JANUARY 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

JANUARY 1991

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

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 90-141. (Judge Broderick, November 26, 1990)

Roy Farmer and others v. Island Creek Coal Company, Docket No. VA 91-31-C. (Judge Broderick, December 20, 1990)

Secretary of Labor on behalf of Michael Price and Joe John Vacha, and UMWA v. Jim Walter Resources, Inc., Docket No. SE 87-128-D. (Judge Broderick, December 20, 1990)

Donald Northcutt, Gene Myers and Ted Eberle v. Ideal Basic Industries, Inc., Docket No. CENT 89-162-DM. (Judge Morris, Interlocutory Review of a December 13, 1990 order.)

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

Dennis Wagner v. Pittston Coal Group, etc., Docket No. VA 88-21-D. (Judge Broderick, November 26, 1990)

Featherlite Corporation v. Secretary of Labor, MSHA, Docket No. CENT 88-113-RM, etc. (Judge Cetti, December 13, 1990)

Secretary of Labor, MSHA v. Tunnelton Mining Company, Docket No. PENN 90-17. (Judge Fauver, December 14, 1990)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 90-44
BLACKFOOT COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On December 18, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Blackfoot Coal Company ("Blackfoot") in default for its failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed Blackfoot a civil penalty of $4,273, as proposed by the Secretary. On January 14, 1991, Blackfoot filed a petition for discretionary review ("PDR") of the judge's default order, requesting that the case be reopened. For the reasons explained below, we vacate the judge's default order and remand for further proceedings.

The record discloses that inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Blackfoot a section 104(d) citation, a section 104(d)(1) order, and three section 104(a) citations alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Blackfoot filed a "Blue Card" request for a hearing before this independent Commission. On August 3, 1990, counsel for the Secretary filed a proposal for penalty assessments, a copy of which was sent to: "Blackfoot Coal Company, Inc.[,] Attn: Gary A. Horn, President[,] P.O. Box 395[,] Nora, VA 24222." When no answer to the penalty proposal was filed, the judge, on September 17, 1990, issued a show cause order directing Blackfoot to file an answer within 30 days or show good reason for its failure to do so. The order was sent to Horn at the same Nora, VA address. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. §§ 2700.5(b), 2700.28.

In its PDR, Blackfoot states that the Secretary's proposal for penalty assessments and the judge's show cause order were sent to an incorrect former address of Blackfoot, that Horn was never president of Blackfoot, and that Horn was not employed by Blackfoot at the time the proposal and show

cause order were received by him, although he had previously been employed by Blackfoot. Blackfoot asserts that mail incorrectly addressed to it has sometimes been delivered to Horn because the postman thought Horn still worked for Blackfoot. The PDR, filed by Blackfoot's president, Sam Blankenship, states Blackfoot's correct address as P.O. Box 1802, Bristol, VA, 24203.

The PDR raises issues concerning the correct address for service on Blackfoot and whether an authorized individual received service on behalf of Blackfoot. It also appears, according to the PDR, that Blackfoot responded to the Secretary's discovery requests in this proceeding. In light of these considerations, we conclude that the operator should have the opportunity to present its position to the judge, who shall determine whether ultimate relief from default is warranted. See, e.g., Patriot Coal Co., 9 FMSHRC 382, 383 (March 1987).

For the foregoing reasons, Blackfoot's PDR is granted, the judge's default order is vacated, the civil penalty is vacated, and the matter is remanded to the judge for appropriate proceedings. Blackfoot is reminded to file documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of any of its filings. 29 C.F.R. §§ 2700.5(b), 2700.7.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 89-6
METTIKI COAL CORPORATION	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (1988)("Mine Act"), the issue before us is whether Commission Administrative Law Judge William Fauver properly found that its roof control plan required Mettiki Coal Corporation ("Mettiki") to replace roof support posts that were removed in order to install longwall equipment. Judge Fauver found that the plan required replacement of the posts and that Mettiki violated its roof control plan, and 30 C.F.R. §§ 75.220 and 75.303(a). He assessed a civil penalty in the sum of $200 against Mettiki for the violations alleged in Order Nos. 3115846 and 3115848. [1] 12 FMSHRC 80, 89-90 (January 1990)(ALJ). For the reasons that

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[1] Section 75.220, entitled "Roof control plan," provides in pertinent part:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered....

