Manager James Allan Houston, along with Brothers and Don Bowling. At that time, Grafton was given a 3 day disciplinary suspension for the incident the day before, and was reduced to plant trainee. He indicated that on the same day, two other bolters, Mundy and Dant, had broken a cable while operating a bolter, and were not disciplined. He also indicated that Houston told him that he was disqualified for mine work due to his "anticipatory refusal" to fight fires (Tr. 62).

The case law that applies to the instant proceeding is well established. The Commission, in Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-96 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

I.

Based on the testimony of Grafton that has not been contradicted, and has been corroborated by the testimony of Dant and Norman Mundy, who were roof bolters on the same shift, I find that after the alarm had been sounded, Magstadt did not have a flashing light on the pickup truck that he was driving.[1/]

I also find, based on the uncontradicted testimony of Grafton as corroborated by Mundy, that once the alarm had sounded Magstadt did not go immediately to pick up the men on the section, and take them to the source of fresh air. Both these actions of Magstadt contravened the evacuation policy procedures as understood by Grafton, Mundy, and Leon Joseph Brothers, a loader operator, who worked 34 years for Respondent. I thus find that when Grafton talked with Allen on December 19, 1988, to voice his concern over the adequacy of training that Magstadt had received in the area of fire evacuation, he (Grafton) was clearly engaged in protected activities.

II.

The warning notice given to Grafton on December 20, 1988, accused him, inter alia, of negligence which resulted in the loader catching fire. Grafton adduced testimony herein to contest a finding of negligence on his part. However, Complainant did not adduce sufficient evidence to predicate a finding that there was any bad faith on the part of Respondent in concluding that Grafton had been negligent. There is no evidence in the record with regard to any of Respondent's actions or words which would indicate that the warning notice issued to Grafton was motivated as a consequence of his protected activities, i.e., complaining to management about Magstadt's failure to properly evacuate miners the day before. I thus conclude, that the warning notice was issued based on management's evaluation of Grafton's conduct with regard to the loader on December 18, and was not motivated in any part by his protected activities.

III.

On February 7, 1989, shortly before Grafton's loader had pulled the electrical box from its connection, Dant was operating a roof bolter along with Mundy when, in turning the bolter around, its electrical cable stretched and broke. The cable was attached to a permanent box that had an anchor. Dant reported this incident to his supervisor, but neither Dant nor Mundy were disciplined.

1/ Mundy indicated that Magstadt did not turn it on until he was 100 feet from the maintenance shop.

In essence, Complainant relies on this incident to establish that the 3 days suspension that he received for ". . . over-extending the bolter beyond the cable limit. . . " (Joint Exhibit 3), was in violation of section 105(c) of the Act.

Allen indicated that Dant and Mundy were not disciplined, as he considered the damage that they caused to the cable to be an error in judgment, whereas Grafton's action was termed negligence. James Allan Houston, Respondent's plan manager, who made the decision to suspend Grafton, indicated that when he learned that the electrical box had been torn off the wall, he asked the supervisor to tell him what took place, and he tried to assess whether Grafton's conduct was negligence or an error in judgment. He indicated that he also consulted with the Human Relations Department. I find Houston's testimony credible. Thus, I find that the decision to suspend Grafton was based upon a business judgment, and Complainant has not established that it was motivated in any part by his protected activities.

IV.

Grafton indicated that, on December 18, 1988, he said that he would not fight a fire. He indicated that the reason for making such a statement was that he was not properly trained in that he had not received any training in fighting a fire, nor had he received any training in the use of a fire extinguisher. He also indicated that he did not know when he bid for an underground job at the mine, that putting out a fire was one of the conditions of employment. In this connection, Grafton indicated that he did not see any film at the 1988 training with regard to fighting a fire or using a fire extinguisher. Dant also indicated that he was not sure whether such instruction was given. However, I find based on the testimony of Allen, who I find to be a credible witness, that in the 1988 training a film was provided showing the use of a fire extinguisher. This also was corroborated by Brothers upon cross-examination. As such, it appears that Grafton was given some training in the use of a fire extinguisher.

On or about February 7, 1989, it was reported to Houston by Allen and MSHA Inspector Donald Bartlett that Grafton had told them that he would not fight any fires in the mine. Grafton does not dispute this, but indicates that he may have told this to Bartlett and Allen sometime in February 1989, prior to February 7, 1989. Houston indicated his response was to disqualify Grafton from working underground in the mine. He was assigned a job above ground as a Trainee Bracket 1 at $8.93 an hour. I find that the only reason why Respondent removed Grafton from working underground was his stated refusal to fight fires underground. As such, I find that Complainant has not established that his transfer from the mine was motivated in any part by any protected activities.

Based on all the above, it is concluded that the Complainant has failed to establish a prima facie case, that he was discriminated against in violation of section 105(c) of the Act.

ORDER

It is hereby ORDERED that the Complaint herein shall be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 12 1990

DENNY ROGER THOMPSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 86-196-D
v.	:	
	:	HOPE CD 85-17
AMHERST COAL COMPANY, Respondent	:	

DECISION
AND
ORDER OF DISMISSAL

Before: Judge Melick

On August 15, 1986, at the request of the parties the captioned proceedings were stayed pending resolution of a case before the Courts of West Virginia involving the same underlying facts. As part of that Stay Order the parties were directed "to file with the undersigned a written report concerning the status of proceedings in the West Virginia Courts on or before January 1, 1987, and on the first day of each quarter thereafter until those proceedings have been exhausted".

On November 4, 1988, an Order to Show Cause was directed to the Complainant for his failure to file the reports required by the Stay Order. In response to the Order to Show Cause the Complainant filed a status report and stated that he would file quarterly status reports commencing January 5, 1989. Under the circumstances an Order Continuing Stay was issued. Thereafter however no status reports were filed and on December 20, 1989, an Order to Show Cause was again issued to the Complainant directing him to show cause on or before January 2, 1990, why "these proceedings should not be dismissed for failure to comply with the Orders of this Judge issued August 15, 1986, and December 16, 1988."

Copies of the Order to Show Cause were sent by certified mail to both the Complainant himself and to his last known attorney. The copy of the Order to Show Cause sent to the Complainant was returned marked "forwarding time expired". The copy of the Order to Show Cause sent to the Complainant's last designated attorney was returned marked "attempted -- not known." The failure of the Complainant and his attorney

to inform the Commission of their current addresses is in violation of Commission Rule 5(c), 29 C.F.R. § 2700.5(c), and the Commission is therefore unable to serve further notices in this proceeding. In addition the Order to Show Cause issued December 20, 1989, has not and can not therefore be answered. Accordingly the captioned proceeding is dismissed.

ORDER

Discrimination Proceeding Docket No. WEVA 86-196-D is hereby DISMISSED.

Gary Melick
Administrative Law Judge

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JAN 12 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 89-5
Petitioner	:	A. C. No. 18-00621-03649
v.	:	
	:	Docket No. YORK 89-18
METTIKI COAL COMPANY,	:	A. C. No. 18-00621-03654
Respondent	:	
	:	Mettiki Mine

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary;
Ann R. Klee, Esq., Crowell and Mooring, Washington, DC, for the Respondent.

Before: Judge Fauver

In these consolidated cases the Secretary of Labor seeks civil penalties for alleged violations of Notice to Provide Safeguard No. 3115882, under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record 1/ as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and the further findings in the Discussion below:

FINDINGS OF FACT

Notice to Provide Safeguard No. 3115882

1. On July 27, 1989, MSHA Inspector J. W. Darios observed water and mud in the approaches to the Nos. 9 and 10 Seals at the Mettiki Mine.

1/ The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

2. Based upon his observations, Inspector Darios issued Notice to Provide Safeguard No. 3115882.

3. The Notice stated that "water mixed with and/or mud over boot deep was present at the C-portal Nos. 9 and 10 seals which restricted access and approach to the seals," and provided for a "safeguard that all travel and walkways at this mine shall be maintained with a clear safe travelway free of debris and stumbling hazards." Gov't. Ex. 4.

4. The approaches to the Nos. 9 and 10 Seals were in an remote area of the mine 150-200 feet from the nearest travelway along which miners would normally walk.

5. The only individuals assigned to travel in the approaches to the Nos. 9 and 10 Seals were the fireboss and the pumper, who conducted weekly examinations of the seals as required under 30 C.F.R. § 75.305.

6. There were no belt conveyors, track or mechanical equipment in the approaches to the Nos. 9 and 10 Seals.

7. Inspector Darios advised the mine foreman, Mervin Smith, that wooden walkways constructed in the approaches to the seals would suffice to control the hazard presented by water and mud in the approaches.

8. Water and mud are common conditions in underground coal mines.

Citation No. 3109953

9. On September 13, 1988, while conducting a routine quarterly AAA Inspection, Inspector Darios observed water and mud in the approaches to the 12 C Seals.

10. Based upon his observations, he issued Citation No. 3109953 alleging the presence of water and mud in the approaches to the Upper and Lower 12 C Seals in violation of Safeguard No. 3115882.

11. The approaches to the 12 C Seals were 70-80 feet from any entry, walkway or travelway through which miners would ordinarily travel during the course of their duties.

12. The only individuals assigned to travel in the approaches to the 12 C Seals were the fireboss and the pumper who conducted examinations of the seals required under 30 C.F.R. § 75.305.

13. There were no belt conveyers, tracks or mechanical equipment in the approaches to the 12 C Seals.

14. The citation was terminated on September 19, 1988, after wooden walkways were constructed in the approaches to the 12 C Seals.

Order No. 3109957

15. On September 14, 1988, Inspector Darios observed water and mud in the approaches to the Nos. 11, 12, 13 and 14 Seals ("C Portal Seals"). He also observed a wooden plank floating in the approach to the No. 13 Seal.

16. Based upon his observations, Inspector Darios issued § 104(d)(2) Order No. 3109957 alleging a violation of Safeguard No. 3115882.

17. The approaches to the C Portal Seals were in a remote area of the mine 100-200 feet from any entry, travelway or walkway through which miners would ordinarily travel during the course of their duties.

18. The only individuals assigned to travel in the approaches to the C Portal Seals were the fireboss and the pumper who conducted weekly examinations of the seals required under 30 C.F.R. § 75.305.

19. There were no belt conveyors, tracks or mechanical equipment in the approaches to the C Portal Seals.

20. The order was terminated on September 16, 1988, after the water was pumped out of the approaches and the wooden walkway was replaced in the approach to the No. 13 Seal.

DISCUSSION WITH FURTHER FINDINGS

An inspector's authority for issuing safeguard notices, which become mandatory safety standards for the mine, is found in 30 C.F.R. § 75.1403, which is a reprint of § 314(b) of the Act. It provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

> (a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the section 75.1403 series in this Subpart 0 precludes the issuance of a withdrawal order because of imminent danger.

Respondent contends that Safeguard No. 3115882 is invalid because it is not based upon a mine-specific condition.

In Southern Ohio Coal Co., 10 FMSHRC 963 (1988), the Commission discussed the issue of the general application of safeguards but did not rule on the specific issue of whether a notice to provide safeguard may be issued for a transportation hazard of a general rather than mine-specific nature. It discussed the subject as follows:

> The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power--authority to issue standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained that that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard.
>
> These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him. They do not, however, resolve the important issue raised here for the first time--whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals for the District of Columbia Circuit, in the context of the Mine Act's

> provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., supra, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).
>
> Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time. [10 FMSHRC at 966-7.]

Section 101 of the Act establishes rigorous procedures for the promulgation of mandatory safety or health standards. The Secretary must comply with the formal notice and comment rulemaking procedures of the Administrative Procedure Act. As part of the history of administrative law, Congress recognized that substantive standards are likely to be fairer and sounder if they are subject to comment by an interested public, and if the enforcement agency is required to explain its regulatory choices. See generally 1 K. Davis, Administrative Law Treatise §§ 6.12-6.33 (1978). In short, standards established by formal rulemaking are preferred because they are less likely to be arbitrary. See Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 402-03 (D.C. Cir. 1976) ("most important aspect [of agency authority to promulgate mandatory standards] is the requirement of consultation with knowlegeable respresentatives of . . . industry [among others]" which was intended to address concern that "freely exercised power of amendment [of mandatory standards] might result in an unpredictable and capricious administration of the statute").

Congress recognized, however, that conditions vary substantially from mine to mine, and that neither it nor the

agency could anticipate every hazard that might arise in a mine. Accordingly, Congress developed several mechanisms to establish individualized standards on a mine to mine basis without formal rulemaking: (1) It allowed petitions for modification so that application of mandatory standards could be modified to accommodate particular mine conditions. (2) It provided for individual mine plans that incorporate standards tailored to the conditions of each mine. (3) In one limited area (§ 314(b) of the Act reprinted as 30 C.F.R. § 75.1403) -- the transportation of men and materials in underground mines -- it authorized individual inspectors to fill regulatory gaps by issuing safeguards to address hazards not covered by promulgated standards.

In Ziegler Coal, supra, the court observed, that a "significant restriction on the Secretary's power to use the ventilation plan as a vehicle for avoiding more stringent requirements [imposed by the rulemaking process] arises from the plan provisions' obvious purpose to deal with unique conditions peculiar to each mine." 536 F.2d at 407. Analyzing the relationship between a ventilation plan under Section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and the mandatory standards relating to ventilation, the court further noted that "the plan idea was conceived for a quite narrow purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines . . . ." [Id. emphasis added.]

> [A]n operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard under the provision of § 101 . . . . For insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. [Id. emphasis added.]

Several Commission judges have applied the Ziegler rationale in holding a safeguard to be invalid because the safety condition was not mine-specific.

However, in a later decision (United Mine Workers of America v. Dole, 870 F.2d 662, 672 (D.C. Cir. 1989)), the court clarified its previous Zielger holding by stating that:

> We read this caution in Zeigler to say only that the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by so doing she

> circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act. Zeigler did not purport to ignore the considerable authority of the Secretary to determine what "should more properly have been formulated as a mandatory standard under the provisions of § 101," id., and to determine what is "subject matter which could have been readily dealt with in mandatory standards of universal application," id.

As so clarified, the Zeigler decision is "a warning that the Secretary should utilize mandatory standards [by formal rulemaking] for requirements of universal application," but it does not preclude the Secretary from "requiring that generally-applicable plan approval criteria or their equivalents be incorporated into mine plans" (870 F.2d at 672).

There is no litmus test for the validity of a notice of safeguard simply by deciding whether the safeguard could as well be applied to "all or nearly all mines" as a mandatory standard. The decision requires a balance between the purpose of a flexible authority (§ 314(b)) to correct unsafe conditions not covered by an existing standard and the purpose of formal rulemaking (§ 101(a)) for safety standards of universal application.

The basic purpose of § 314(b) authority to require safeguards is to ensure the safety of miners in transportation of personnel and material by permitting the inspector to correct observed unsafe conditions that are not covered by existing safety standards. Congress did not state that the unsafe condition must be unique to the mine involved, nor did it preclude use of this authority for unsafe conditions experienced in a number of mines.

The record in this case tips the balance on the side of an unwarranted circumvention of the formal rulemaking procedures (§ 101(a) of the Act).

Alan Smith, Safety Director for Mettiki, testified, based upon his personal experience at Mettiki and other mines, that water accumulation and mud are common conditions in underground coal mines, both in approaches to seals and on travel or walkways. Tr. 216-220. In addition, Mr. Smith testified that he had spoken with the safety directors at three other mines, each of whom had stated that they experienced similiar problems with water accumulation in seal areas. Tr. 219-220. Mervin Smith, the mine foreman, also testified that, based on his experience, mud and water are common conditions in underground coal mines. Tr. 211. MSHA's records of safeguards show that MSHA has issued safeguards for water and mud on roads in all but one of the mines in the subdistrict involved in the instant cases. Respondent's Supp. Exs. I-VI. See, e.g., Safeguard No. 222091 (safeguard issued to Laurel Run Mining Company Portal No. 2 requiring that "all off

track haulage roadways . . . be maintained as free as practicable from bottom irregularities, debris, and wet and muddy conditions") (Respondent's Supp. Ex. I); Safeguard No. 630548 (safeguard issued to Island Creek Coal Company Dobbin Mine requiring "all off track haulage roadways . . . [to be] maintained as free as practicable from bottom irregularities, debris, and wet and muddy conditions") (Respondent's Supp. Ex. II); Safeguard No. 626939 (safeguard issued to the Masteller Coal Company requiring "all haulage roads . . . [to be] maintained as free as practicable from bottom irregularities, debris and water or muddy conditions") (Respondent's Supp. Ex. III).

The Secretary's regulatory scheme is fully consistent with treating water and mud hazards in approaches and travelways as a subject for formal rulemaking rather than safeguards. For example, in Part 77 of the regulations -- "Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines" -- the Secretary must use formal rulemaking, since there is no statutory authority for notices of safeguards in surface mining. Section 77.205 of the mandatory safety standards provides in part:

§ 77.205 Travelways at surface installations.

(a) Safe means of access shall be provided and maintained to all working places.

(b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

These standards address the same kind of safety conditions as those involved in Safeguard No. 3115882. The Secretary has not shown that a bypass of § 101(a) rulemaking is reasonably justified for "stumbling and slipping hazards" in underground mines.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Notice of Safeguard No. 3115882 is invalid.

3. Citation No. 3109953 and Order No. 3109957 are invalid because the underlying Notice of Safeguard is invalid.

ORDER

1. Notice of Safeguard No. 3115882, Citation No. 3109953, and Order No. 3109957 are VACATED.

2. These proceedings are DISMISSED.

William Fauver
Administrative Law Judge

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JAN 12 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 89-6 A. C. No. 18-00621-03645
v.	:	
	:	Mettiki Mine
METTIKI COAL COMPANY, Respondent	:	

DECISION

Appearances: Judith Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary;

Ann Klee, Esq., Crowell and Moring, Washington, DC, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alleged safety violations under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record 1/ as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

Mine Ventilation

1. At all relevant times, the Mettiki Mine was ventilated by an exhaust system. Mine fans on the surface pulled fresh intake air from the portals into the mine.

2. From the portals, intake air was pulled through three main entries to the bottom of the hill, as shown on Exh. R-4, and directed to the left into the K-Mains so it could be used to ventilate the L-3 and L-4 longwall panels.