Section 75.303(a) provides in pertinent part:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal

follow, we affirm the judge's decision.

Mettiki operates the Mettiki Mine, an underground coal mine located in Garrett County, Maryland. On July 13, 1988, Joseph Darios, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a quarterly examination of the mine. Inspector Darios was accompanied by Alan Smith, the company representative.

Upon arriving in the L-4 longwall set-up entry, Inspector Darios observed that the area had been mined to widths greater than 18 feet, and that roof support posts were missing from various locations in the L-4 entry and the Nos. 5 and 6 crosscuts. He measured widths ranging from 20 feet 6 inches to 23 feet 9 inches in the areas where the posts had been removed. In addition, he noticed that the roof in the cited area was "scaly," in that there were fractures in the immediate roof, but not in its upper strata. Inspector Darios also observed that the pan line, the conveyor system for removing the coal from the longwall face, had been installed, but that neither the longwall shields nor shearer had been installed. Inspector Darios stated that he overheard two Mettiki employees state that the posts had been removed on July 11, 1988, while the pan chains were being pulled around a turn into the area. Tr. 451.

The roof control plan that was in effect when the first 155 feet of the L-4 set-up entry was mined (the "old plan"), requires a single row of posts on a maximum of 5-foot centers to be installed when the set-up entry is sheared to 21 feet so as "to reduce the entry width to a maximum of eighteen feet." Joint Exh. 5; Gov. Exh. 13; Tr. 434. The roof control plan subsequently adopted by Mettiki and applicable to the remainder of the cited area (the "new plan"), allows shearing of entries and connecting crosscuts to maximum widths of 23 feet, but requires a double row of posts to be installed on a maximum of 5-foot centers "to reduce the width of the proposed sheared area to 18-feet wide maximum prior to shearing." Gov. Exh. 13; Joint Exh. 4, p. 31; Tr. 434-35. Both versions of the plan allow removal of the posts as the longwall pan, shields and shearer are installed. [2] Joint Exh. 4, p. 31.

> mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. ... Each such examiner shall ... examine and test the roof, face, and rib conditions in such working section ... and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. ... Each such mine examiner shall also record the results of his examination....

[2] The new plan additionally provides that as "the longwall pan, shields and shearer are installed, posts will be removed as necessary." (emphasis added).

Based upon his observations, Inspector Darios issued Order No. 3115846 to Mettiki pursuant to section 104(d)(2) of the Mine Act, alleging that Mettiki violated its roof control plan and section 75.220, and further alleging that the violation was significant and substantial and caused by Mettiki's unwarrantable failure to comply with the standard. Gov. Exh. 12. Inspector Darios subsequently modified that order to designate which conditions were violative of Mettiki's old roof control plan, and which conditions were violative of Mettiki's new roof control plan. Tr. 407-08; Gov. Exh. 13.

Inspector Darios also issued Order No. 3115848, pursuant to section 104(d)(2) of the Act, alleging a violation of 75.303(a) because he believed that suitable preshift examinations of the L-4 set-up entry and Nos. 5 and 6 connecting crosscuts were not conducted on July 12 and 13, 1988. He based this conclusion on the fact that the last work day in that area was July 11, 1988, and that the conditions cited in Order No. 3115846 were not recorded in the July 12 and 13, 1988, preshift examination records. Order No. 3115848. Inspector Darios further found Mettiki's alleged violation of section 75.303(a) to be significant and substantial and caused by Mettiki's unwarrantable failure to comply with the standard. Id.

The orders were terminated when posts were replaced in the cited locations and when an adequate preshift examination of the cited areas was conducted and the allegedly hazardous conditions were entered in Mettiki's preshift examination records.

The Secretary proposed a civil penalty of $1100 for the alleged violation of section 75.220 and Mettiki's roof control plan, and $1000 for the alleged violation of 75.303(a). Mettiki contested the validity of the withdrawal orders, the associated special findings, and the civil penalties proposed by the Secretary of Labor.

At the evidentiary hearing, the parties agreed to terminate the hearing prior to Mettiki's presentation of its case, to stipulate the existing record, and to limit the issues to be decided. Tr. 470-72. It was agreed that the only liability issue remaining in dispute was whether Mettiki's roof control plan required Mettiki to replace posts that were removed in order to install longwall equipment. Tr. 470. The parties further agreed that if the judge determined that Mettiki's plan required replacement of the posts, his holding would be dispositive of both orders and the orders would be modified to section 104(a) citations with reduced findings of negligence and gravity. Tr. 471-73. Finally, the parties agreed that the opinion evidence of Inspector Darios to the effect that the plan did not require replacement of the posts would not be binding on the government. Tr. 471-72.

Before the judge, Mettiki contended that the Secretary failed to meet her burden of establishing that the provision allegedly violated was part of its approved and adopted plan and that the condition cited by Inspector Darios violated any provision of that plan. Mettiki argued that the plain wording of the roof control plan did not proscribe the cited conditions because it did not expressly require replacement of the posts. Mettiki contended that, as a result, it did not receive adequate notice that it was expected to replace

posts which had been removed in order to install longwall equipment. Mettiki argued alternatively that, even if its plan could be read to require the replacement of posts removed to install longwall equipment, the Secretary's enforcement actions were nonetheless invalid because Mettiki had not yet installed the longwall shields or shearer.

The judge rejected Mettiki's arguments and interpreted Mettiki's roof control plan to require Mettiki to replace the posts cited as missing. The judge's interpretation of Mettiki's roof control plan emphasized that the plan allows the operator to shear set-up entries and crosscuts an additional five feet to a maximum of 23 feet only after a double row of posts on five-foot centers have been installed. 12 FMSHRC at 89. The judge found that the stated purpose of requiring the double row of posts is to maintain an 18 foot width before the entries and crosscut are widened to 23 feet.

The judge interpreted "as" in the phrase "[a]s the longwall pan, shields, and shearer are installed, posts will be removed as necessary," to mean "during the time that" or "while." Id. The judge concluded that the plan allows removal of the posts only during installation of the pan, shields, and shearer. The judge also stated his belief that use of the phrase "as necessary" in the plan further demonstrates that removal of the posts should be minimized.

The judge also relied upon provisions in the plan setting forth the order in which steps are to be performed so that the entries and crosscuts are narrowed by and supported with posts at each step. The judge emphasized that the plan provision stating that the "entry and crosscut will be sheared to 23 feet wide and supported to plan" read in conjunction with the provision allowing removal of posts only when installation of the longwall equipment is occurring, supports a conclusion that posts removed in order to install longwall equipment must be replaced. The judge explained that a contrary interpretation would render the cutting and roof support procedures superfluous. Additionally, the judge stated that a contrary interpretation would create a dangerous situation in which posts could be absent indefinitely. Id.

Consistent with the parties' stipulations, after the judge determined that Mettiki's roof control plan required replacement of the posts and that, consequently, Mettiki had violated its plan and sections 75.220 and 75.303(a), he modified the orders to citations issued pursuant to section 104(a) of the Mine Act. 12 FMSHRC at 90. The judge modified the allegations of negligence in the orders from the original designation of high to moderate, and modified the allegations of gravity in both orders by deleting the significant and substantial designations. Id. Finally, the judge assessed a civil penalty of $100 for each of the two violations.