1/ The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

3. On July 19, 1988, when Order 3115856 was issued, Mettiki was in the process of retreat mining the L-3 longwall panel, although no mining was being done that day because the mine was idle for the miners' vacation.

4. The L-3 longwall panel was ventilated by five intake entries, two on the headgate side and three on the tailgate side.

5. The intake entry on the headgate side served as the main section intake; most of the air in that entry was used to ventilate the longwall face. Once the intake air ventilated the longwall face, it became return air which was carried out of the mine through the bleeder entries and the gob and into the main return.

6. The three entries on the tailgate side of the L-3 longwall panel were also intake entries, which carried more fresh air in an inby direction up the tailgate and into the bleeders.

7. This method of ventilating the L-3 panel was approved in the mine ventilation and methane and dust control plan.

8. The main entries immediately outby the L-3 longwall panel, which are the subject of this case, were ventilated entirely with intake air.

9. The "teardown rooms," consisting of two entries and connecting crosscuts immediately inby these main entries, were also ventilated with intake air. The teardown rooms were to be used to disassemble the longwall equipment when the panel was mined out, so that the L-3 longwall equipment could be moved to the next panel.

10. Because the L-3 panel was nearly mined out, Mettiki was using the vacation period to complete a substantial amount of work in the teardown rooms (including hauling supplies, rehabilitating a roadway and operating a diesel scoop).

11. Management decided that the rehabilitation work in the teardown rooms required increased intake air, and to provide this two special ventilation measures were taken. First, a stopping was removed from the No. 12 crosscut between the Nos. 3 and 4 entries of the K-Mains so that intake air could be maintained in the L-3 teardown rooms. Second, although it was not required by the ventilation plan, a check curtain was erected in the No. 11 crosscut of the No. 2 main track entry ("A" on Exh. R-4) to direct some of the fresh air headed for the longwall face into that area.

12. Once the intake air in the K-Mains ventilated the teardown rooms, it was directed up the L-3 tailgate entries into the bleeders behind the L-3 panel and out of the mine through the main return.

13. Intake air from an isolated K-Mains entry was also used to ventilate the seals adjacent to a mined-out area.

14. Once the fresh air swept the seals, it was directed into the bleeder entries adjacent to the mined-out L-2 longwall panel, into the main return, and out of the mine. The intake air that ventilated the seals was not used to ventilate any working areas.

Order 3115856

15. On July 19, 1988, MSHA Inspector William Darios inspected the K-Mains entries immediately outby the L-3 longwall panel.

16. Inspector Darios had never been to the L-3 section before, but he believed that the L-3 longwall panel was ventilated in accordance with page 48b of Mettiki's ventilation plan.

17. Acting Mine Foreman Joe Peck accompanied Inspector Darios on his inspection.

18. Near the mouth of the tailgate entry, immediately adjacent to the L-3 longwall panel, Inspector Darios took an air measurement of 7,104 cubic feet per minute.

19. He believed the air at that location was moving in an outby direction and concluded it was return air.

20. In addition, Inspector Darios believed that the air used to ventilate the seals adjacent to the K-Mains entries was return air, because he thought the seals were examined only weekly, as required by § 75.305 for seals ventilated with return air. Because he thought there was return air in the tailgate entry and at the seals, he assumed that all K-Mains entries at the mouth of the L-3 longwall panel carried return air.

21. All these assumptions led him to the conclusion that having a check curtain (instead of a permanent stopping) in a crosscut in the No. 2 entry of the K-Mains ("A" on Exh. R-4) allowed air from the headgate side of the L-3 panel to "mix" with the return air he believed to be present in the K-Mains entries.

22. Believing this condition violated the mine's ventilation plan, Inspector Darios issued Order 3115856, alleging a violation of 30 C.F.R. § 75.316.

Order 2493077

23. On July 6, 1988, Inspector Darios issued Section 104(d)(2) Order 2943077 after observing a kink or bend in the

cable of the C Portal Nordberg Hoist. The kink was 13 inches long and kinked 3/8 of an inch when the cable was weighted and 7/8 of an inch without weight.

24. The kink in the cable was 10 feet 2 1/2 inches from the Nordberg Hoist Barney car.

25. Grease and dirt imbedded in the cable at the point of the kink made it impossible to properly examine the damage without proper cleaning.

26. When the inspector observed the kink in the cable, the equipment had not been removed from service.

27. The condition was noted in the daily examination book by the hoist operator on July 1, 1988.

28. The damage was not repaired nor was the hoist cable removed from service between July 1, 1988 and July 6, 1988.

29. The kink was examined visually by the hoist operator but the cable was not cleaned before his examination nor was the kink measured during his examination.

30. The equipment needed to repair the cable was present on the mine property.

DISCUSSION WITH FURTHER FINDINGS

Order 3115856

The ventilation plan required that return entries be separated from intake entries by permanent stoppings within three crosscuts of any working face. Exh. J-3 at 48a. There was no requirement that intake entries be separated from other intake entries or that returns be separated by stoppings from other returns. At the time Order 3115856 was issued, the K-Mains immediately outby the L-3 longwall panel were ventilated with intake air so that work could be performed in the teardown rooms.

The check curtain cited by the inspector was placed in the middle of an intake entry, and permitted a small amount of intake air to pass through the curtain to intake entries on the other side. Placement of the curtain did not violate Mettiki's ventilation plan. Rather, as Mr. Peck testified, at the time the order was issued, the ventilation of the K-Mains and the L-3 longwall panel complied with the ventilation plan; the air pressure against the check curtain was what he expected to see, indicating that the K-Mains were ventilated with intake air.

There was no requirement for a stopping or even a check curtain at the No. 11 crosscut of the No. 2 entry cited by the inspector. Mr. Peck testified that the only reason a check

curtain had been installed at that location was to maintain the amount of fresh air going to the longwall face; it was not intended as a permanent separation because one was not required. Moreover, there was no requirement for a stopping at the No. 12 crosscut between the Nos. 3 and 4 entries of the K-Mains. Mr. Peck testified that a stopping had been necessary at that location to maintain the separation between the primary and secondary escapeways from the L-2 longwall section during the retreat mining of that panel. However, once the L-2 panel was mined out and retreat mining switched to the L-3 longwall panel, the escapeways had to be rerouted, obviating the need for a stopping at the location cited by the inspector. Tr. 330-33.

I find that the L-3 longwall panel was being ventilated in accordance with page 48a of the ventilation plan, as Mr. Peck explained. The inspector was mistaken in his conclusion that Respondent was following page 48b of the plan.

Thus, contrary to the inspector's assumptions, there was no mixing of intake and return air in violation of the ventilation plan, because there was no return air in the places he believed it existed. Where the stopping had been removed and where the check curtain was located, intake air was mixing with intake air and that did not violate Mettiki's ventilation plan or any other mandatory standard.

Order 23943077

The Secretary has alleged a violation of 30 C.F.R. § 75.1434(e), which provides in part:

> Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:
>
> * * *
>
> (e) Distortion of the rope structure * * * .

On Friday, July 1, 1988, Hoistman Ellsworth Lambert noticed a kink, or bend, in the hoist cable and noted it in the hoist examination book at 4:20 p.m. On Tuesday, July 6, before 7:30 a.m., Mine Superintendent Steve Polce called Maintenance Foreman Dave Blythe to inform him that a bend in the hoist rope had been reported. He sent Maintenance Foreman Blythe to investigate the condition. Mr. Blythe examined the kink and considered it a distortion of the rope structure within the meaning of § 75.1434(e). He ordered parts to replace the damaged part of the cable, but did not remove the cable from service pending repairs.

Later that day, around 9:45 a.m., MSHA Inspector Joseph W. Darios inspected the hoist. After carefully inspecting the kink

in the cable, he issued Order 23943077 alleging a "substantial and significant" (S & S) violation of 30 C.F.R. § 1434(e), and an unwarrantable failure to comply with the regulation.

I find that the kink in the cable was a "distortion of the rope structure" within the meaning of § 75.1434(e), as recognized in the testimony of both Inspector Davis and Maintenance Foreman Blythe. Respondent's argument that the kink was not a distortion of the cable structure is not persuasive, and is far afield of the facts in this case.

Inspector Darios found the violation was S & S because of the risk of serious injuries in the event the cable broke. The hoist cable supported mantrips and heavy equipment up and down a steep slope (about a 15% grade). If the cable broke, there was a reasonable likelihood of serious injuries.

The Secretary has proven a significant and substantial hazard under the criteria set forth in the Act and by the Commission. An S & S violation is one "that could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" (§ 104(d)(1) of the Act). 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" the violation meets the statutory definition. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Company, 6 FMSHRC 1 (1984), the Commission further discussed the element of an S & S violation. The Secretary must prove: (1) there is a violation, (2) the violation contributed to a discrete safety hazard, (3) the hazard would be reasonably likely to lead to an injury and (4) the injury would be reasonably serious. 6 FMSHRC at 3-4.

In this case, the violation contributed to a discrete safety hazard of the hoist's wire rope breaking. Inspector Darios noticed the kink in the cable. Seeing that dirt and grease were coating the cable, he asked to have the area cleaned so he could examine it. He then measured the distortion with weight on the cable and with weight removed from the cable. He observed that the spacing between the lays of the cable in the internal portion of the kink was wider than usual. He concluded, based upon his expert training, experience and careful observations, that the cable was distorted, that there could be internal damage to the wire rope and that the total condition created an S & S hazard of the rope breaking.

The evidence clearly supports the conclusion that the violation contributed to the cause and effect of a discrete safety hazard and that continued normal mining operations would endanger miners. There was sufficient visible evidence of a

distortion of the cable structure to justify the inspector's concerns about possible internal damage.

The evidence further establishes that the hazard contributed to by the violation was reasonably likely to result in serious injuries. Breakage of the cable was reasonably likely to result in a number of different events that could cause serious injury. Derailment of the hoist could result in a collision between the hoist and equipment parked on side tracks. Such a derailment and the subsequent collision could result in miners becoming caught between equipment. Also, heavy equipment could travel down the track and strike people at the bottom of the slope. In the event the cable broke, even if emergency equipment operated successfully to prevent a collision or derailment (and this is not always a reasonable assumption), lurching of a mantrip could cause serious injuries to riders.

The operator introduced the results of a destructive test in which the cable broke at 217,000 pounds. This evidence also showed that the cable broke at the point of the kink. Therefore, the weakest point, the point of failure, was the site of the distortion. The evidence demonstrates that the kink threatened the integrity of the cable. Furthermore, the test itself did not reflect the conditions under which the rope was used. In the test, constant pressure was increased until the cable broke; this was not intermittent pressure that would reflect the daily strain put on the cable. Nor did the test take into account the fact that, with continued use of the cable, strands in the distorted section would undergo greater friction, and more water would infiltrate the core of the cable with greater risk of corrosion.

The Commission stated in National Gypsum that the inspector's independent judgment and expertise are an important element in making significant and substantial findings. Inspector Darios carefully examined the distortion in the cable, including measurements with weight tests, and reasonably concluded there was an S & S hazard if the condition were allowed to continue unabated.

The inspector also found an unwarrantable violation. A violation is unwarrantable if it results from "aggravated conduct" constituting more than ordinary negligence. Emery Mining Company, 9 FMSHRC 1997 (1987). I find that Respondent displayed indifference or a serious lack of reasonable care in failing to address the problem in the hoist cable that existed for six days. Such conduct met the Emery Mining definition of an unwarrantable violation.

Both the lack of procedures that would assure prompt discovery and correction of the violation and management's conduct in failing to address and correct the condition once it was discovered support a finding of unwarrantable failure. The hoist operator, Elwood Lambert, first noticed that there was a

kink in the cable around 4:20 p.m. on Friday, July 1, 1988, during his daily examination of the equipment. The condition was reported in the examination book on July 1 and was noted every day until July 6, 1988, when Inspector Darios came to the mine to conduct a regular inspection. Although the condition was noted for six days, management did not take any action to examine the cable until July 6, 1988, when Maintenance Foreman Dave Blythe examined the cable in response to a call from the Mine Superintendent. At that time, he looked at the cable and decided that the problem was not serious. He decided to perform the repairs when convenient. No other management official examined the cable before the order was issued by Inspector Darios.

Respondent's decision to allow the cable to remain in service demonstrates a serious lack of reasonable care. Because he was the only member of management to examine the cable before the order was issued, Foreman Blythe's actions must be closely examined. First, he decided to allow the cable to remain in service in spite of his belief at the time that the kink constituted a distortion of the structure of the cable within the meaning of 30 C.F.R. § 75.1434(e). Tr. 602. He explained his decision to allow the violation to continue by saying that the cable had been allowed to remain in service in the past when broken wires had been found. Tr. 610. This explanation is unsatisfactory. It must be noted that he failed in this case to make measurements with a micrometer as he had been required to do when broken wires were found. Tr. 610-611. Furthermore, whereas distortions require retirement of a cable (§ 75.1434(e)) broken wires may not (see § 75.1434(a)). Moreover, although he felt the condition posed no hazard, he was aware that a visual examination of an unbroken cable does not reveal internal damage. Finally, he did not mention that he placed any reliance on previously issued citations. He only said that the mine has always repaired distortions when convenient.

Management's failure to discover and correct the violation for almost a week further supports a finding that its conduct constitutes an unwarrantable violation. The daily examination books are countersigned by a management official. However, no management official was available to perform this duty from Friday, July 1, until the following Tuesday, July 5. Even at that time, no action was taken and the condition was allowed to exist another day without attention. When Foreman Blythe was finally notified of the condition, his examination was only cursory.

Respondent argues that its conduct was not unwarrantable because its personnel relied on citations issued by another inspector, Wayne Fetty, for distortions in wire ropes in which the rope was not required to be removed from service immediately. However, the actions taken by Mettiki's management at the time of the instant violation reveal that management was not even aware of the condition for five days after it was first reported in the

examination books. Tr. 688-689. Further, the management official who examined the cable did not indicate that he relied upon Mr. Fetty's citations. In fact, he testified that he never discussed with Mr. Fetty what constitutes sufficient damage for application of the retirement criteria. Tr. 601.

An examination of the operator's conduct at the time the distortion was discovered reveals a failure of management to address safety problems identified by the miners. The duty of assessment of the severity of the distortion of the cable was left to the judgment of an hourly employee. Tr. 691. Under management's policy, it was the rank and file's responsibility to determine if a problem already identified in the examination books is serious enough to alert management to take immediate action. Tr. 690-691. If a problem happened to occur on a Friday as it did in this case, there was no management official responsible for locating and assessing violations that occurred to the hoist. Tr. 690-691.

On balance, I find that Respondent's conduct rose to a level above ordinary negligence.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I assess a civil penalty of $1100 for this violation.

Orders 3115846 and 3115848

At the hearing, the parties stipulated that the only issue remaining on liability as to these orders is whether Mettiki's roof control plan required Mettiki to replace posts that were removed in order to install longwall equipment. Tr. 472. If this issue is answered in the affirmative, the parties stipulated that the above § 104(d) orders should be modified to § 104(a) citations with reduced findings of negligence and gravity.

Order 3115846 alleges that roof support posts had been removed in a number of places in the L-4 entry and Nos. 5 and 6 crosscuts allowing the width of the entry and crosscuts to exceed 18 feet, in violation of Mettiki's roof control plan and 30 C.F.R. § 75.220. Order 3115848 alleges a violation of 30 C.F.R. § 75.303 for a failure to conduct an adequate preshift examination of the cited area.

Mettiki's roof control plan provided that, "As the longwall pan, shields, and shearer are installed, posts will be removed as necessary." Jt. Ex. 4, p.31.

The Secretary contends that this provision is only a conditional exception to the requirement for an 18 foot width in the longwall setup entry and crosscut. She contends that in context, the word "as" is synonymous with "while" or "when" so that the roof control provision means that after the longwall equipment is moved through the entry and crosscut, the removed

posts must be put back in place to keep a maximum width of 18 feet.

Respondent contends that the roof control plan does not expressly require posts to be reinstalled after they have been removed according to the plan, and such a requirement is not reasonably implied by the plan.

The roof control plan requires the setup entry and crosscuts to be mined 18 feet wide initially and supported with roof bolts. The operator is then required to set a double row of posts on five foot centers along the length of the setup entry and crosscuts. The plan then and only then allows the operator to shear off an additional five feet in width along the rib opposite the posts to allow the entry or crosscut to be a maximum width of 23 feet. The stated purpose of requiring the double row of posts to be set is to maintain an 18 foot width before the entry and crosscut is widened to 23 feet. At no time in the process is the setup entry and crosscut allowed to become more than 18 feet wide without additional support of the double row of posts.

The plan then provides that, "As the longwall pan, shields, and shearer are installed, posts will be removed as necessary." (Emphasis added.) The word "as" is reasonably interpreted to mean "during the time that," or "while" in this context. Thus, the plan allows for removal of the posts only during installation of the panline, shields and shearer. The limitation that the posts be removed only as necessary further emphasizes that such removal be minimized.

The roof support plan specifies the order in which the steps are to be performed so that the set-up entry and crosscuts may be sheared to a maximum width of 23 feet. The plan requires that the steps be taken in a specific order so that at each step the entry and crosscut are always narrowed by, and supported by posts. Further, the plan for supporting the roof of the longwall setup entry and crosscut specifically states that the "entry and crosscut will be sheared to 23 feet wide and supported to plan." (Emphasis added.) The plan requires the double row of posts to be set. That requirement read in conjunction with the provision allowing removal of such posts only when installation of the panline, shields or shear is occurring, supports the conclusion that the posts must be reinstalled after removal.

To interpret the roof plan to allow posts to remain absent would render the specific cutting and roof support procedures superfluous. The plan must not be interpreted to render its requirements illogical. If the roof support plan for the longwall setup entry and crosscuts were interpreted as urged by the operator, the effect would be quite dangerous. If posts were not required to be replaced, one section of panline might be installed and posts could be removed. Then if work did not continue, under Respondent's interpretation the entry or crosscut

could remain unsupported with excessive widths indefinitely. The plan is written and must be interpreted to avoid this result.

The parties' stipulation is granted to modify these orders to § 104(a) citations with reduced findings of negligence and gravity. The original allegation of negligence in Order 3115846 is changed to moderate negligence and gravity is changed by deleting S & S. In Order 3115848, the original allegation of negligence is changed to moderate negligence and gravity is changed by deleting S & S.

Independent of the question whether the instant violation is "significant and substantial" within the meaning of § 104(d)(1) of the Act, I find that it is a serious violation within the meaning of "gravity" in § 110(i) of the Act. It is serious because the safety standard is an important protection for miners and Respondent's conduct created a reasonable possibility of serious injury that could result from excessive widths of entries and crosscuts. It is also a serious violation because of the need to deter future violations of this type.

Considering all the criteria for civil penalties in § 110(i) of the Act, I assess a civil penalty of $100 for each of the two violations cited in revised Citations 3115846 and 3115848.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. The Secretary failed to prove a violation of 30 C.F.R. § 75.316 as alleged in Order 3115856.

3. Respondent violated 30 C.F.R. § 75.1434(e) as alleged in Order 23943077.

4. Respondent violated 30 C.F.R. § 75.220 as alleged in revised Citation 3115846.

5. Respondent violated 30 C.F.R. § 75.303 as alleged in revised Citation 3115848.

Order

WHEREFORE IT IS ORDERED that:

1. Order 3115856 is VACATED; Order 23943077 is AFFIRMED; revised Citations 3115846 and 3115848 are AFFIRMED.

2. Respondent shall pay the above civil penalties of $1,300 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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JAN 12 1990

METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. YORK 89-10-R
	:	Citation No. 3110188; 11/1/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Mettiki Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 89-26
	:	A. C. No. 18-00621-03659
v.	:	
	:	Mettiki Mine
METTIKI COAL COMPANY, Respondent	:	

DECISION

Appearances: Judith Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for the Secretary;

Susan Chetlin, Esq., Crowell and Moring, Washington, DC, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alleged violations of safety standards and Mettiki Coal Corporation seeks to vacate the citations under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record 1/ as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

1/ The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

FINDINGS OF FACT

Citation No. 3110188

1. In November, 1988, when Citation No. 3110188 was issued, Eimco diesel powered self-propelled personnel carriers, here called "White Knights," ran on an underground track to carry Mettiki's miners to their working sections at the Mettiki Mine.

2. The White Knight personnel carrier was about 22 feet long, 8 feet wide and 4 1/2 feet high, with a capacity of 16 passengers.

3. The White Knight personnel carrier was equipped with two separate braking systems.

4. The regular, or "service," brakes were hydraulic disk brakes on the axles. They were activated simultaneously by pulling the service brake lever.

5. The other braking system was a parking brake. Unlike the service brakes, the parking brake was a mechanical drum brake, designed to prevent the carrier from moving when parked. When the operator pulled the parking brake lever (located to the right of the foot throttle on the front of the engine cover), the brake would lock the motor shaft and remain engaged until the brake handle was physically released.

6. Under Mettiki's safety rules, before the miners boarded the personnel carrier, the operator was required to check the sanders, headlights and other components.

7. As the personnel carrier began to move, both braking systems were to be tested. First, the parking brake was tested by applying power while the brake was still set to be sure it held the vehicle in the parked position; then, the parking brake was slowly released. Once the parking brake was released, the hydraulic brakes were tested by applying them to hold the equipment.

8. After a personnel carrier reached a working section, it was parked on a switch off to the side of the main track until it was needed. When the carrier was parked, the parking brake was set to secure the vehicle.

9. On November 11, 1988, MSHA Inspector Charles Wotring inspected the E-2 section of the Mettiki Mine.

10. An empty White Knight was parked in a crosscut off the main E-2 track, to make room to move supplies into the E-3 section.

11. The personnel carrier was parked almost on the level, about 20 feet from the base of a slight incline; the parking brake was engaged.

12. The inspector briefly examined the personnel carrier, and observed that the parking brake was set. He made no findings that the White Knight was not functioning properly.

13. The inspector issued Citation 3110188, alleging a violation of 30 C.F.R. § 75.1403, because he believed that parking the White Knight and securing it only with the mechanical parking brake was insufficient to satisfy Notice to Provide Safeguard 620279, which had been in effect at the Mine since June, 1980, and modified on May 11, 1988.

14. The Safeguard required track-mounted haulage equipment to be secured with a stop block, equipped with derails or chained to the rail to prevent runaway movement.

Citation No. 3110075

15. On September 21, 1981, Notice to Provide Safeguard 857887 was issued at Mettiki's Beaver Run Mine, now known as Mettiki Mine. The notice stated that a crossover was not provided at the tail of the B-2 section belt, "where persons are required to cross the belt for travel, and work," and required a safeguard to provide a crossover "where persons cross belts anywhere at this Mine."

16. On December 5, 1988, Inspector Wotring observed that a belt crossing was not provided at the First Left belt drive near the F Mains belt. Footprints indicated that people had been crossing there.

17. The juncture of the F Mains and First Left belts was about 100 feet from a crossunder. The First Left belt, being about 100 feet long, could be also crossed by walking to the end of the belt and around the tailpiece. However, Mettiki did not prohibit personnel from crossing belts unless the belts were moving.

18. Although miners were not prohibited from crossing non-moving belts, Mettiki policy prohibited miners from crossing moving belts except where crossings were provided.

19. Mettiki policy required a warning system to warn miners that belts were about to be started. A verbal warning was to be broadcast three times over the mine phone pager system, which had speakers along the belt lines. In some places along a belt, a miner would be unable to hear such a warning. Also, the verbal warning system was subject to human error.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3110188

Notice of Safeguard 620279 was modified on May 11, 1988, to change the safeguard requirement to read:

> Positive acting stopblocks, derails or chain type car holds shall be used to secure or prevent runaway of track mounted haulage equipment. Other devices not specifically designed for such purpose are not acceptable * * * .

This is essentially the same language as the modification of a safeguard that was invalidated in Beth Energy Mines, Inc., 11 FMSHRC 942 (1989) (Judge Mellick). In that case, the judge found that in the early part of 1988 "all of these safeguards regarding the use of positive acting stopblocks or derails in District 3 were uniformly modified to include language prohibiting the use of certain types of stopblocks," and "this standarized language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine." Id. at 943.

Inasmuch as this case involves the same MSHA District and the same standarized provision for a safeguard, I find that the Beth Energy Mines decision (which became a final Commission decision because it was not reviewed) creates a collateral estoppel against the Secretary. Having already litigated and lost that issue against a different defendant, the Secretary is estopped from relitigating it in this case. See Parkland Hosiery Co. v. Shore, 439 U.S. 322 (1979); and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundations, 402 U.S. 313 (1971).

Apart from the doctrine of estoppel, I apply the precedent of the Beth Energy Mines decision and hold, on the merits, that the underlying Notice to Provide Safeguard is invalid.

Accordingly, Notice to Provide Safeguard 62927 and Citation 3110188 will be vacated.

Citation 3110075

An inspector's authority to issue a notice to provide a safeguard is provided in § 314(b) of the Act and the Secretary's regulations at 30 C.F.R. § 75.1403.

A notice to provide safeguard must provide the operator with reasonable notice of the hazard it addresses and the conduct required to comply with the safeguard. Southern Ohio Coal Co., 7 FMSHRC 509 (1985); Jim Walter Resources, Inc., 1 FMSHRC 1317

(1979). In this case, Notice to Provide Safeguard No. 857887 stated that "This safeguard is to require that a crossover be provided where persons cross belts anywhere at this Mine." It cited § 75.1403 as its authority. That section, at 75.1403-1(a), states:

> (a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

One of the criteria is § 75.1403-5 (j), which provides:

> (j) Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

Notice to Provide Safeguard No. 857887 did not state that the safeguard applied to non-moving belts as well as moving belts, nor did it otherwise put the operator on notice that the criterion in § 75.1403-5(j) was being expanded by the notice to provide safeguard. Accordingly, Notice to Provide Safeguard No. 877887 may not be applied to non-moving belts at Respondent's mine.

The Secretary did not prove by a preponderance of the reliable evidence that the persons crossing under the cited belts did so while the belts were moving. It was at least as likely that the crossings had occurred while the belts were idle as it was that the miners crossed under moving belts. Since the Secretary has the burden of proving a violation, I conclude that she did not prove a violation of Notice to Provide Safeguard No. 857887.

The Secretary proved that crossing over or under a nonmoving belt is a hazardous practice, because the belt may suddenly move. However, that hazard is not sufficiently addressed by Notice of Safeguard No. 857887.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Notice to Provide Safeguard No. 62927 and Citation No. 3110188 are invalid.

3. The Secretary failed to prove a violation of 30 C.F.R. § 75.1403 as alleged in Citation No. 3110075.

ORDER

WHEREFORE IT IS ORDERED that:

1. Notice to Provide Safeguard No. 62927 and Citation No. 3110188 are VACATED.

2. Citation No. 3110075 is VACATED.

William Fauver
William Fauver
Administrative Law Judge

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JAN 12 1990

METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. YORK 89-12-R
	:	Citation No. 3110113; 11/1/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mettiki Mine
	:	Mine ID 18-00621
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 89-16
	:	A. C. No. 18-00621-03655
v.	:	
	:	Mettiki Mine
METTIKI COAL COMPANY, Respondent	:	

DECISION

Appearances: Judith L Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for the Secretary;

Susan Chetlin, Esq., Crowell and Moring, Washington, D.C., for the Respondent.

Before: Judge Fauver

At the hearing of this case, the parties proposed a settlement of Order No. 2709745. That settlement was approved, and the penalty amount will be included in the Order below. With respect to Citation No. 3110113, the parties proposed as a settlement, modification of the citation to delete the allegation of a significant and substantial violation and to have the penalty set by the judge. Tr. 785-786. 1/ Having considered the representations and documentation submitted, I approve the settlement and assess a civil penalty of $100 for this violation.

1/ The transcript and exhibits are consolidated in the following cases, which were heard in May 1989:
Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties of $250 within 30 days of this Decision. Docket No. 89-12-R is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

Judith L. Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Susan E. Chetlin, Esq., Crowell and Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505 (Certified Mail)

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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

JAN 12 1990

WILBUR HARTLEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 89-41-DM
CARGILL, INC., Respondent	:	MD 89-19
	:	Cargill Salt Mine

DEFAULT DECISION

Before: Judge Fauver

On November 16, 1989, because of Complainant's failure to file a prehearing statement required by an Order of Continuance dated September 26, 1989, a show cause order was issued allowing Complainant until December 4, 1989 to file a prehearing statement or show cause why his Complaint should not be dismissed.

Complainant has failed to file a response to the show cause order, and is hereby held in default.

ORDER

WHEREFORE IT IS ORDERED that the Complaint is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

Mr. Wilbur Hartley, P.O. Box 221, Jarvisburg, NC 27947 (Certified Mail)

Ms. Toni Adams, Cargill, Inc., Cargill Salt Mine, 191 Portland Point Road, Lansing, NY 14882 (Certified Mail)

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JAN 18 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 89-17
	:	A. C. No. 18-00621-03653
v.	:	
	:	Mettiki Mine
METTIKI COAL COMPANY, Respondent	:	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary;

Susan Chetlin, Esq., Crowell and Moring, Washington, DC, for the Respondent.

Before: Judge Fauver

At the hearing of this case, the Secretary moved to vacate Citation No. 3110387. FOR GOOD CAUSE SHOWN, the motion is GRANTED and this case is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

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COLONNADE CENTER
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DENVER, CO 80204

JAN 22 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-100-M A.C. No. 29-00822-05505
v.	:	Santa Fe River Pit
CENTRAL CONCRETE PRODUCTS, Respondent	:	

DECISION

Appearances: Terry K. Goltz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
William Donnelly, President, Central Concrete Products Company, Santa Fe, New Mexico, pro se.

Before: Judge Morris

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

After notice to the parties a hearing on the merits was held in Santa Fe, New Mexico.

The parties initially waived their right to file post-trial briefs and requested a bench decision. While the judge was rendering his decision respondent's president took issue with some of the judge's findings (Tr. 41).

In view of respondent's objection it was considered appropriate to review the transcript. Accordingly, the bench decision was vacated.

The parties did not file post-trial briefs.

Jurisdiction

As a threshold matter respondent contends its sand and gravel operation is not subject to the Act.

The statutes, the legislative history and the court decisions are contrary to respondent's contentions.

When Congress adopted the Mine Act it enacted this definition of a mine:

> "Coal or other mine" means (A) an area of land from which minerals are extracted * * * (B) private ways and roads appurtenant to such area, and (C) lands * * * facilities, equipment * * * or other property * * * used in, or to be used in, or resulting from the work of extracting such materials from their natural deposits * * *, or used in, or to be used in the milling of such minerals, or the work of preparing coal or other minerals, . . ." 30 U.S.C. § 802(3).

The Senate Committee, which was largely responsible for drafting the final mine safety legislation, elaborated as follows:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.
>
> See S. Rep. No. 181, 95th Congress., 1st Sess. 14 (1977), reprinted in Senate Sub-Committee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 "Legis. Hist."

Court and Commission decisions further support the view that sand and gravel operations are subject to the Act. Compare: Marshall v. Standt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979); Marshall v. Sink, 614 F.2d 37 (6th Cir. 1980); Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979), cert denied ____ U.S. ____, 100 S. Ct. 1835; Arizona Crushing Co., 2 FMSHRC 3736 (1980).

It is clear that sand and gravel operations are subject to the Mine Act. Accordingly, respondent's threshold argument is denied.

Citation No. 2867636

This citation charges respondent with violating 30 C.F.R. § 56.9087, which provides as follows:

§ 56.9087 Audible warning devices and back-up alarms.

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Citation No. 2867636 reads as follows:

The 988 CAT loader has an inoperative back-up alarm.

THE EVIDENCE

WILLIAM TANNER, JR., a federal MSHA inspector and person experienced in mining, has conducted about 1500 inspections (Tr. 6-8).

On February 4, 1988, he inspected Central Concrete at its Santa Fe River Pit. When he entered the site he conferred with Harold Martinez, the foreman and crusher operator (Tr. 8).

The company was crushing and screening river gravel (Tr. 9, 10, 26).

The inspector issued a citation because a 988 CAT loader had a disconnected back-up alarm (Tr. 10, 12, 17). The loader was being used to load trucks in the river bed (Tr. 13). The loader has blind sports. If the operator turns to his left and looks back he has a blind spot to his right. Conversely, if he turns right and looks back, he has a blind spot to his left. The blind spots are 25 to 30 feet and even further back (Tr. 14, Ex. P-5)

In the inspector's opinion it was unlikely that an injury would occur due to this condition (Tr. 17, 18). Further, he did not consider the violation to be significant and substantial.

Mr. Donnelly advised the inspector that he had personally disconnected the alarm. The inspector charged the company with moderate negligence because someone should have noticed the alarm was not working (Tr. 18). Upon re-inspection he found the back-up alarm had been re-hooked (Tr. 19).

Citation No. 2867637

This citation charges respondent with violating 30 C.F.R. § 56.11001, which provides as follows:

> § 56.11001 Safe access.
>
> Safe means of access shall be provided and maintained to all working places.

The citation reads as follows:

> A safe means of access was not provided to the primary screen work area.

MSHA Inspector WILLIAM TANNER, JR. observed that two boards used for a walkway were broken at one end. This condition was caused by large rocks falling off the screen and breaking the boards.

Exhibit P-6 shows the main screen from the hopper. At the time of the inspection the ladder (shown in Exhibit P-6) was broken in the middle on the right-hand side. Mr. Martinez said workers climb to the top of the screen to perform weekly maintenance (Tr. 21, 22, 27). The two broken boards were used for a walkway (Tr. 22).

Foreman Martinez only shrugged his shoulders when the witness asked him about the handrails (Tr. 19, Ex. P-6, P-7, P-8).

The inspector considered that an injury was unlikely. He further considered the violation was not significant and substantial. The negligence was moderate because the company could have gotten a better ladder, repaired the two boards and put up handrails (Tr. 23).

At a re-inspection on February 10, 1988, the inspector issued a 104(b) order because the condition had not been abated (Tr. 24).

In cross-examination the inspector agreed the front-end loader was removing river gravel and loading it onto large trucks (Tr. 26).

Mr. Tanner indicated the 988 loader had an obstructed view to the rear (Tr. 28).

WILLIAM L. DONNELLY, testifying for the company, agreed the back-up alarm was not working (Tr. 30). However, Mr. Donnelly's view is that after a time workers will disregard and "tune out" an alarm. Also an alarm can disturb the equipment operator (Tr. 30).

Mr. Donnelly also indicated, regarding the safe access issue, that some boards had been broken. However, Mr. Donnelly didn't think a guard rail was needed (Tr. 31).

TOD AGENBROAD was present during the inspection. However, the inspector used his book (regulations) as a "Bible" instead of as a guideline (Tr. 32).

Mr. Agenbroad agrees there were some broken boards. But he didn't remember if the ladder was broken. Mr. Agenbroad didn't consider the access unsafe. But they corrected the problem by adding a guardrail to the outside. He felt this caused maintenance to be a lot more difficult (Tr. 33, 34).

The witness didn't feel anyone in the area could hear the back-up alarm unless he was real close to it. In addition, there would be no one on the ground in danger of being struck by the loader.

The company did not keep a flagman to watch behind the loader (Tr. 34, 35).

Discussion

Concerning the failure to have a backup alarm: the inspector indicated the alarm was inoperative and the view to the rear was obstructed. Respondent's President, Mr. Donnelly, admits this condition existed.

Citation No. 2867636 should be affirmed since it is clear that respondent violated the regulation.

The failure to provide safe access to the primary screenwork area is established by the uncontroverted evidence. Specifically, everyone agrees that two boards and the side of the ladder used for access were broken.

During the bench decision Mr. Donnelly stated the company did not admit the broken ladder was unsafe (Tr. 41). However, the contrary opinions of witnesses Donnelly and Agenbroad are rejected. Broken boards and broken side rails do not provide safe access as contemplated by the regulation.

Both citations herein should be affirmed.

Civil Penalties

Section 110(i) of the Act sets forth the criteria to be followed in assessing civil penalties.

The operator should be considered small. The proposed assessment form indicates respondent produces 7,160 tons per year.

There was no evidence indicating how a penalty might affect this operator's ability to continue in business.

The operator's prior history is favorable since the company was only assessed three violations in the two previous years.

The operator was moderately negligent since the conditions as to both violative conditions were open and obvious. These conditions should have been observed and remedied.