Mettiki's petition for review challenged the judge's finding that Mettiki's plan requires replacement of posts removed to install longwall equipment. Mettiki essentially argues, as it did before the judge, that its plan does not expressly prohibit the conditions cited in Order No. 3115846, and that the Secretary cannot disregard the express terms of the plan in order to require replacement of the posts without employment of the plan amendment

process. Mettiki asserts that it did not receive adequate notice that replacement of the posts was required, and that even if such a requirement could be read into the plan, the orders are nonetheless invalid because Mettiki was in the process of installing longwall equipment. We disagree.

It is a well settled rule of construction that a written document must be read as a whole, and that particular provisions should not be read in isolation. U.S. v. Morton, 467 U.S. 822, 828 (1984); rehearing den., 468 U.S. 1226 (statute); Washington Metro v. Mergentime Corp., 626 F.2d 959, 961 (D.C. Cir. 1980) (contract). If the provision allowing removal of the posts is read in isolation from the provisions requiring that entries and crosscuts be supported with posts to reduce the width of these areas to a maximum of 18 feet, one might well reach the conclusion that the posts need never be replaced. Such a reading, however, would result in a contradiction between the provisions allowing removal of the posts and the provisions requiring support and would render the support phrases superfluous. It is well established that written provisions of the same document must be read and interpreted consistently with each other and that effect must be given to each part of a document to avoid making any word meaningless or superfluous. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (statute); 17 Am Jur. 2d Contracts §§ 258-59 (1964).

We find that the judge properly interpreted Mettiki's roof control plan in accordance with these settled canons of construction. We are unpersuaded by Mettiki's assertion that the Secretary failed to meet her burden of proving that Mettiki's plan required replacement of the posts because Inspector Darios testified that the posts did not have to be replaced once they were removed. The parties agreed to consider Inspector Darios' opinion testimony irrelevant and non-binding on the Secretary. Tr. 443, 471-72; M. Br. at 9. We also are unconvinced by Mettiki's argument that it did not receive adequate notice that it was required to replace posts following their removal. If Mettiki's plan is read as a whole, avoiding conflicts between provisions and without rendering provisions superfluous, the plan clearly requires that a maximum width of 18 feet must be maintained and that this plan requirement can be exceeded only when posts are temporarily removed as necessary to install the specified longwall equipment. Furthermore, Mettiki had notice of other mandatory standards pertaining to roof control which recognize and seek to prevent the hazards associated with excessive widths of entries and crosscuts. See, i.e., 30 C.F.R. § 75.203(a), 75.203(e), and 75.206(a).

We similarly reject Mettiki's argument that the subject enforcement action was nonetheless invalid since Mettiki had not yet completed installation of the longwall equipment because, although it had installed the longwall pan, it had not yet installed the shields and shearer. Mettiki essentially argues that if the plan requires replacement of the posts, it should be read to require replacement of the posts only after all three components of longwall equipment have been installed. The Secretary responds by stating that Mettiki's argument is unavailing in light of evidence in the record that, in this instance, installation of the longwall equipment was not a continuous, uninterrupted process. S. Br. at 8. The judge did not directly consider Mettiki's argument that the orders were invalid because Mettiki was in the process of installing the equipment. Instead, his determination that

Mettiki's plan required replacement of posts removed to install longwall equipment was dispositive of this issue. 12 FMSHRC at 89-90. His decision is consistent with the parties' stipulation that "the only issue remaining on liability ... is whether Mettiki's roof control plan required Mettiki to replace posts that were removed in order to install longwall equipment." 12 FMSHRC at 88. The parties further agreed that, if the judge decided "that the roof control plan is [to be interpreted] as MSHA contends, then ... the 104(d)(2) order would be converted into a 104(a) citation, with reduced allegations as to gravity and negligence." Tr. 472. Thus, in view of these agreements between the parties, we need not determine the period of time during which the posts could remain absent before Mettiki was required to replace them in accordance with its roof control plan.