The gravity of each violative condition was moderate. It appears there was minimal exposure to the company's workers.

The company is entitled to the statutory credit for abating the violative conditions alleged in Citation No. 2867636.

On balance, I deem the penalties hereafter set forth in the order of this decision are appropriate.

ORDER

Based on the foregoing conclusions of law I enter the following order:

1. Citation No. 2867636 is affirmed and a penalty of $20 is assessed.

2. Citation No. 2867637 is affirmed and a penalty of $50 is assessed.

John J. Morris
Administrative Law Judge

Distribution:

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William Donnelly, President, Central Concrete Products Company, P.O. Box 4115, Santa Fe, NM 87502 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 22 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 89-96 A.C. No. 24-00108-03520
v.	:	Big Sky Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, Incorporated, St. Louis, Missouri, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal for Penalty by Petitioner on March 2, 1989, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq.

Petitioner seeks assessment of a $119 penalty for Respondent's alleged infraction of 30 C.F.R. § 77.1605(k) as described in the subject Section 104(a) Citation (No. 2929942) which was issued by MSHA Inspector James Beam on June 22, 1988, as follows:

> "The elevated roadway in the 002 pit that the 120 ton coal trucks are using to be loaded is not provided with an adequate berm or guard rail on the outer bank. The road is approximately 15 to 20 feet above the floor of the pit and 300 - 400 long. The berm that is provided goes from nothing in places to approximately 2½ feet in others."

30 C.F.R. § 77.1605(k), relating to the subject of "Loading and haulage equipment; installations", provides:

> "Berms or guards shall be provided on the outer bank of elevated roadways."

Respondent contends that no violation occurred since the area cited by Inspector Beam was not an "elevated roadway" within the meaning of the cited standard, and that in any event there was an adequate berm present (T. 12-13). Whether any violation was "significant and substantial" is also in dispute should an infraction of the regulation be determined to have occurred.

FINDINGS

General. The area cited by Inspector Beam, approximately 300 - 400 feet in length (T. 41, 47-48, 68, 86-87), was located on top of Respondent's "coal bench" (T. 67). The drop-off on the pit side of the bench was "approximately" 15 - 20 feet high (T. 67, 76, 78, 84), and coal trucks, a utility truck and a foreman's vehicle were traveling on it. The Inspector described the inadequacy of berms on June 22 as follows:

> "And when we traveled the road, I noticed the berm on this road. In places there wasn't any berm at all. Most of the berm that was there was coal that had rolled off of the bucket as the shovel was loading trucks."
>
> (T. 67)

> "The berm that I observed along the edge of the roadway was some places approximately two and a half feet high and other places there wasn't any berm at all where the coal had just rolled off into the pit."
>
> (T. 75)

Inspector Beam was of the opinion that there was no berm present along this elevated roadway that was capable of restraining the vehicles he observed operating on it (T. 75-76). He saw no evidence that the mine operator had attempted to install a berm in this area (T. 89) and he observed it in the same condition the day before (T. 88).

The roadway was approximately 20 feet wide (T. 68) and the widest vehicles observed using it were coal (haul) trucks which were themselves approximately 14 - 15 feet wide (T. 69, 86). The Inspector estimated the speed of the foreman's truck and service (utility) truck at 15 or 20 miles per hour (T. 68-69) and the coal trucks at 5 - 10 m.p.h. (T. 86). 1/

1/ Respondent's mine superintendent, Tracy Hendricks, estimated the speed of the coal trucks as not exceeding 5 m.p.h. and the speed of pickup trucks at "maybe 10 miles an hour." (T. 102).

As previously noted, the drop from the bench traveled by the loading trucks was approximately 15 - 20 feet and was vertical (See Ex. R-4 and T. 46-48, 67, 74, 75, 76). Each of five coal trucks would make approximately 30 - 34 trips per day on this roadway (T. 99-100).

Prior to issuance of the Citation on the morning of June 22, 1988, the Inspector observed three of these coal trucks to enter the roadway from the southeast while empty and to exit filled with 100 tons of coal going in a northwesterly direction (T. 69, 70-73, 74, 75, 76, 77, 104, 114). Inspector Beam described the hazard and the effect this placement of the driver on the side of the vehicle opposite the vertical drop would have in this manner:

"Q. And what hazard if any is presented by the fact that this roadway either did not have a berm at all or the berm only rose to two and a half feet?

A. The hazard would be somebody going over the edge of the coal into the open pit. And the edge of the coal was just a vertical drop to the bottom of the pit.

Q. And again, would you refresh my recollection? What was the length of the vertical drop on this roadway, or the depth if you would?

A. Approximately 20 feet.

Q. Now, the fact that the drivers would have been using the road on the spoils side driving on the spoils side of the road with the outer bank to the right of the driver, what effect, if any, does that have on the hazard?

A. The driver would have to judge the distance of how close he was to the edge of the coal. In some cases this coal was sloped off maybe two or three feet back into the roadway. It wasn't 20 feet all the way along the length of this road.

Q. Was it less than 20 feet in some spots?

A. In places it was less than 20 feet.

Q. Did you observe that day how close the edge of the outer bank that vehicles came?

A. A few places, I seen places where they come within two or two and a half feet of the outer edge."

(T. 76-77)

The Inspector was of the opinion that the judgment of the driver of a vehicle as to the distance from the edge would be adversely affected by his being on the side of the vehicle opposite the edge (T. 85).

The roadway in question was used primarily to transport coal, but it was also used to carry equipment and personnel (T. 67-69, 71, 73, 77, 102, 106). According to Inspector Beam it was a roadway that was being used for "all purposes" (T. 77) and he estimated its lifetime as being "not more than a couple of weeks probably" (T. 88-89).

Inspector Beam defined the word "adequate" -- as used in the Citation with respect to berms -- as "enough to stop a vehicle if it were to go out of control" (T. 81). An adequate berm thus would had to have been "mid-axle to the biggest vehicle" to travel on the roadway, in this case coal (haul) trucks. Mid-axle to such trucks would be 44 inches (T. 91) in height and about 4 - 5 feet wide. 2/

Abatement was accomplished in 2 hours (T. 79) by preventing traffic from traveling on the roadway altogether rather than by installing berms along the "vertical drop" side of the bench (T. 89) although such would have been possible (T. 91).

Over the past 5 years, 61 percent of the fatalities in surface mines were to mobile equipment operators, 46% of which fatalities occurred where the operators either jumped or were thrown from vehicles (T. 77).

2/ "Berm" is defined in 30 C.F.R. § 57.2 as a "pile or mound of material capable of restraining a vehicle."

Respondent's Evidence. The Superintendent of Respondent's Big Sky Mine, Tracy Hendricks, was of the opinion that the bench in question was not a roadway within the meaning of the regulation, based on the following rationale:

> "Well, I believe that a roadway has to have berms, has to designed and has to have drainages and all of this sort of thing.
>
> And a working area in the pit, working off the bench is not a permanent roadway. It's there for short periods of time. It changes from day to day.
>
> And so, consequently, I do not believe it's a roadway." (T. 97) (emphasis added).

Respondent's evidence placed emphasis on the fact that the bench/roadway in question was not permanent in nature to support the opinion of its witnesses that the berm requirement was not applicable to the cited area (T. 138). Part of this rationale was that the cited area was "a working area in the pit" and not a "roadway" (T. 97, 122, 135-137). 3/ The size of the pit ranges from 100 feet wide to several hundred to 1000 feet long (T. 130-132).

Respondent had not been cited for failing to have a berm on a bench prior to issuance of the subject Citation, nor had it been previously advised or told that a berm was required or needed by any MSHA inspector (T. 98). Mr. Hendricks, a 19-year employee at the Big Sky Mine, indicated that he was not aware of any prior accidents at the mine involving trucks going off the bench (T. 99, 103, 146, 147) and that in its 20-year history, the Big Sky Mine's mining cycle had never utilized the practice of installing berms on the edge of the bench. Mr. Hendricks conceded that when coal is being removed from the pit, the roadway (bench) is normally elevated 10 or 15 feet (T. 100). Prior to the mining of coal, the bench is not elevated (T. 101), and thus is not elevated until some coal is removed (T. 102).

3/ Respondent offered no basis, however, for the implication that a "roadway" could not exist in or be a part of a "working area." Respondent's argument simply appears to be that since the cited area was in the working area it could not be a roadway.

Mr. Hendricks expressed the opinion that it would not be possible for a coal (haul) truck to roll over the bench because "at that speed if a wheel were to leave the edge of the bench, ... it would center out first." (T. 102-103). The theory supporting this opinion would not apply to pickup trucks or service trucks, however (T. 106).

Respondent's evidence that there had not been prior incidents of trucks going over the edge at the mine, based on Mr. Hendrick's testimony and that of other witnesses (T. 146-147), was not challenged or rebutted and is found as a fact. Respondent also established that its additional costs for compliance with the subject for 1990 would come to an estimated $72,300 (T. 141-143).

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

The facts pertinent to resolution of this matter are not in significant dispute.

There is no question that if the regulation is found applicable to the cited bench area a violation occurred because the provision requiring berms (or guards) was not complied with since the loose coal and material that was present in places along the 300 - 400 foot area cited clearly was not sufficient to constitute compliance with the standard. Respondent made no substantial contention or showing in this regard. Not only was there no substantial evidence that the coal or other material which was present was sufficient to restrain a vehicle or provide reasonable "control and guidance" of a vehicle, but Respondent's witnesses did not deny or overcome the Inspector's credible testimony that in places there were no berms whatsoever (T. 75). 4/ There of course is no indication in this record - or contention - that "guards" were in place along the cited area.

4/ Although in its Brief, pp. 25-26, Respondent makes the argument that "the berm which results from the blade running down the bench" is adequate to help "control and guide the vehicles," I find no probative or substantial basis in the evidentiary record, Commission precedent, or regulations (see fn. 2) to make such a finding, i.e., that the material present along the side of the bench constituted an adequate berm since it provided "reasonable control and guidance of a vehicle." I thus find the precedent cited by Respondent in support of this argument, Secretary v. U.S. Steel, 5 FMSHRC 1604 (ALJ Koutras, 1983), inapplicable to the factual situation presented.

The primary question raised by Respondent is whether the "bench" which was cited by Inspector Beam was an "elevated roadway" within the meaning of the subject regulation, 30 C.F.R. § 77.1605(k). 5/ In connection with a similar standard, 30 C.F.R. § 56.9-22, the Commission has answered the question in the affirmative. See Secretary v. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981) involving a quarry bench elevated 40 feet above a lower bench. In Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February 1981) the Commission also noted that "the same purpose and the same principles" underlying 30 C.F.R. § 56.9-22 underlie 30 C.F.R. § 77.1605(k) and applied the berm requirements thereof to a bridge since it was deemed to be part of a roadway.

Here, the physical hazard was a 15 - 20 foot vertical drop along the side of a roadway approximately 20 feet wide traveled by vehicles - some of which are themselves 14½ feet wide -- within 2 - 2½ feet of the edge (T. 75). The dangers posed by the absence of adequate berms here are no different than those posed in other situations, whether they involve bridges or more permanent roadways. The record being clear that the height of the drop is sufficient to create a danger of serious injury should a vehicle go over the side of the bench, it is found that the bench area cited is "elevated" within the meaning of the standard. There is also considerable probative evidence establishing that the bench was used with frequency by various types of trucks and that the bench was in existence a significant period of time - which the Inspector estimated as up to two weeks (T. 88-89) -- both during coal removal and after the coal was removed. It is thus concluded that this was a "roadway" and that that the regulation is applicable to the cited area.

It is finally observed that Respondent's heavy reliance on the decision in Secretary v. Peabody Coal Company, 6 FMSHRC 2530 (ALJ Morris, 1984) is not well founded. In that matter Judge Morris determined that the El Paso Rock Quarries, Inc., supra, was not controlling in view of the great width (120-140 feet) of the bench at the mine involved in his proceeding.

5/ As noted earlier, this standard appears in a group of regulations under the heading "Loading and haulage equipment; installations." Because hauling was a major activity involved, the question of whether the provisions of 30 C.F.R. § 77.1605(k) are applicable only to loading and hauling activities is not passed on.

Specifically, Judge Morris held:

> "I do not find on this record that any vehicles transported coal, equipment or personnel closer than within 60 feet of the edge of the Peabody bench. The difference between operating not closer than 60 feet of the edge and operating within 10 to 12 feet of the edge is crucial. A distance of 60 feet is not insubstantial. An interstate highway lane measures 12 feet. If no vehicle is ever shown to have been operated within 5 such lanes of an edge, I cannot hold that the unused 60 foot portion can nevertheless be somehow denominated as a 'roadway.'" (emphasis supplied)

In the case at hand the roadway was but 20 feet wide and trucks operated within 2 or 2½ feet of the edge.

It having been determined that the standard is applicable to the 300 - 400 foot bench area described by the Inspector in the Citation and that the berms there were inadequate, an infraction of 30 C.F.R. § 77.1605(k) is found to have occurred.

SIGNIFICANT AND SUBSTANTIAL

Respondent's remaining contention concerns the propriety of the "significant and substantial" (S&S) designation to the violation.

A violation is properly designated as being of a significant and substantial (S&S) nature if, based on 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, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Mathies the Commission enumerated the elements necessary to support a significant and substantial finding:

> (1) The underlying violation of a mandatory standard; (2) a discrete health hazard -- 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 question will be of a reasonably serious nature.

It has previously been found that a violation occurred. The absence of adequate berms or guards on an elevated roadway where vehicles travel close to a 15 - 20 foot vertical drop constitutes a safety hazard and patently constitutes the violation's contribution of a measure of danger to the drivers of the vehicles. Petitioner's evidence established that serious injuries could result if the hazard (a vehicle's going over the edge) should come to fruition. The remaining and critical question posed by the 4-part, so-called, Mathies formula is whether a reasonable likelihood existed that the hazard would occur should normal mining proceed.

The Inspector's judgmental basis on this issue is subject to some question in view of his belief that any "likelihood," however remote, would constitute an S&S violation. The Inspector gave the following testimony in this connection:

> "Q. Would your opinion as to the seriousness of this violation change any if we were to assume that similar circumstances had not occurred in over 20 years at this particular mine?
>
> A. No, it wouldn't. It wouldn't change at all.
>
> Q. So, as far as you're concerned an S & S is any likelihood, no matter how remote, of an occurrence happening, that would still be the S and S, is that correct.
>
> A. I believe you could say that."
> (T. 82)

Mine Superintendent Hendricks testified that it would not be possible to roll a haul truck over the side because at the speed they travel "if a wheel were to leave the edge of the bench," because of the weight of the coal "it would center out first." (T. 103). He conceded that this rationale would not apply to pickup, service or welding trucks (T 106) and I would infer it would not apply to unloaded coal haulage trucks. Respondent's strongest evidence -- unrebutted -- appears to be that in 20 years there has been no occurrence of trucks going

over the side of the bench. I agree with the assertion of Respondent (Brief, p. 28) that:

> "If one were to consider the total trips through the pit by haul trucks, together with service and foremen's vehicles, it is likely over one million trips on the bench have occurred. These trips have been incident free. As such, two explanations are likely. Either there is no discrete hazard, or, there is no reasonable likelihood that the hazard will lead to an injury."

In the final analysis, there is no evidence upon which to find or infer that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. Accordingly, the designation of this violation as "significant and substantial" is found unwarranted.

PENALTY ASSESSMENT

The parties have stipulated that Respondent is a large coal mine operator and that a penalty of the amount proposed by MSHA ($119) will not affect its ability to continue in business. 6/ Documentary evidence (Ex. P-1) indicates that Respondent had a history of 8 prior violations prior to the occurrence of the instant violation. Respondent demonstrated good faith in abating the violation after notification thereof (T. 79). Although it has been determined that the violation was not "significant and substantial", it nevertheless is concluded that such was a serious violation since serious injuries could have resulted to miners had a vehicle gone over the side of the bench/roadway.

In mitigation of penalty, it appears that no prior Citations had been issued Respondent, or MSHA enforcement action taken, for the practice (failure to provide adequate berms or guards) charged here. Also, it appears that Respondent's management personnel who testified were of the opinion that other Western surface mines had not been subject to the requirements of the standard involved here. Thus, the lack of compliance with the

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6/ This type of stipulation, commonly seen, is in the nature of a negative pregnant which leaves open what, if any, level of penalty assessment might jeopardize a mine operator's ability to remain in business. Such a stipulation is not binding as to the maximum amount of penalty which can be assessed in appropriate circumstances since under Commission precedent the burden is on the Respondent coal mine operator to establish that it is unable to pay a penalty at some level or amount.

standard appears to have stemmed from the genuine belief that the bench area cited was not a "roadway" within the intended coverage of the regulation rather than from an oversight, negligence, or wilful conduct.

In the premises, a penalty of $100 appears appropriate and is assessed.

ORDER

Citation No. 2929942 is MODIFIED to delete the "significant and substantial" designation thereon and is otherwise affirmed.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days of the date of issuance of this decision a civil penalty in the sum of $100.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF FRED BARTLEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-102-DM
	:	Jenkins Quarry
v.	:	
ADAMS STONE CORPORATION, Respondent	:	

CORRECTED SUPPLEMENTAL DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; David Adams, Vice-President, Adams Stone Corporation, Pikeville, Kentucky, for Respondent.

Before: Judge Broderick

Pursuant to my order of December 5, 1989, the Secretary filed a statement of the total back wages due Fred Bartley under the decision issued October 18, 1989. Respondent on January 9, 1990, replied to the Secretary's statement.

The total back wages and other benefits to which Bartley is entitled under the decision amount to $9,438. This amount was paid to Bartley on December 8, 1988, pursuant to an arbitration award. Respondent is therefore given credit for the payment of this amount in accordance with Order No. 3 in the decision issued October 18, 1989. In addition to this amount, Bartley is entitled to interest under the formula set out in UMWA v. Clinchfield Coal Company, 10 FMSHRC 1493 (1988). Interest through December 7, 1988, totals $316.75.

Therefore, IT IS ORDERED:

1. The findings, conclusions and orders of the decision issued October 18, 1989, are REAFFIRMED.

2. Respondent shall, within 30 days of the date of this Corrected Supplemental Decision, pay to Complainant the sum of $316.75 representing the interest on the amount of back pay and other benefits to Complainant Bartley on December 8, 1988.

3. Respondent shall, within 30 days of the date of this Corrected Supplemental Decision, pay to the Secretary a civil penalty in the amount of $1000 for the violation of section 105(c) of the Mine Act.

4. This decision is FINAL.

James A. Broderick
Administrative Law Judge

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JAN 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), ON BEHALF OF CHARLES SCOTT HOWARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 90-31-D
	:	C-2 Mine
v.	:	
HARLAN CUMBERLAND COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

On January 16, 1990, Petitioner filed a Motion to Dismiss. The Motion alleges that that it is made in accordance with section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), in that ". . . factual information now available to the Secretary causes her to conclude that she cannot successfully prosecute this Litigation." On January 18, 1990, Respondent filed a statement indicating that it does not oppose this Motion.

Accordingly the Motion is GRANTED.

It is ORDERED that Miner Charles S. Howard shall have 30 days, after entry of this Order, to file an action in his own behalf under section 105(c) of the Act. It is further ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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JAN 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-227
	:	A.C. No. 36-06475-03501 YIV
v.	:	
	:	Iselin Preparation Plant
PENNSYLVANIA ELECTRIC COMPANY, Respondent	:	

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
John P. Proctor, Esq., Bishop, Cook, Purcell, & Reynolds, Washington, DC, and Timothy N. Atherton, Esq., Pennsylvania Electric Company, Johnstown, Pennsylvania for Respondent.

Before: Judge Melick

In these civil penalty proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," the Secretary of Labor has alleged two violations in Citations No. 2884282 and 2884283 of the mandatory standard at 30 C.F.R. § 77.400(c). In particular she has charged that employees of the Pennsylvania Electric Company (Penelec) removed protective guards at the No. 5A and No. 5B head drives for the belt conveyor at the top of Bin 2 at the 001 Preparation Plant. In its Answer and at initial hearings below Penelec asserted that the Secretary of Labor through her Mine Safety and Health Administration (MSHA) did not have jurisdiction under the Act, to conduct inspections at the cited 5A and 5B head drives. Assuming jurisdiction did exist Penelec did not dispute the existence of the cited violations or that there was a reasonable likelihood that the hazard contributed to by the violations would result in an injury of a reasonably serious nature.

On review a majority of the Commission held that jurisdiction over the cited 5A and 5B head drives existed under the Act but remanded the case for further proceedings on the question of "whether the Secretary of Labor, through the Mine Safety and Health Administration (MSHA) has properly

exercised her authority to regulate the cited working condition at Penelec's generating station."

On remand the Secretary objects to the scope of the remand order and maintains that Commission review of her internal decision-making processes and intrusion by the Commission into her reasons and motives for such decisions is impermissible and privileged. She argues that the Commission is without jurisdiction to make such inquiry in these civil penalty proceedings and notes that the Federal District Courts have been granted exclusive jurisdiction under the Administrative Procedure Act, (5 U.S.C § 702 and 704) to review the Secretary's actions when properly challenged. The Secretary maintains that she has been given sole discretion under Section 3(h)(1) of the Act to decide whether OSHA or MSHA should inspect the subject area of the mine based on administrative convenience. She further argues that the Commission has no lawful authority in any event to order sanctions against her even should she be found to have acted "improperly".

These important arguments should, of course, have been presented by the Secretary when this case was on review before the full Commission so that the matter could have been fully briefed, argued and considered by that body. In any event, in light of my findings herein, there is no need to reach these issues.

Following additional hearings on remand I find that although the Secretary never clearly established, prior to the issuance of the citations at bar, that MSHA would assert exclusive inspection authority over the subject 5A and 5B head drives, I do not find in these civil penalty proceedings any legally cognizable Secretarial impropriety in exercising her authority to regulate the area of the cited 5A and 5B head drives identified or sanctioned within the framework of the Act.[1/] This does not mean that the Secretary's practices disclosed at hearings should be condoned or be found to be acceptable. Indeed the Secretary's past practice of determining MSHA inspection authority over the subject area based upon whether the workers present at that time were members of the United Mine Workers of America (in which case MSHA inspected the area) or members of the International Brotherhood of Electrical Workers (in which case MSHA did not inspect the area) is quite bizarre and clearly unacceptable.

[1/]The Secretary's inconsistent enforcement practices have already been considered in mitigation of the operator's negligence under Section 110(i) of the Act. 10 FMSHRC at

It is also apparent from the newly developed record that the MSHA-OSHA Interagency Agreement, "Agreement", was not initially involved in this case because the OSHA/MSHA issue first arose before that agreement was implemented in 1979. Thereafter until a potential conflict was identified upon the issuance of the citations at bar and upon the subsequent complaints by Penelec, questions of whether MSHA or OSHA should inspect the 5A and 5B head drives apparently did not arise. The Agreement, by its own terms, does not come into play until someone raises the question. It is also noted that once the question was raised by Penelec the Agreement was invoked by MSHA and apparently the matter was resolved at the local level (Remand Ex. G-3).

Gary Melick
Administrative Law Judge

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cont'd fn.1
pps. 1782-1783. In light of the newly developed undisputed evidence that MSHA had indeed previously inspected, and issued citations for violations at, the subject 5A and 5B head drives and that Penelec was aware of those inspections and citations it is now clear that no reduction in negligence should have been permitted. The absence of any evidence that OSHA ever inspected the cited area and the representations that the cited conditions were violations under either OSHA or MSHA regulations are also significant in this regard. Stipulation Number 4, previously entered by the parties, is therefore misleading, if not totally inaccurate.

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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

JAN 23 1990

KENT COAL MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 89-99-R Order No. 2894113; 2/7/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 89-100-R Citation No. 2894114; 2/7/89
	:	Docket No. PENN 89-101-R Order No. 2894115; 2/7/89
	:	Docket No. PENN 89-102-R Order No. 2894116; 2/7/89
	:	Docket No. PENN 89-103-R Order No. 2894117; 2/7/89
	:	Docket No. PENN 89-104-R Citation No. 2894118; 2/7/89
	:	Docket No. PENN 89-105-R Order No. 2894119; 2/7/89
	:	Docket No. PENN 89-106-R Citation No. 2894120; 2/7/89
	:	KENT No. 55 Mine
	:	Mine ID 36-07756
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-183 A.C. No. 36-07756-03507
v.	:	Kent No. 55
KENT COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant/Respondent;
Paul D. Inglesby, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

In these consolidated proceedings, Kent Coal Mining Company (KENT) is challenging the legality of four orders issued pursuant to section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 (the Act) and the four section 104(a) citations issued in conjunction with those orders. The four order/citation sets apply to, in turn, Roger A. Young, Kimball Rearick, John A. Radomsky and Gary Lancashire. They were all issued by MSHA Inspector John Kopsic on February 7, 1989, because of the alleged failure of the contestant mine operator to provide hazard training pursuant to 30 C.F.R. § 48.31(a) for the four above-named employees of the independent drilling and blasting services contractor.

A representative order (Order No. 2894113) reads as follows:

> Roger A. Young, driller, SS No. 197-42-6883, an employee of an independent contract driller at the 001 pit is hereby declared a hazard to himself and others and is to be immediately withdrawn from mine property until he receives the training required under Part 48.31(a) 30 C.F.R. The driller was observed working at the 001 pit and was not given hazard training before commencing work activities. The driller did have his training required under Part 48.28(a) 30 C.F.R.
>
> A 104(a) Citation (No. 2894114) has been issued in conjunction with this order.

Its related citation (Citation No. 2894114) reads as follows:

> An employee of an independent contract driller was observed working at the 001 pit without first being given hazard training under Part 48.31(a) 30 C.F.R. for this particular mine site by the foreman or person designated to give hazard training.

A 104(g)(1) Order (No. 2894113) has been issued in conjunction with this citation.

The other orders and citations are substantially the same for the other three employees involved.

STIPULATIONS

The parties stipulated as follows:

1. Kent Mine No. 55 is owned and operated by the Kent Coal Mining Company and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 6-7).

2. The Administrative Law Judge has jurisdiction over these proceedings (Tr. 7).

3. The subject citations and orders were properly served by a duly authorized representative of the Secretary of Labor on an agent at the Kent Coal Company on the dates and places stated therein and may be admitted into evidence for the purpose of establishing due issuance but not for the truth of the matters asserted therein (Tr. 7).

4. Kent demonstrated good faith in the abatement of the citations and orders (Tr. 7).

5. The assessment of a civil penalty in the proceedings will not affect the Kent Coal Company's ability to continue business (Tr. 7).

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that, (A) the annual production tonnage of Kent's parent and all its subsidiaries is 9,386,168; and (B) Kent Coal Company Mine Number 55's annual production tonnage is 30,440 (Tr. 7).

Applicable Regulations

§ 48.22 Definitions.

For the purposes of this Subpart B-

> (a)(1) "Miner" means, for purposes of §§ 48.23 through 48.30 of this Subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker

contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. Short-term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under § 48.26 (Training of newly employed experienced miners) of this Subpart B, may in lieu of subsequent training under that section for each new employment, receive training under § 48.31 (Hazard training) of this Subpart B. This definition does not include:

(i) Construction workers and shaft and slope workers under Subpart C of this part 48;

(ii) Supervisory personnel subject to MSHA approved state certification requirements; and

(iii) Any person covered under paragraph (a)(2) of this section.

(2) Miner means, for purposes of section 48.31 (Hazard training) of this Subpart B, any person working in a surface mine or surface areas of an underground mine excluding persons covered under paragraph (a)(1) of this section and Subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine.

§ 48.31 Hazard Training.

(a) Operators shall provide to those miners, as defined in section 48.22(a)(2) (Definition of miner) of this Subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

(1) Hazard recognition and avoidance;

(2) Emergency and evacuation procedures;

(3) Health and safety standards, safety rules and safe working procedures

(4) Self-rescue and respiratory devices; and,

(5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners shall receive the instruction required by this section at least once every 12 months.

DISCUSSION AND FINDINGS

On February 7, 1989, Inspector Kopsic performed a regular AAA inspection at the Kent No. 55 Mine, a surface coal mine. During this inspection, he observed four contractor's employees working on a drill bench at the site. Claron Explosives, Inc., had four employees working on the site that day, two drillers and two driller helpers.

The inspector talked to all four employees and learned that they had not specifically received "hazard training" for the Kent No. 55 mine site prior to commencing their duties at that site, although he was satisfied that they had their comprehensive annual refresher training from their employer.

The particular hazard that he had in mind at the time was that there was no berm along the elevated roadway which was approximately 40-50 feet high. In the inspector's opinion, this lack of a berm along with Kent's failure to notify the drillers of this missing berm, posed a hazard to them as they operated their drilling equipment back and forth across the bench. However, to the extent that it is relevant here, the fact that there was no berm along the elevated roadway was just as obvious to these four experienced miners as it was to the inspector.

Subsequent to the issuance of the orders/citations herein, abatement was accomplished when Kent's shift foreman, Mr. Marafka, told them where other equipment was working on the site, where they were going to be working, the location of communications, the need to wear their hard hats and safety-toed shoes and to stay away from the edge of the drill bench until the bulldozer got the berm up. This training took approximately 15 minutes to accomplish and Inspector Kopsic was satisfied that the training required by 30 C.F.R. § 48.31(a) had now been accomplished.

Hazard training under 30 C.F.R. § 48.31(a) is an absolute requirement for those miners defined in 30 C.F.R. § 48.22(a)(2) and is an optional method of compliance with the training regulations for each new employment for those short-term, specialized contract workers, such as drillers and blasters, who

are engaged in the extraction and production process and who have initially received training under Section 48.26 (Training of newly employed experienced miners). For miners otherwise defined in Section 48.22(a)(1), the hazard training is not required.

Section 48.22(a) is an extremely subjective standard with which to measure who is required to have hazard training, but the idea is to distinguish between those miners who are more or less permanent employees who would be likely to be aware of any hazardous conditions at a particular mine and those employees who only infrequently come into contact with a particular mine, and thus, presumably, could be caught unaware of its latent dangers.

The four individuals involved in this case have differing levels of experience at the Kent No. 55 mine site. Roger Young and Kimball Rearick have done most of the drilling that has been done at the Kent No. 55 site in the last five years. For the year prior to the alleged violations, they averaged 3 or 4 days a week drilling at the Kent No. 55 mine. For all intents and purposes, they were permanent employees, as described by Mr. Marafka. Messrs. Lancashire and Radomsky, on the other hand, only drilled at the No. 55 site once prior to this incident, although they had worked for Kent on an occasional basis at other surface mines over the previous three year period. With regard to the instant occurrence, these two employees first arrived on the site the day prior to the MSHA inspection and continued to drill on the site for the following 3-4 weeks. Arguably, therefore, they could and should be characterized as "short-term, specialized contract workers, such as drillers and blasters".

Using the above dichotomy only the latter two drillers, Lancashire and Radomsky, would need the "hazard training" specifically referred to in 30 C.F.R. § 48.31(a); while the other two drillers working right beside them, Young and Rearick, would only require the annual refresher training. I note here parenthetically that the annual refresher training for all four of these drillers, given under 30 C.F.R. § 48.28(a) by their own employer was the same training for each of them.

It seems logical to me that all four should have the same type and quantum of safety training since they were working together, exposed to the same extent to the same hazards of mining. I don't believe the Secretary disagrees with this, since she believes they all four require the "hazard training" specifically given under section 48.31(a). However, the Secretary arrives at this all-encompassing requirement by defining the drillers as either "short-term service workers who were contracted by the operator" or "short-term specialized contract workers who were engaged in the extraction process."

(The emphasis on the short-term is my own). While this definition could most likely be made to stick to Lancashire and Radomsky, it is clearly inapplicable to Young and Rearick. They are more akin to "service workers contracted by the operator to work at the mine for frequent or extended periods", and thus are not required to be given "hazard training" under 30 C.F.R. § 48.31(a).

By strict adherence to the language of section 48.22, we have the anomalous situation where four men performing similar job functions in the same setting, within several feet of each other, require training under different sections of the training regulations. The saving feature from a logical standpoint seems to be that the same information is required to be imparted to everyone, albeit under different guises.

As I indicated on the record at the conclusion of the hearing in this matter, I do not believe that the particular training that was ultimately given to abate the citations and orders in this case imparted any significant, new information to the four drillers. The training Mr. Marafka gave that morning, had in fact, already been given in the form of annual refresher training from their employer under section 48.28(a). This annual training covered the same types of hazards and procedures addressed by the "hazard" training that the drillers received from Mr. Marafka to abate the alleged violations.

In Mr. Marafka's own words (Tr. 80-81):

> I basically just gave them a verbal talk on job training. I discussed the high wall and how to get in and get out, communications. They have their own communications in their vehicle, and basically be safe and be aware of other equipment.

He went on to state that there was nothing unique about this site and that what he had to say about the high wall, the other equipment operating in the vicinity of the bench and the condition of the bench itself either wasn't any different than what he would have said about any other high wall operation or was obvious to all experienced observers, including the four employees we are concerned with herein.

Mr. Petrunyak, the Vice President and General Manager of Claron Explosives, Inc. also testified. If his testimony is to be believed, and I see no reason not to credit it fully, he personally had previously given each of the four drillers all the training that was subsequently given them again by Mr. Marafka to abate the orders/citations, only he had given it in much more depth.

Accordingly, I find that, unbeknownst to Inspector Kopsic, the four miners at issue herein, had already received the required training from their employer under section 48.28(a). They are not then required to repeat this generalized training under the heading of "hazard training" pursuant to section 48.31(a), even if they are the type of miners required to be trained under that section. For additional "hazard training" over and above the required comprehensive annual refresher training for experienced miners to have any meaning, there must be something new and meaningful to tell them. A search of the record in this case demonstrates that there was not. Mr. Marafka it seems was just going through the motions of abatement here to satisfy the inspector, abate the orders and get the men back to work. He gave no new information to these men who had been performing these drilling services at this site and others substantially like it on a daily basis for at least several years.

In view of the foregoing findings and conclusions, I conclude and find that the preponderance of the evidence adduced in this case establishes that whether or not the four named employees were subject to the hazard training requirements of the cited section 48.31(a), and clearly, Young and Rearick, at least, were not, they had in fact previously received such training as part and parcel of their annual refresher training under Section 48.28(a). Therefore, I conclude that the violations charged in the orders/citations did not occur and they must be vacated.

ORDER

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

Order Nos. 2894113, 2894115, 2894117, and 2894119 and Citation Nos. 2894114, 2894116, 2894118, and 2894120 ARE VACATED, and no penalty may be assessed.

Roy J. Maurer
Administrative Law Judge

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JAN 30 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 88-191
	:	A.C. No. 15-11964-03541
v.	:	
	:	H-2 Mine
HARLAN CUMBERLAND COAL COMPANY, Respondent	:	
	:	Docket No. KENT 88-192
	:	A.C. No. 15-07201-03559
	:	
	:	C-2 Mine

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Secretary;
Mr. Wallace Harris, Safety Director, and Mr. Clyde V. Bennett, President, Harlan Cumberland Coal Company, Grays Knob, KY, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alledged safety violations under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

Citation No. 3163046

1. On May 11, 1988, MSHA Inspector Jimmy A. Tankersley issued Citation No. 3163046 because he found that the Jeffrey 1028 continuous miner in the 001 working section was not maintained in a permissible condition. Specifically, there was

an opening in excess of .005 inch in the main breaker box cover on the continuous miner.

2. The inspector considered Harlan Cumberland's H-2 Mine, an underground coal mine, to be a gassy mine, i.e., a mine which released methane. Because the mine is below the water table, he was particularly attentive to its gassy nature. He took a number of methane readings during his inspection, and found methane in all five entries Respondent was driving.

3. To substantiate his methane-detector readings, the inspector also took bottle samples of air, including one in the area of the cited continuous miner. Although the area was well ventilated, analysis of an air sample showed .4% methane. The inspector believed that this level of methane in a well-ventilated area indicated a risk of a substantial increase in the methane level. He also considered the fact that the continuous miner was being used to advance, i.e., it was cutting coal and proceeding into virgin territory and that there was no way to predict how much methane would be in the virgin territory. He considered the possibility that, when removing a cut of coal, the miner could hit a methane gas pocket. The inspector was aware of a mine, like H-2 Mine, in which there generally was a low methane content most of the time but a continuous miner had cut into a pocket of methane. The inspector testified that, "there's no way to determine that there's not an air pocket of methane . . . somewhere in the coal bed" (Tr. 27).