Finally, we reject Mettiki's argument that Order No. 3115848 alleging a violation of section 75.303(a) should be vacated because the Secretary allegedly failed to introduce the order into evidence or present evidence regarding its issuance. At the evidentiary hearing, Mettiki agreed that the judge's determination of whether Mettiki's plan required replacement of the roof support posts would be dispositive of both orders. Tr. 472-73. We believe, therefore, that the judge properly held Mettiki to the terms of its agreement.

We conclude that the judge correctly interpreted Mettiki's roof control plans to require replacement of roof support posts which are removed in order to install longwall equipment. Accordingly, we affirm the judge's decision.

Richard V. Backley, Acting Chairman

Joyce Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-116
	:	A.C. No. 15-16162-03529
v.	:	
	:	Docket No. KENT 90-162
BEECH FORK PROCESSING INCORPORATED,	:	A.C. No. 15-16162-03527
Respondent	:	
	:	Docket No. KENT 90-163
	:	A.C. No. 15-16162-03528
	:	
	:	Mine No. 1

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Craig S. Preece, Comptroller, Beech Fork Processing, Inc., Lovely, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with twenty (20) violation of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. The respondent filed timely contests and hearings were held in Pikeville, Kentucky. The parties waived the filing of posthearing briefs, but I have considered all of their oral arguments made on the record during the hearings in my adjudication of these matters.

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, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these proceedings are (1) whether the cited conditions or practices constitute violations of the cited mandatory safety and health standards; (2) whether several of the cited violations were significant and substantial (S&S); (3) whether one section 104(d)(1) violation in Docket No. KENT 90-116, was unwarrantable; and (4) the appropriate civil penalty assessments to be made for the violations which have been affirmed.

Stipulations

The parties stipulated to the following (Tr. 7-8):

1. The respondent does not dispute the fact of violations in these proceedings.

2. The history of prior violations is reflected in an MSHA computer print-out (exhibit P-1).

3. The proposed civil penalty assessments for all of the violations are appropriate to the size of the mining operations conducted by the respondent.

Docket No. KENT 90-116

This case concerns one section 104(d)(1) citation and four section 104(a) citations issued by MSHA inspectors during the course of their inspections, and they are as follows:

Section 104(d)(1) "S&S" Citation No. 3369907, October 4, 1989, 30 C.F.R. § 75.316 (Exhibit P-2): "The air reaching the face in the No. 2 left brk. where the 12 CM Joy continuous-mining machine was being operated could not be measured with an approved and calibrated anemometer."

MSHA Inspector Carlos Duff confirmed that he issued the citation and he described the conditions he found which prompted him to do so. He stated that he detected less than 100 cubic feet of air per minute in the cited area which had been driven to a depth of 120 feet without establishing the required ventilation of 6,000 cubic feet a minute as provided by the ventilation plan (exhibit P-3).

Mr. Duff confirmed that he detected no methane in the area but that the absence of ventilation resulted in "real dusty" conditions which created visibility problems. He stated that the

mining machine, shuttle cars, and scoops were potential sources of ignition and in the event of any methane liberation while coal was being cut at the face there was a hazard of a fire or explosion in the event the methane reached an explosive level.

Mr. Duff confirmed that the cited condition was corrected within 20 minutes and that the violation was timely abated. Although a ventilation curtain had been installed in the area, and the respondent had a waiver allowing it to maintain the curtain 20 feet from the face, no ventilation had been established for the 120 feet area which had been driven.

Mr. Duff stated that the superintendent, or foreman, Danny Osborne, was a certified foreman and that he was required to monitor the ventilation on the section and check for methane every 20 minutes. Mr. Duff stated further that given the fact the entry had been driven for 120 feet, the lack of ventilation was not created during the shift and had to exist for at least two shifts and that Mr. Osborne did not deny that he was aware of the cited condition.

Mr. Duff confirmed that he did not check the mining machine, and he conceded that in the event the methane monitor were functioning properly and there were no permissibility violations, the gravity would be less than he found (Tr. 9-26).