4. The inspector expected that, if the air quantity were reduced, e.g., through a failure of the ventilation system components, the methane level would probably increase.

5. The inspector determined that there had been a recent, significant rise in methane accumulation at the H-2 Mine and he recognized this as an indication that change was ocurring someplace in the coal bed of the mine. On February 18, 1988, air samples showed a reading of 8,700 cubic feet of methane found in 24 hours when the air quantity was 60,000 cubic feet per minute. Just three months later, in May, 1988, the methane reading was 22,000 cubic feet of methane in 24 hours when the air quantity was even greater, i.e., 76,000 cubic feet per minute.

6. The inspector's experience was that methane usually accumulates between one and twelve inches from the roof of the mine. It is most violently explosive at 10%, but its explosive range is 5% - 15%. He testified that methane tends to accumulate where air movement is reduced, such as in the face area when coal is not being cut and when ventilation is not so strong as it is when coal is being cut.

7. An electrical arc is a normal part of the operation of a continuous miner.

8. Morris Lewis, an electrical specialist with MSHA, also testified at the hearing. Mr. Lewis distinguished a methane ignition from an explosion. An ignition, he said, occurs when methane alone catches fire; ignitions are confined to the particular area where methane has accumulated. An explosion, on the other hand, would occur when a methane accumulation ignited and propagated an explosion of float coal dust, coal dust, or other combustible material. The explosion could involve an entire mine. It was the electrical specialist's opinion that, in a wet, relatively dust-free mine such as H-2, with the level of methane present in this mine, and with the .005 inch gap in the breaker box lid, if a pocket of methane were hit in the course of mining there would be a reasonable likelihood of an ignition with serious injuries to several miners.

Citation No. 3162239

9. On March 23, 1988, miners at the Harlan Cumberland C-2 mine were advance mining in the 002 section. The continuous miner had broken down after operating for about one hour that day. About 1:45 p.m., MSHA Inspector Lawrence L. Rigney found .1% to .2% methane in the face area. Methane is usually found in areas below the water table; Inspector Rigney thought it unusual to find methane at the higher elevation at which the 002 Section was located. It was not only unusual to find a methane concentration at that elevation, but Inspector Rigney was surprised to be able to detect the methane with his spotter. Usually the concentration of methane in higher-altitude areas is discernible only through the more exacting laboratory analysis of air bottle samples. In at least 15 previous visits to this mine, Inspector Rigney had not found enough methane in the mine to detect it with his spotter.

10. Mine foreman David Mitchell accompanied Inspector Rigney as he tested for methane throughout the 002 Section. Mr. Mitchell made a methane check each time Inspector Rigney made one.

11. Inspector Rigney made his first methane check (finding .1% to .2% methane) where the continuous miner was located, in the right break, number three entry.

12. As he continued through the section, Inspector Rigney found that there was an abandoned area adjacent to the main intake air course. Curtains were hanging across all but one part of the entry to the abandoned area.

13. Inspector Rigney walked back up the cross entry to the timber line (root posts) adjacent to the abandoned area and made a second methane check with his spotter. There, when the auxiliary fan was not running, he found .3% to .6% methane. There was so little air movement that his anemometer blades would not turn. Inspector Rigney took another reading with his spotter at this place with the auxiliary fan running; the reading rose to .9% to 1.6% methane. An air bottle sample taken at this location showed .81% methane.

14. Inspector Rigney took his second air bottle sample at the point marked 4169 on Joint Exhibit 1. His spotter showed .1% methane. The laboratory analysis of the air bottle sample taken there showed .14% methane.

15. Inspector Rigney's third air bottle sample was taken at another point marked on Joint Exhibit 1. His spotter indicated .2% methane at that location; the laboratory analysis of the air bottle sample he took there also showed .2% methane.

16. The Inspector's fourth air bottle sample was taken at another point marked 3797 on Joint Exhibit 1. With the fan was turned off, his spotter showed .2% methane. The laboratory analysis of the air bottle sample taken there was .22% methane.

17. Finally, Inspector Rigney went back to the timber line area and took another reading. With the fan was turned on, his spotter indicated .9% to 1.6% methane. Mine Foreman David Mitchell's spotter showed 2% methane at a point to the left of the inspector's position and a little closer to the edge of the abandoned area. The laboratory analysis of the air bottle sample, taken at the position marked 3798 on Joint Exhibit 1, showed 1.5% to 2% methane.

18. The abandoned area was separated from the active part of the mine by double rows of timbers to block access. Danger signs and caution boards were posted as well. The abandoned area was not accessible for air testing because of the hazard of roof falls. The pillars had been pulled out so the roof support was gone. Even when the pillars had been in place, roof conditions were adverse. The area had a history of roof failure.

19. A six-inch bore hole had been drilled from the abandoned area to the surface of the mountain. Respondent expected that any methane that accumulated in the abandoned area would be ventilated to the surface through that bore hole bleeder system. The abandoned area had not been sealed before the bore hole was drilled; the bleeder system was not operating effectively. The fan blowing into the mine in the number one entry was supposed to maintain positive air pressure against the

curtains across the entry to the abandoned area, in order to prevent methane from seeping into the air course and across the face where miners were working. There was nothing in the bore hole to pull the air from the abandoned area to the surface. Methane is lighter than air. This fact, coupled with the positive pressure to be maintained by the fan in the number one entry, was expected by Respondent to cause the methane to rise to the mountain surface and dissipate into the atmosphere.

20. However, Respondent operated an auxiliary fan while coal was being produced on this section. With the auxiliary fan operating, the methane was being pulled out of the abandoned area into the active section.

21. Inspector Rigney considered the situation very dangerous. There was an abandoned area where the pillars had been pulled, and the roof conditions were so adverse that there were roof falls even when the pillars were in place. There was an accumulation of methane. There was the potential of another roof fall which could have pushed air from the abandoned area in one big rush of wind out into the intake air course and to the face. The incombustible content of the roadway was less than the allowable 65% in the intake aircourse. There was an accumulation of loose coal, coal dust, and some float coal dust. There was float coal dust in the electrical boxes for the belt conveyors. If there had been a methane ignition, there was enough dust that could have been thrown into suspension and it could have resulted in a coal dust explosion.The inspector thought it reasonably likely that this combination of factors would contribute to a major mine hazard involving fatal injuries. He therefore issued an imminent danger order.

22. Power to the auxiliary fan was disconnected. It took less than a minute for the methane level to go below 1% once the auxiliary fan was turned off. When the methane level dropped below 1%, the equipment was backed out from the face area. Miners proceeded to build cinder block walls that would effectively seal the abandoned area from the active mining area.

23. At the same time that he issued the imminent danger order, the inspector issued Citation No. 3162239, charging a violation of 30 C.F.R. § 75.312.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3163046

In its answer, Respondent acknowledges the violation charged in this citation (an impermissible continuous miner), but

contends that the inspector erred in designating it as "significant and substantial."

Gravity of a Violation

The term a "significant and substantial violation" derives from § 104(d)(1) and (2) of the Act, 1/ and not its civil penalty provision (§ 110(i)). The civil penalty provision simply uses the term "gravity of the violation," as one of six statutory criteria to consider in assessing a penalty.

1/ Sections 104(d)(1) and (2) provide:

"(d)(1) 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 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 person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such are until an authorized representative of the Secretary determines that such violation has been abated.

"(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (i), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violation. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

Sections 104(d)(1) and (2) grant an administrative injunctive power to the Secretary of Labor quite different from the civil penalty authority in § 110(i). Sections 104(d)(1) and (2) authorize the Secretary to withdraw miners from a mine if a certain chain of violations occurs. The chain must begin with a finding of a violation which, though not an imminent danger, 2/ is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" and is also "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . . ." If a mine inspector finds such a violation, § 104(d)(1) requires that the inspector "include such finding in any citation given to the operator . . . ." It is this finding that begins a § 104(d)(1) chain that may lead to a § 104(d)(2) order withdrawing miners from the mine or a part of it.

This administrative injunctive power is strictly construed by the Commission, which has ruled that, to prove a "significant and substantial" violation, the Secretary must prove "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 (1981)).

The Commission has not stated how its definition of a "significant and substantial" violation differs from the Act's definition of an "imminent danger" (see n. 2, infra). However, inasmuch as § 104(d)(1) excludes an "imminent danger" from its application, the Commission's definition of an S & S violation must mean a level of gravity below an imminent danger.

"Gravity of the violation," as used in § 110(i), i.e. for civil penalty purposes, is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of § 104(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the importance of the operator's conduct, in relation to the Act's purpose of deterring violations and encouraging compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing injury or illness, or even fit into a

2/ Section 3(j) of the Mine act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight. 3/ Other mine safety and health violations are serious because they may combine with other violations or conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

With this background, I turn to the question of whether the evidence sustains the inspector's finding that the violation was of a "significant and substantial" nature within the meaning of § 104(d)(1).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission stated:

> 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 (1984) (emphasis deleted). It has also

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3/ For example, a stop-look-and-listen safety law for public service vehicles at railroad crossings may be considered an important safety standard even though a particular instance of violation may not show a "reasonable likelihood" of collision with a train.

stated that, in accordance with § 104(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 (1984). Applying these principles to the instant case, I conclude the reliable evidence sustains the inspector's finding that the violation was of a significant and substantial nature.

In United States Steel Mining Co., 8 FMSHRC 1125 (1985), the Commission reversed a judge's holding that a ventilation violation was not significant and substantial. The Commission observed that, although "methane measured in the section revealed a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made 'in terms of continued normal mining operations' [citing U.S. Steel Mining Co., Inc., 6 FMSHRC at 1574]," and if "normal mining operations were to continue, a rapid buildup of methane could reasonably be expected." 8 FMSHRC at 1130. These considerations also apply in the instant case.

In Texasgulf, Inc., 10 FMSHRC 498 (1988), three continuous mining machines were used in a mine containing methane. They were not maintained in a permissible condition in that their flange joints had gaps exceeding .004 inch. The inspector detected no methane on his hand-held detector. Bottle samples indicated only .005% to .009% methane in the mine atmosphere. Just as in the case at hand, the inspector determined that the violations could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Texasgulf, as Respondent does here, conceded the violations but disputed the inspector's finding that the violations were significant and substantial. The Commission, in affirming the judge's decision that the violations were not significant and substantial, stated:

> We recognize that permissibility violations have the potential for serious danger. Nonetheless, whether a permissibility violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. [Emphasis added.]

The non-coal mine in Texasgulf (a trona mine) was very different from the Harlan Cumberland H-2 Mine. Texasgulf's mine showed methane levels of .005% and .009%. The methane levels in

the Harlan Cumberland Coal H-2 Mine were between 45 and 80 times greater. The highest level of methane ever detected in Texasgulf's mine was .2%, far below the level detected in Harlan Cumberland's mine. The Texasgulf mine's geological features were not conducive to methane liberation. Thus, the Commission noted that the geological structure of the unmined portion of the Texasgulf mine bed was essentially the same as that which had been mined, showing no presence of methane-producing geological factors. Further, the Commission noted that the record established a substantial factual basis for explaining the Texasgulf mine's prior history of low methane liberation and for reasonably expecting low methane in the future. However, in the instant case the inspector found an approximately three-fold increase in the amount of methane detected in the mine during the three months before the citation. This degree of buildup was a warning that something was changing in the coal seam.

The Commission in Texasgulf stated that, "[I]n determining whether a violation is of a significant and substantial nature the appropriate question is whether there is a reasonable likelihood of . . . a sudden liberation of methane." Texasgulf at 503. Given the evidence of Texasgulf mine's history of low methane emissions as well as the evidence establishing a reasonable expectation of low methane emissions, the Commission concluded that there was substantial evidence to support the judge's holding that the violations were not significant and substantial. However, here it is evident that, given the sudden increase in methane liberation over the three months prior to the citation, changes were occurring in the coal bed at Harlan Cumberland's mine. Those changes showed a reasonable likelihood of a sudden liberation of methane if the continuous miner hit a methane pocket as mining advanced.

No witness testified on behalf of Respondent about the circumstances leading to the issuance of Citation No. 3163046. The inspector was the only witness at the hearing with first-hand knowledge. He found the impermissible condition of the continuous miner to be a discrete safety hazard reasonably likely to cause serious injuries. The inspector's independent judgment is an important element in making significant and substantial findings, which should not be lightly set aside. National Gypsum, supra.

I find that the reliable evidence sustains the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $200 is appropriate for this violation.

Citation No. 3162239

This citation, as amended, alleges a violation of 30 C.F.R. § 75.312, which provides:

> § 75.312 -- Air passing through abandoned, inaccessible, or robbed area.
>
> Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine. No air which has been used to ventilate an area from which the pillars have been removed shall be used to ventilate any working place in a mine, except that such air, if it does not contain 0.25 volume percentum or more of methane, may be used to ventilate enough advancing working places immediately adjacent to the line of retreat to maintain an orderly sequence of pillar recovery on a set of entries.

In its answer, Respondent acknowledges the violation alledged in Citation No. 3162239, but contends that the inspector erred in designating it as a "significant and substantial" violation.

The regulation requires that air from an abandoned area not be allowed to ventilate any working place in a mine.

Miners at the Harlan Cumberland C-2 mine were in advance mining in the 002 Section. There was an abandoned area adjacent to the area where miners were working. Curtains had been put up but did not cover the entire span of the entry to the abandoned area.

Pillars had been removed from the abandoned area. Roof conditions in the abandoned area were adverse; even when the pillars were in place, there had been several significant roof falls. The abandoned area was separated from the active part of the mine with double rows of road timbers to block entry. The abandoned area was not accessible for inspection or air testing because of the hazard of roof falls.

An auxiliary fan was operated when the continuous miner was operating in order to provide sufficient air movement to the face of the coal. However, the auxiliary fan was powerful enough to override the positive pressure created by the fan in the number one entry, allowing air from the abandoned are to move into the working area of the 002 section and across the face.

Respondent did not prevent the abandoned area air from going into the working area of the 002 Section. As a result, there was a buildup of methane in the working area, creating a dangerous situation. The evidence amply sustains the inspector's finding that the violation was of a "significant and substantial nature."

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $275 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Respondent violated the safety standards as alleged in Citations Nos. 3163046 and 3162239.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3163046 and Citation No. 3162239 are AFFIRMED.

2. Respondent shall pay the above civil penalties of $525 within 30 days of this Decision.

William Fauver
Adminstrative Law Judge

Distribution:

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Mr. Wallace Harris, Jr., Safety Director, Harlan Cumberland Coal Company, General Delivery, Grays Knob, Kentucky 40829 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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5203 Leesburg Pike
Falls Church, Virginia 22041

JAN 30 1990

ROCHESTER & PITTSBURGH COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 89-85-R
	:	Order No. 2889351, 2/2/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Greenwich Collieries No. 2
	:	Mine ID 36-02404

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, Pennsylvania, for the Contestant; Joseph Crawford, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this Contest Proceeding, the Operator (Contestant) seeks a review of a withdrawal Order issued by the Mine Safety and Health Administration (MSHA) pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). Pursuant to notice, the case was heard in Johnstown, Pennsylvania, on November 21, 1989. Leroy Niehenke testified for Contestant, and Robert Joseph testified for the Secretary (Respondent). Respondent filed a Post Hearing Brief on January 12, 1990. Proposed Findings and Memorandum of Law were filed by Petitioner on January 16, 1990.

Stipulations

At the Hearing the Parties entered into the following stipulations:

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

2. Rochester & Pittsburgh Coal Company is subject to the jurisdiction of the Mine Act.

Findings of Fact and Discussion

Leroy Niehenke, an MSHA Inspector and Electrical Specialist, testified that on February 2, 1989, his supervisor informed him that there was an outstanding citation that had been issued for Contestant's Greenwich Collieries Mine. Niehenke indicated that his supervisor told him to go to the mine, and check on the status of the cited condition.

The original citation had been issued on December 21, 1988, alleging a violation of 30 C.F.R. § 1719 in that "The illumination provided for both the front and rear of the Kersey scoop tractor serial number 7175, . . . located in M11X-1, 010 working section, was less than .006 foot lamberts. . . " The original citation had set January 16, 1989, as the date for the abatement of the cited violation.

Niehenke indicated that he observed the scoop, on February 2, and the illumination system was not completely installed, inasmuch as the power cable for the illumination system was not installed, the unused openings for the light enclosures were plugged but not tack welded, and hose clamps on a flame resistant conduit were not provided. According to Niehenke, he had installed this type of system in the past, and indicated that it should take two individuals two shifts to install this system. He also indicated that dealers, who provide the necessary parts to properly illuminate the scoops, are located within 20 to 30 miles of the subject mine.

In essence, Niehenke testified that he decided to issue a 104(b) Order for failure to abate, rather than extend the citation, because the Operator did not show any "diligence" in abating the violative condition (Tr. 30). He also indicated that the hazard of operating the scoop without adequate illumination, was not eliminated by moving the scoop outby the last open crosscut. He thus indicated that the equipment, i.e., the scoop, still could be used anywhere including the inby by the last open crosscut, and hence he issued the 104(b) Order rather than extend the time to abate the Citation. He also indicated that there were no signs preventing the scoop from being used inby the last open crosscut.

The original citation issued December 21, 1988, alleges that the scoop in question did not have sufficient illumination as provided for in 30 C.F.R. § 75.1719(e)(6). It was subsequently amended to show a violation of 30 C.F.R. § 75.1719-1(d).

30 C.F.R § 75.1719(a), states that sections 75.1719 through 75.1719-4 prescribe the requirements ". . . for illumination of working places in underground coal mines while persons are working in such places and while self-propelled mining equipment is operated in the working place." (emphasis added). Section 75.1719-1(d), supra, provides as follows: "The luminous intensity (surface brightness) of surfaces that are in a miner's normal field of vision of areas in working places that are required to be lighted should be not less than 0.06 footlamberts when measured in accordance with section 75.1719-3." (Emphasis added). Thus a plain reading of these regulatory sections reveals that the requirements for illumination are limited to "working places," and that specifically the requirement for luminaries of not less than .06 footlamberts, is required for machinery which is "operated in the working place." 30 C.F.R. § 75.2(g)(2) defines working place as ". . . the area of the coal mine inby the last open crosscut." The scoop in question, when observed by Niehenke on February 2, was outby the last open crosscut (Government Exhibit 2). Niehenke indicated on cross-examination that as far as he could determine, the scoop in question was not used inby the last open crosscut, after the citation in question was issued. He further indicated on cross-examination, that the scoop in question was in complete compliance with all regulatory standards if used outby the last open crosscut. He agreed that on the date he issued the Citation the scoop was in a condition that permitted its use outby the last open crosscut.