Section 104(a) "S&S" Citation No. 3158954, December 18, 1989, 30 C.F.R. § 75.1103-4 (Exhibit P-4):

> The automatic fire sensor and warning device system was not properly installed on the No. 4 and 5 belt flight. The fire sensor line ended approximately 120 feet outby the No. 5 tail roller. The fire sensors on the No. 4 and 5 belts were installed at or below the bottom belt.

MSHA Inspector Foster I. Justice confirmed that he issued the citation and he described the cited conditions. He stated that the fire sensor devices were in fact installed along most of the belt line but that they were hung from a wire rope and were hanging below the belt rather than at an elevation above the belt. He stated that the foreman, Gary Sumpter, advised him that the fire sensors throughout the mine were installed in a similar fashion but that no one had previously cited the condition or said anything about it. Mr. Justice confirmed that because of the 11 foot coal height in the mine, the respondent had a problem installing the fire sensors at elevations above the belt because of the roof and mining height conditions.

Mr. Justice stated that no sensors were installed for the 120 feet at the area outby the tail roller, but they probably would have been when the belt was extended. He agreed that the

mining height and roof conditions did present an installation problem and he conceded that the condition was probably observed and not cited during prior inspections. He confirmed that the condition was timely abated and that the respondent repositioned the sensors above the belt lines.

Mr. Justice stated that since heat and smoke rises, the location of the sensors below the belt presented a hazard in that there would be a delay in alerting the miners on the section in the event of a mine fire and they could have been "smoked out" before the sensors detected any smoke. He confirmed that the belt drive motors, stop-start boxes, and electrical wiring on the belt line were potential sources of ignition. Any belt slippage or stuck rollers could have resulted in a belt fire and the eight miners on the section would have been exposed to smoke inhalation and carbon monoxide. The belt was running coal at the time he observed the conditions, and Mr. Sumpter acknowledged that he was aware of the fact that the sensors were installed below the elevation of the belt (Tr. 28-42).

Section 104(a) "S&S" Citation No. 3158955, December 19, 1989, 30 C.F.R. § 70.501 (Exhibit P-6):

> Based on the results of a supplemental noise survey conducted by MSHA on 12/18/89, the noise standard has been exceeded in the environment of the roof drill operator, occupation code 014 on the 001-0 MMU. The results obtained from a personal noise dosimeter, Mark I, property No. 108221 showed a C/T value of 169.5%.
>
> A hearing conservation plan as required by 30 C.F.R. § 70.510 shall be submitted to MSHA within 60 days from the date of this citation.

Inspector Justice confirmed that he issued the citation and he explained that he conducted a noise survey on the designated roof drill operator occupation, used an approved dosimeter, and found that the noise exposure exceeded the required level. He stated that the respondent is required to monitor the noise exposure from the equipment to insure compliance.

Mr. Justice stated that he conducted five additional noise surveys and found the noise exposure to be in compliance in those instances. He confirmed that one of the miner operators surveyed was furnished with personal hearing protection with an EAR-plug device, but that he did not determine whether the cited drill operator had such a device. He conceded that any hearing damage for excessive noise would occur over a protracted period of time. The violation was timely abated after a subsequent test determined no excessive noise level exposure for the drill operator

and the respondent timely submitted a hearing conservation plan (Tr. 42-51).

Section 104(a) "S&S" Citation No. 2982728, January 17, 1990, 30 C.F.R. § 77.216-3(a) (Exhibit P-7): "The slurry impoundment has not been examined and the instrumentation monitored by a qualified person at intervals not exceeding seven days. The last examination recorded in the book was dated 1-8-90. The last piezometer readings recorded in the book were dated 12-22-89."