Accordingly, I find that inasmuch as section 75.1719, supra, mandates illumination standards at the working place, once the scoop in question had been removed from the working place, i.e., outby the last open crosscut, it was no longer in violation of section 75.1719, supra. When Niehenke observed the scoop on February 2, it was not at the working place. Hence, the original citation had been abated, as the scoop's condition no longer violated the terms of section 75.1719, supra, since it was not at the working place. Accordingly, since the citation had been abated, the section 104(b) Order should not have been issued, and it should be vacated.

ORDER

It is ORDERED that the Notice of Contest herein is SUSTAINED, and it is further ORDERED that Order No. 2889351 be VACATED.

Avram Weisberger
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 31 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-51-M A. C. No. 40-02968-05502
v.	:	
	:	Moltan Company
MOLTAN COMPANY, Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN for the Petitioner;
Mr. Edward J. Lucas, Plant Superintendent, Moltan Company, Middleton, KY, for the Respondent.

Before: Judge Fauver

This civil penalty case was brought by the Secretary of Labor under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. MSHA Inspector Craig holds an electrical certification issued by the Commonwealth of Kentucky and he has maintained such certification to the present.

2. Inspector Craig inspected Respondent's Molton mine, in Hardeman County, Tennessee, on March 9 and 10, 1988.

3. On March 10, 1988, Inspector Craig issued Citation No. 3252473, alleging the following conditions: "The number one cooler control electrical cabinet's three circuit breakers and six starter relays can only be operated and/or reset by opening

the cabinet door and reaching inside the cabinet. Employee's [sic] thus expose themselves to the bare 480 volt terminals and conductor ends inside the cabinet. This area of the plant is monitored and operated by the number one kiln operator employee."

4. The inspector's attention was drawn to the electrical cabinet because he observed that someone had left the cabinet door open.

5. The electrical cabinet door was not equipped with a standard safety latch or disconnecting mechanism that would automatically deenergize the electrical components within the cabinet when the cabinet door was opened.

6. In the event of a motor shut down, the kiln operator would open and reach into the electrical cabinet to reset the motor starter operating controls (relays), thereby placing himself in danger of electric shock because of the close proximity to energized conductors and terminals carrying 480 volts of electrical power.

7. In the citation, Inspector Craig designated the alleged violation "S & S" ("significant and substantial"). Later his supervisor ordered him to change it to a "non-S & S" violation, in an effort to avoid litigation. Inspector Craig did not agree with this change, but modified the citation as directed. The supervisor later ordered the citation to be modified to restore the original allegation of an "S & S" violation.

DISCUSSION WITH FURTHER FINDINGS

The citation alleges a violation of 30 C.F.R. § 56.12040, which provides:

> Operating controls shall be installed so that they can be operated without danger of contact with energized conductors.

This case raises two issues: (1) were the motor starter controls inside the cabinet "operating controls" within the meaning of § 56.12040? (2) If there was a violation, was it "significant and substantial" as found by the inspector?

I find that the motor starter controls were an essential part of the motor operating controls and therefore are covered by the safety standard. The motors could not be operated unless the reset buttons were in the on position, and if they were pushed out to the disconnect (or off) position by a motor overload, the kiln operator had the job of resetting them in order to restart the motor.

The inspector, an electrician with long mining and enforcement experience, testified that a motor overload in the systems controlled by the electrical cabinet could occur at any time and might occur as often as daily or several times a day. Respondent's only witness was a former kiln operator, a member of management at the time of the hearing, who had worked as a kiln operator about two years before the citation. He testified that at that time he had reset the motor starter controls about once or twice a year. He did not know the experience of other shifts. The kiln operated three shifts a day, seven days a week. This witness was not an electrician.

I credit Inspector Craig's expert opinion testimony that the motors could overheat and require resetting inside the cabinet at any time, and perhaps even several times a day. I also credit his expert opinion of the danger involved in reaching inside the cabinet where live wires and conductors were exposed.

It was a violation of the safety standard to have exposed live wires and terminals in the cabinet near the reset buttons for the motor circuits.

The reliable evidence amply sustains the inspector's finding that the violation was of a "significant and substantial" nature. Respondent's practice was reasonably likely to result in a fatal or other serious injury if not abated. When a miner reached into the cabinet, even slight inattention or a slight tumble or fall could result in death by electrocution.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $300 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 56.12040 as alleged in Citation No. 3252473.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3252473 is AFFIRMED.

2. Respondent shall pay the above penalty of $300 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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Mr. Edward J. Lucas, Plant Superintendent, Moltan Company, Post Office Box 9, Middleton, KY 38052 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 31 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-165 A.C. No. 42-01211-03541
v.	:	Trail Mt. No. 9 Mine
BEAVER CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner;
David M. Arnolds, Esq., Thomas F. Linn, Esq., Beaver Creek Coal Company, Denver, Colorado, for the Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act," charging Beaver Creek Coal Company (Beaver Creek) with a violation of three mandatory safety standards found in Title 30 of the Code of Federal Regulations.

Beaver Creek filed a timely answer to the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs filed, and the matter was submitted for decision.

Citation No. 3227060

Citation No. 3227060 alleges a Section 104(a) S&S violation of 30 C.F.R. § 75.316. The cited safety standard provides as follows:

§ 75.316 Ventilation system and methane and dust control plan.

[Statutory Provisions]

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

Beaver Creek's ventilation plan does include requirements for stoppings. The plan provides:

> "All ventilating controls such as stoppings . . . shall be of substantial and incombustible construction, installed in a workman-like manner and maintained in the condition to serve the purpose for which they were intended. The intent being to direct the air to the sections and working faces, and to separate entries for escapeway purposes." (Joint Exhibit 24)

The citation under the heading "Condition or Practice" charges a violation of 30 C.F.R. 75.316 as follows:

> The #13, 14, 15, 20, 21, 33, 39, 41, 43 and 44 stoppings on the South mains belt entry were not maintained. The back of the stoppings have crushed and a half of the hollow blocks have fallen off. The stoppings are used to separate the belt entry from the intake entry. The intake entry is used as a designated intake escapeway. The above conditions do not comply with the approved ventilation system and methane and dust control plan.

Inspector Huggins testified that he inspected the stoppings which were used to separate the belt entry from the intake entry and to direct airflow. The stoppings were constructed with hollow cement cinder blocks that were 6 to 8 inches wide by 8 inches high by 15½ to 16 inches long. Huggins observed that the back-half of some of the cinder blocks had broken off. On cross-examination, however, Inspector Huggins testified that there were no holes or breakthroughs in any of the stoppings.

Beaver Creek at the hearing conceded a non-S&S violation of the cited regulation. It vigorously maintained, however, that the violation was not significant and substantial pointing out that none of the stoppings at issue had been broken through and the purpose for the stoppings was in no way compromised.

The primary issue before me is whether the alleged violation of 30 C.F.R. § 75.316 is "significant and substantial" within the meaning of the Act.

Beaver Creek's ventilation plan, quoted above, provides that stoppings "shall be . . . maintained in the condition to serve the purpose for which they were intended" and that this intent was "to direct air to the sections and working faces, and to separate entries for escapeway purposes" (Joint Exhibit 24, p. 19). Since the undisputed evidence established that none of the stoppings were broken through, the stoppings at the time of inspection were serving their intended purpose which was "to direct the air to the sections and working faces, and to separate entries for escapeway purposes." It is clear from Inspector Huggins' undisputed testimony that no hazards were presented by the stoppings unless they were in fact broken through in some sort of explosion (Tr. 474).

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). 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 present case I find that the evidence presented at the hearing is insufficient to find that the cited violation was of a significant and substantial nature.

It is recognized that a violation of 30 C.F.R. § 75.316 has the potential for serious danger. Nevertheless, whether such a violation is significant and substantial "must be based on the evidence in the record of the particular facts surrounding the violation, including the nature of the mine involved." Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 20, 1988).

The discrete safety hazard contributed to by the violation at issue is that an explosion or major fire could blow out a stopping and this would contaminate the intake escape (Tr. 474). The key question is whether there was a reasonable likelihood of a major fire or explosion that would break through the stopping or stoppings in question had normal mining operations continued.

Such an occurrence would require a confluence of factors. Although there is a chance such a fire or explosion could occur there is insufficient evidence to conclude that there was a reasonable likelihood of such occurring had normal mining operations continued.

Citation No. 3227060 is therefore modified from a 104(a) S&S violation to a 104(a) non-S&S violation.

Citation No. 3227081

This Section 104(a) citation alleges a significant and substantial violation of 30 C.F.R. § 77.502. At the hearing Beaver Creek agreed to withdraw its contest and pay the Secretary's initial proposed penalty of $91.00. This disposition and penalty is consistent with the Act.

Citation No. 3227084

This citation alleges a Section 104(a) significant and substantial violation of 30 C.F.R. § 75.400. At the hearing the Secretary moved to modify the citation by redesignating it a 104(a) non-S&S violation. Beaver Creek agreed to withdraw its contest to the newly redesignated non-S&S violation and pay the Secretary's amended proposed penalty of $20.00.

Upon review and evaluation I find the agreed settlement disposition of Citation No. 3227084 is consistent with the criteria set forth in Section 110(i) of the Act. The settlement disposition of this citation is approved.

Penalty Assessment for Citation 3227060

In assessing a civil penalty under Section 110(i) of the Act the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. A print-out of Beaver Creek's assessed violation history (Ex. H, J - 1) shows violations within the two-year period prior to the inspection leading to the issuance of Citation No. 3227060. The mine inspector evaluated the degree of Beaver Creek's negligence in violating 30 C.F.R. § 75.316 as "moderate". Upon evaluation of the evidence I too find that the violation resulted from the operator's

ordinary negligence which is moderate. Beaver Creek demonstrated good faith in abating the violation. The Secretary's proposed penalty will have no affect on Beaver Creek's ability to continue in business. Beaver Creek produces 1,358,520 tons of coal annually. This includes 300,000 tons of coal produced at the Trail Mountain No. 9 Mine. Considering the size of Beaver Creek's business and the other statutory criteria set forth in Section 110(i) of the Act, the appropriate penalty for this violation is $100.00

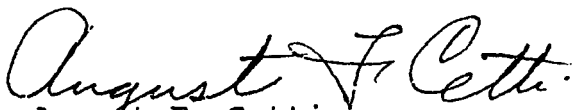
ORDER

1. Citation No. 3227060 is modified to a 104(a) non-S&S violation and as modified is affirmed. A civil penalty of $100.00 is assessed.

2. Citation No. 3227081 is affirmed and a civil penalty of $91.00 is assessed.

3. Citation No. 3227084 as modified to a Section 104(a) non-S&S violation is affirmed and a civil penalty of $20.00 is assessed.

Beaver Creek is directed to pay the Secretary of Labor a civil penalty in the sum of $211.00 within 30 days of the date of this decision.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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JAN 31 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-72-M
	:	A.C. No. 04-04791-05510 F2M
v.	:	
	:	Morning Star Mine
TARGET CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Patricia Jeanne Howze, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary of Labor (Secretary); Stephan G. Saleson, Esq., Gresham, Varner, Savage, Nolan and Tilden, San Bernardino, California, for Target Construction, Inc. (Target).

Before: Judge Broderick

STATEMENT OF THE CASE

Following an investigation of an accident resulting in a serious injury to a miner, MSHA issued two imminent danger withdrawal orders, each alleging a violation of a mandatory safety standard (30 C.F.R. § 56.9054 and § 56.9055). In this proceeding, the Secretary seeks civil penalties for the violations. Target denies that the alleged violations occurred. Pursuant to notice, the case was called for hearing in Ontario, California, on October 11, 1989. Vaughan Duane Cowley and Rodric Breland testified on behalf of the Secretary. Daryl Rogers, Daniel Ruminski, and Jeffery Fegert testified on behalf of Target. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Target was the contract operator of an open pit multiple bench gold and silver mine in San Bernardino County, California, known as the Morning Star Mine. Target operated the mine under contract with Heavy Metals Development Company, a wholly owned subsidiary of Vanderbuilt Gold Corporation. In 1989, the mine employed an

average of 24 employees; approximately 120,000 man-hours per year were worked at the mine. Target operated other facilities, but the record does not disclose their size or extent.

At about 8:00 a.m., April 12, 1988, MSHA was notified by Target of an accident at the mine which was thought to have resulted in a fatal injury to a miner. It was later reported that the injury, though serious, was not fatal. Federal Mine Inspector Vaughan Cowley and supervisory inspector Rodric Breland went to the mine and at about 11:00 a.m. inspected the dump area where the accident occurred, accompanied by Target officials. They discovered that a large, 65 to 70 ton truck had gone over the dump bank approximately 250 feet to the bottom of the dump. The berm and other ground material for a distance of approximately 84 feet in width had gone over the bank with the truck. The inspectors saw several cracks in the ground in the dump area, one of which extended about 200 feet, crossing almost the entire dump area. Another crack was seen 30 feet from the perimeter. The inspector measured one of the cracks and found it to be 1 inch wide and 2 inches deep. I find that these cracks in the ground were as described by the inspectors. The cracks were obvious to visual inspection. The ground of the bank sloped down toward the perimeter. The downslope was determined to be a 2.8% grade. Loads were being dumped at the edge of the bank. The evidence, and especially the photographs of the bank, do not establish that the ground subsided beneath Billingsley's truck to the extent that it caused the vehicle to go over the bank.

The berm was measured and varied from 22 inches to 38 inches high. There was no support on the back side of the berm. Target employed haulage trucks and dozers on the bank. The mid-axle height of Target's largest truck was approximately 48 inches. It was (and is) the common understanding in the industry that berms should be at least as high as the mid-axle height of the largest vehicle being operated on a bank.

The truck in question was at the bottom of the bank, its front wheels and diesel fuel tank having been separated from the truck. The fuel tank was badly damaged and lay beside the truck. The front wheel assembly with the wheels facing the bank, was found below the truck (Ex. R-9 and 10). Diesel spills were seen at two areas on the slope (Ex. R-5 and 6). Head phones were found on the slope about 15 to 25 feet from the crest to the left of the truck tire marks. The truck gear box showed the transmission was between neutral and first gear. The truck driver, Bill Billingsley, was rescued from the slope, at a point about 200 feet from the crest of the dump.

Billingsley sustained severe crushing injuries which resulted in the amputation of both legs. The inspector

interviewed him in the hospital. He stated that he backed up to the dump area, put the gear shift in neutral and "revved" the motor to dump his load when he heard and saw the ground subsiding behind him. He shifted to first gear before going over the slope backwards. Billingsley stated that the gear shift linkage on the truck was defective. Two other truck drivers told the inspector that the gear shift linkage was troublesome; that the truck would appear to be in neutral when it was actually in reverse. Neither Billingsley nor either of the other employees was called as a witness. Billingsley is no longer employed by Target. Cliff Morrison, the night shift supervisor, had been at the scene when the accident occurred, but was not interviewed by the inspector and was not called as a witness. The bulldozer operator who was responsible for the berm told the inspector that there was an adequate berm when he was at the dump shortly before the accident. He was not called as a witness. A mechanic was working on a disabled truck in the area. He told a Heavy Metals engineer, Daniel Ruminski, that the he did not hear a back-up alarm on Billingsley's truck, nor did he hear a revving noise such as occurs when a truck is dumping. However, neither did he hear Billingsley's truck go over the side, nor another truck which dumped after Billingsley. The mechanic was not called as a witness.

In September 1987, Target was cited by MSHA for a berm violation which resulted in a fatal accident. At the close-out conference following that citation Target was told that a berm should as a minimum be as high as the mid-axle height of the largest piece of equipment on the mine property. Sometime in 1985 a Target truck went over a dump. The driver jumped out and sustained broken bones. On another occasion, a truck was reported to have gone over with no injuries resulting. In March 1987, an imminent danger withdrawal order was issued to Target for lack of an adequate berm in the dump.

On April 12, 1988, at about 2:30 p.m., Inspector Cowley issued two section 107(a) orders of withdrawal citing a violation of 30 C.F.R. § 56.9055 because of unstable ground at the dump site, insufficient to support the weight of the 65 ton haulage trucks; and a violation of 30 C.F.R. § 56.9054 because adequate berms were not provided at the waste dump. The berm violation was abated when Target established 48 inch berms completely around the perimeter of the dump with two to one slopes on the front and back sides. The ground violation was abated by compacting the ground in the dump area and reversing the slope from a 2.8 percent downslope to a 2 percent up-slope. Both orders were terminated on April 14, 1988, at 4:45 p.m.

There was considerable testimony addressed to the question of what caused the accident to Billingsley, and how the accident

occurred. This evidence does not bear necessarily or directly on the primary issues before me: did the alleged violations occur? It may be important, however, in determining the gravity or negligence if the violations or either of them are established.

Respondent contends that Billingsley drove forward over the bank either intentionally or inadvertently. It suggests that he may have been listening to the radio (hence the reference to the headset), and that he was tired and inattentive after working a long shift. Target's production manager at the Moringstar Mine, Clarence Darrell Rogers, testified that Billingsley was an experienced truck driver and an excellent employee.

Daniel Ruminski, a mining engineer for Heavy Metals, supervised the contract with Target. Ruminski testified that he initiated the first safety program at the mine. In his opinion, Target was very safety conscious following the September 1987, fatal accident. In Ruminski's opinion, the ground in the dump area was stable before the April 1988 accident and the berm was adequate. He admitted that he did not measure the berm, but criticized the way MSHA measured it. He agreed that the industry standard required a berm to be mid-axle height of the largest vehicle in use. He disagreed with MSHA's position that the industry standard required a berm to be twice as wide as it was high.

Ruminski took a number of photographs after the accident (Exhibits R-5 through 15) in an attempt to determine how and why the accident happened. He concluded that Billingsley drove the truck forward through the berm and over the bank. He based his conclusion on an analysis of the photographs and of the physical conditions at the dump after the accident.

Clarence Darrell Rogers, Target's production manager, was of the opinion that the berm was adequate prior to the accident, and that the ground was stable. Like Ruminski, he believed that Billingsley had gone over the slope forward.

I am unpersuaded by Ruminski's analysis and find on the basis of the evidence before me that Billingsley's truck went over the bank backward. Although he did not testify, Billingsley told Inspector Cowley and his ultimate supervisor Rogers, that he backed over the edge of the dump. I find it significant that Billingsley was described by his superior as an experienced driver and an excellent employee. He told the inspector that he was having trouble with the gear shift linkage, and this was corroborated by other drivers. Ruminski's opinion is based in part on the statement of the mechanic that he did not hear a back up alarm or the revving of the motor on Billingsley's truck. I discount this, because the mechanic also did not hear the truck

go over the dump, nor did he hear another truck unload subsequently. Ruminski is not an accident reconstruction expert, but a mining engineer. The extraordinary trauma involved in a loaded 65 to 70 ton truck going over an embankment and coming to rest 250 feet below can result in too many twists and turns and revolutions to put much reliance on Ruminski's over-simplified analysis. I place greater reliance on the statements of Billingsley. Obviously, it would be more statisfactory to have had his testimony, as well as that of the foreman, mechanic and other truck drivers, but for various reasons these men were not called as witnesses. Based on the statements of Billingsley and his co-workers to the inspector, I find that the gear shift linkage on the truck was defective. I find that the ground in the dump area was unstable, as evidenced by the cracks in the surface. However, the evidence does not establish that the unstable ground by itself caused the truck to go over the bank.

REGULATIONS

30 C.F.R. 56.9054 provided, as of April 12, 1988, as follows:

> Berms, bumper blocks, safety hooks or similar means shall be provided to prevent overtravel and overturning at dumping grounds.

30 C.F.R. 56.9055 provided, as of April 12, 1988, as follows:

> Where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank.

ISSUES

1. Whether the evidence establishes that Target failed to provide berms at the waste dump sufficient to prevent trucks from overtravelling the dump edge?

2. Whether the evidence establishes that the ground at the Morning Star Mine dumping place was such that it might fail to support the weight of a 65 to 75 ton truck?

3. If either or both of the above questions are answered affirmatively, what is the appropriate penalty for the violation considering the statutory penalty criteria?

CONCLUSIONS OF LAW

I

Respondent Target was at all times pertinent to this proceeding subject to the provisions of the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and the subject matter of this proceeding.

II

There is direct and convincing evidence in the record that the berm at Target's dump was not as high as the mid-axle height of Target's largest vehicle. Although the standard in effect on March 12, 1988, did not in terms require that it be at least of mid-axle height (the standard adopted effective in September 1988, did specifically require that), the evidence is very clear that such was a recognized industry standard, and that a berm of that height is necessary to prevent overtravel. I reject the conclusions of Target's witnesses that the berm was adequate when the citations were issued. I conclude that the berm provided at Target's dump, which was from 10 to 26 inches lower than mid-axle height, was not sufficient to prevent overtravel and overturning. I conclude that a violation of 30 C.F.R. § 56.9054 has been established.

III

There is a dispute as to the existence and significance of cracks in the ground in the dump area. I accept the testimony of the federal inspectors as to the existence and extent of the cracks (see findings of fact, page 2). I also accept their conclusions that these extensive cracks constituted evidence of unstable ground, evidence that the ground might fail to support the weight of a vehicle. Therefore, I conclude that the evidence establishes a violation of 30 C.F.R. § 56.9055.

IV

Target is a relatively small operator, employing approximately 24 persons. There is no evidence in the record as to its general history of prior violations, but there is evidence of prior inadequate berm and unstable ground violations. This history is significant, and will result in increased penalties for the violations found herein. There is no evidence that the imposition of penalties in these proceedings will affect Target's ability to continue in business. The violations were abated promptly in good faith.

The inadequate berm violation was very serious. It contributed directly to the accident and to the serious injury suffered by Billingsley. The unstable ground condition in itself did not contribute to the injury, but, combined with the downslope, it constituted a very hazardous condition. It, too, was a very serious violation.

Target was certainly on notice of the critical importance of providing adequate berms and stable ground in its dumping area. It had experienced a number of accidents including a recent fatal accident as an apparent result of violations of the two standards involved herein. On the other hand, there is evidence in the record that the berms were adequate some hours prior to the accident which occurred on April 12, 1988. The location of both the bank and the berm change of course as dumping continues. Nevertheless, I conclude that Target was negligent in permitting the inadequate berm here, and in permitting the unstable ground.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the berm violation is $8000, and an appropriate penalty for the unstable ground violation is $5000.

ORDER

Based on the above findings of fact and conclusions of law, Orders/Citations 3286977 and 3286978 are AFFIRMED. Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties for the violations found herein.

ORDER/CITATION	PENALTY
3286977	$ 5000
3286978	8000
	$13000

James A. Broderick
Administrataive Law Judge

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slk

ADMINISTRATIVE LAW JUDGE ORDER

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 24, 1990

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 89-234-R
v.	:	Citation No. 3114001; 5/31/89
	:	Docket No. WEVA 89-235-R
	:	Citation No. 3114002; 5/31/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 89-236-R
	:	Citation No. 3114003; 5/31/89
	:	Docket No. WEVA 89-237-R
	:	Citation No. 3114004; 5/31/89
	:	Docket No. WEVA 89-238-R
	:	Citation No. 3103921; 6/1/89
	:	Docket No. WEVA 89-239-R
	:	Citation No. 3103922; 6/1/89
	:	Docket No. WEVA 89-240-R
	:	Citation No. 3103923; 6/1/89
	:	Docket No. WEVA 89-241-R
	:	Citation No. 3103924; 6/1/89
	:	Docket No. WEVA 89-242-R
	:	Citation No. 3103925: 6/1/89
	:	Docket No. WEVA 89-243-R
	:	Citation No. 3103926; 6/1/89
	:	Docket No. WEVA 89-244-R
	:	Citation No. 3103927; 6/1/89
	:	Docket No. WEVA 89-245-R
	:	Citation No. 3103928; 6/1/89
	:	Blacksville No. 1 Mine
	:	Mine ID 46-01867

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 90-3 A. C. No. 46-01867-03815
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 90-8 A. C. No. 46-01318-03901
	:	Robinson Run No. 95

ORDER DENYING OPERATOR'S MOTION TO DISMISS
ORDER OF DISCOVERY
ORDER TO CONFER
NOTICE OF HEARING

In the above-captioned cases the operator challenges the validity of citations issued to it pursuant to 30 C.F.R. § 50.30. In a motion do dismiss, the operator seeks to have the charges against it dismissed on the ground that Part 50 was not properly promulgated and is unenforceable. The Solicitor opposes dismissal.

At the outset, the Solicitor argues that the operator is precluded from challenging the validity of Part 50 because of res judicata and collateral estoppel, citing my decision in Consolidation Coal Company, 9 FMSHRC 727 (April 1987). (Solicitor's brief pp. 3-5). The Solicitor errs in this respect. In those cases the operator initially challenged Part 50, but abandoned that position when it joined the Solicitor in recommending settlements which I approved. Under the circumstances, I do not believe it can be said that the validity of Part 50 was litigated or that such a determination was necessary for disposition of those cases. Nothing in the settlement motions indicates otherwise. Accordingly, my observations regarding the validity of Part 50 were, as the operator states, in the nature of dicta. (Operator's reply brief pp. 3-9). Also, the validity of the adoption of Part 50 was not raised or decided in Consolidation Coal Company, 10 FMSHRC 1633 (Nov. 1988), affirmed in part, reversed in part, 11 FMSHRC 1935 (October 1989).

A determination of the validity of procedures pursuant to which Part 50 was adopted requires consideration of a most unique chronology. The Federal Mine Safety and Health Amendments of 1977 replaced the Federal Coal Mine Health & Safety Act of 1969 (hereinafter referred to as the "Coal Act" or the "1969 Act") with the Federal Mine Safety and Health Act of 1977 (hereinafter referred to as the "Mine Act" or the "1977 Act"). This legislation was enacted on November 9, 1977. Pub. L. No. 95-164, 95th

Cong., 1st Sess. Pursuant to section 307 of the Amendments, they became effective 120 days after enactment, i.e. March 9, 1978.

Prior to enactment of the Mine Act, the Mining Enforcement and Safety Administration (MESA) of the Department of the Interior on October 17, 1977 issued a Notice of Proposed Rule Making replacing Part 58 of the regulations, the reporting requirements of the Federal Metal and Nonmetallic Act (hereinafter referred to as the "Metal and Non-Metal Act") and Part 80 applicable to the Coal Act with a new Part 50 applying to both statutes. 42 Fed. Reg. 55568. Under the 1977 Section Amendments both these laws were subsumed into the new Mine Act. Pub. L. No. 95-164, §§ 301, 306. On December 30, 1977, the Secretary of the Interior adopted Part 50 as a final rule. 42 Fed. Reg. 65534.

Whether or not Part 50 may be applied under the Mine Act depends upon an interpretation of the transfer provisions of the 1977 Amendments. Section 301(b)(1) of the Amendments provides:

> (b)(1) The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act and standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 which are in effect on the date of enactment of this Act shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines and to coal mines respectively under the Federal Mine Safety and Health Act of 1977 until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines and new or revised mandatory health or safety standards applicable to coal mines.

Relying upon section 301(b)(1), the operator argues that Congress permitted transfer of only those standards and regulations in effect on November 7, 1977, the date of enactment. (Operator's brief pp. 9-12). As set forth above, Part 50 was not then in effect. Nevertheless, I cannot accept the operator's position. To be sure, section 301(b)(1) refers to mandatory standards under the Metal and Non-Metal Act and to mandatory standards and regulations under the Coal Act. But it provides that they shall remain in effect "as mandatory health and safety standards". Accordingly, despite the reference to regulations, I conclude that, taken in its entirety, section 301(b)(1) means mandatory standards.

In addition, section 301(b)(1) must be read in conjunction with section 301(c)(2) of the Amendments which provides:

> (2) All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

The parties agree that Part 50 is a regulation rather than a mandatory standard. (Operator's brief pp. 14-16; Solicitor's brief pp. 11-12). I accept the Solicitor's representation that section 301(c)(2) is a broad savings provision pursuant to which the regulation denominated as Part 50 and adopted under the Coal Act was carried over to the Mine Act. (Solicitor's brief p. 7). In this manner both sub-paragraphs (b)(1) and (c)(2) may be read concomitantly, with each given its proper meaning and due effect, and thereby insuring an orderly transfer of power from one statute to the other and from one governmental department to another.

The operator's initial brief makes no mention of section 301(c)(2). It only refers to section 301(c)(1) which has nothing to do with the issue presented here. The initial brief criticizes the decision of Administrative Law Judge Koutras in Helca Mining Company, 1 FMSHRC 1872 (November 1979), which held that Part 50 was enforceable under the Mine Act. In particular, the operator takes the Judge to task for his supposed reliance upon (c)(1). The Helca decision is however, based upon (c)(2) and does not mention (c)(1). The operator's description of the provisions of (c)(1) may well be correct, but that section is irrelevant. (Operator's brief, footnote 14, pp. 11-12).

In its reply brief, the operator takes note of section 301(c)(2). (Operator's reply brief p. 10). But I do not find persuasive any of the arguments advanced in either the operator's original or reply brief. First, there is nothing inconsistent between the prospective grant of regulatory authority to the Secretary of Labor effective with the Mine Act and a continuation

of such authority in the Secretary of the Interior up to that date. The operator's argument that MSHA can now cure the invalidity of Part 50 with swift regulatory action is disingenuous. (Operator's reply brief p. 12). This would mean Congress intended a four month hiatus in the power of enforcement. Adoption of this view also would result in a 12 year gap in enforcement.

The operator's reliance upon section 307 of the Amendments for the proposition that the Secretary of the Interior had no authority to issue regulations except as necessary for the transfer of functions, is not credible. (Operator's initial brief pp. 12-13; reply brief p. 10). In the first place, the operator does not recognize that section 307 refers to both the Secretary of Labor and the Secretary of the Interior. Clearly, this section is meant to deal with the transfer of power from one to the other, but tucked away as it is, in a section dealing with the effective dates of the new law, it is nothing more than another housekeeping provision that does not affect the proper interpretation of 301(b)(1) and (c)(2), supra. If Congress wanted to divest the Secretary of the Interior of all regulatory authority upon enactment of the Amendments, it could have expressly said so which it did not.

As the operator points out, the Mine Act followed the Coal Act in imposing a periodic reporting requirement with respect to accidents and investigations. (Operator's initial brief pp. 7-8; reply brief p. 10). The operator is correct that the Conference Report states that in so doing Congress adopted the House rather than the Senate version. S.Rep. No. 95-461, 95th Cong., 1st Sess., at 45 reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977, at 1323. (Operator's brief p. 8). But I do not see how this assists the operator. The statutory history merely indicates that Congress continued to require periodic reporting of these events by operators. It does not support the assertion that after enactment of the Mine Act the Secretary of the Interior lost all authority to issue regulations regarding reporting. On the contrary, Congress' decision to maintain reporting requirements militates against such a conclusion.

The operator's reliance upon the directive in the Mine Act that the Secretary of Labor adopt regulations to implement section 115 regarding training of miners, is misplaced. (Operator's brief pp. 8-9). As noted above, the operator acknowledged that the reporting provisions of the Mine Act closely follow those in the Coal Act. The opposite is true of section 115 of the Mine Act. That section was a wholly new innovation. Nothing comparable existed under the Coal Act where training requirements were limited to (1) a general directive for training of "certified" and "qualified" persons as defined, (2) training in the use of self-rescue devices, (3) and programs for operators and miners in avoidance and prevention of accidents and

unhealthful conditions and in the use of methane detection devices. Sections 317(i), 317(n) and 502. 30 U.S.C. §§ 377(i), 377(n), 952 (repealed 1977). In requiring the Secretary of Labor to adopt regulations for training, Congress intended to insure the prompt implementation of section 115 which had no predecessor in the prior law. This is totally different from reporting requirements where the new law emulated the old.

Moreover, adoption of new training requirements cast no doubt upon the Secretary of the Interior's authority to issue regulations on the matter in the interim period. On the contrary, in discussing the new provision regarding training and the need for regulations, the Senate Report expressly recognized the Secretary of the Interior's authority to issue regulations on that matter in the period between the enactment date and the effective date stating as follows:

> The Committee is aware that MESA has prepared mandatory training regulations for coal miners and that final rules are likely to be promulgated before the effective date of this Act. To the extent that the Secretary of the Interior's training regulations applicable to coal mines fulfill the requirements of this provision, they should continue in effect. If such standards need amendment to comply with the statutory requirements of this bill, only those deficient areas need be amended.

S. Rep. No. 95-181, supra, pp. 50-51, Legislative History, supra, pp. 638-639.

Thus it was recognized that the Secretary of the Interior had the power under the 1969 Act to issue training regulations during the period before the 1977 Act became effective, although the 1969 Act had no general training provisions. It must be held therefore, that the Secretary a fortiori had such regulatory authority with respect to reporting regulations inasmuch as the 1969 Act already contained reporting requirements.

The operator's additional argument that a penalty cannot be assessed under Part 50 because it is a regulation and not a mandatory standard must be rejected. (Operator's initial brief pp. 16-21; reply brief pp. 13-15). The original House and Senate bills imposed penalties for violations of regulations. Legislative History, supra at pp. 157-158, 235-236. Admittedly, specific mention of penalty assessments for regulatory violations was deleted during the legislative process. Legislative History, supra. at pp. 402-403, 1123. However nothing in the legislative history supports the operator's contention that Congress expressly rejected civil penalties for regulatory violations. As the

operator acknowledges, Congress was not satisfied with the Department of the Interior's administration of mine safety under the 1969 Act. (Operator's brief pp. 5-6, 10). Much of its unhappiness was directed at the civil penalty process. S. Rep. No. 95-181, supra at pp. 40-46; Legislative History, supra, at pp. 628-634. Indeed, creation of this Commission was one of the means devised by Congress to improve assessment and adjudication of civil penalties under the 1977 Act. Nothing would be more destructive of Congress's stated intention to promote mine health and safety than to interpret legislative history which is essentially silent on the matter, so as to create a breach in enforcement by not levying penalties for regulatory violations. It makes far more sense to hold that since violations of regulations are violations of the statute under which they are issued, Congress omitted language regarding penalties for violations of regulations because it was mere surplusage. See decision of the Interior Board of Mine Operations Appeals in United States Steel Corporation, 8 IBMA 230 (December 21, 1977). Also, as the Solicitor points out, section 110(a) of the Mine Act must be read in concert with sections 104(a) and 105(a) which provide for issuance of citations for violations including those of a regulation and for notification to the operator of a penalty assessment for each such citation. (Solicitor's brief p. 11). See, UMWA v. Dole, 870 F.2d 662, 668 n.8 (D.C. Cir. 1989). I do not accept the operator's scenario whereby Part 50 violations could be subject to penalty assessments only after issuance of a withdrawal order under section 104(b) for failure to abate. (Operator's brief p. 18). There is nothing to indicate Congress intended such a convoluted procedure.

The remainder of the assertions of both parties deal with the merits of the case. I cannot decide these issues absent some kind of record whether comprised of stipulations or evidence after a hearing. Since all these cases apparently involve the same issue it may be that the parties can agree that a decision in one case can govern all. The parties should confer regarding these matters.

In light of the foregoing, it is ORDERED that the operator's motion to dismiss be DENIED.

It is further ORDERED that the previously entered Order of Stay for Discovery be LIFTED and that the discovery requests be complied with within 35 days from the date of this order.

It is further ORDERED that counsel confer with respect to the matters set forth above.

It is further ORDERED that counsel appear at a non-evidentiary hearing to discuss the most expeditious manner of

considering the remaining issues on Tuesday, March 13, 1990, at 10:00 a.m., Federal Mine Safety and Health Review Commission, Office of Administrative Law Judges, Two Skyline Place, Suite 1000, 5203 Leesburg Pike, Falls Church, Virginia 22041.

Paul Merlin
Chief Administrative Law Judge

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