MSHA Inspector Robert H. Bellamy testified that he is a mining engineer, has a degree in mining engineering from the University of Kentucky, and that he is a specialist in dam impoundments which are created for disposal of mine refuse. He confirmed that he issued the citation after determining that the coal fines slurry dam impoundment constructed and maintained by the respondent was not being examined at least every 7 days and that the piezometer instrument used to monitor the water level in the impoundment was not being monitored and checked every 7 days as required by the standard.

Mr. Bellamy confirmed that an inspection book was maintained at the mine but that it did not reflect that the required inspections and monitoring of the impoundment was being conducted and recorded. He stated that plant superintendent James Chitti was one of the three individuals qualified to inspect and monitor the impoundment and that Mr. Chitti advised him that he was "caught up in other work" or was "too busy" to perform these tasks.

Mr. Bellamy stated that the purpose of the inspection and monitoring of the impoundment is to detect any hazards which may be developing and whether or not the impoundment is being properly constructed. He described the impoundment as a 130-foot high dam covering 900 acres and confirmed that the respondent was continuing to build it up by placing refuse materials on it and that a bulldozer is at the site at all times for this purpose. He confirmed that people were living below the location of the impoundment, and that in the event of a failure of the impoundment, they would be at risk.

Mr. Bellamy confirmed that at the time of the inspection the impoundment was within the established safety factor, and that the respondent had generally been in compliance in the past with the required inspections and monitoring cycles (Tr. 52-68).

Section 104(a) "S&S" Citation No. 2982729, January 17, 1990, 30 C.F.R. § 77.216(d) (Exhibit P-8):

> The maintenance of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that drainage from the right

abutment (looking downstream) has been allowed to erode the downstream outslope of the embankment. The erosion has accumulated at the toe, partially blocking the underdrain outlet.

Inspector Bellamy confirmed that he issued the citation after observing that material at the toe of the impoundment embankment had eroded and washed down the embankment blocking the underdrain (Exhibit P-10, sketch of violative condition). The purpose of the underdrain is to relieve any excess water accumulated under the embankment, and as a result of the blockage caused by the blocking of the underdrain, the water had accumulated and was seeping from the area above the drain. If the blockage had continued, the water would not flow through the underdrain and it will accumulate in and saturate the embankment and may eventually lead to a failure of the embankment and the dam. Mr. Bellamy confirmed that the impoundment was not being maintained in accordance with the approved plan (Exhibit P-9; Tr. 68-77).

Docket No. KENT 90-162

This proceeding concerns five (5) section 104(a) citations issued on December 6, and 18, 1989, and they are as follows:

No. 3367667, 30 C.F.R. § 77.216(d) (S&S) (Exhibit P-11).

The construction of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that the landslide debris and loose soils are not being removed from the left abutment prior to the placement of coarse refuse.

Inspector Bellamy confirmed that he issued the citation after finding that the mine refuse material deposited on the impoundment embankment was being deposited on top of other loose soils and debris which had slid down the embankment during a prior "landslide" in the area. The landslide materials were unsuitable for compaction and should have been removed from the area before the refuse materials used to construct the impoundment were deposited. Mr. Bellamy described the area as 150 by 50 feet, and he confirmed that 1 or 2 months prior to his inspection he had discussed the construction methods with Mr. Chitti and informed him that he could remove the landslide materials as the dam was being constructed but that he could not cover it with the refuse materials used to construct the dam.

Mr. Bellamy stated that some of the landslide material had been cleaned out prior to the day of his inspection, but that he could not recall what Mr. Chitti may have said about the refuse materials which had been deposited over the landslide area which he observed. Mr. Bellamy confirmed that the failure to remove

the unstable landslide materials would cause seepage in that area and would result in a "differential settlement" of the area and a failure in that relatively small area. He did not believe that any major failure of the impoundment would have occurred at the time of the inspection but that a "worst case" scenario would be a possible failure of the embankment if the condition were not corrected. He considered the cited area to be a "weak zone" in the dam embankment. He believed that construction work on the impoundment began approximately a year or so prior to the time of his inspection. He did not know when the initial landslide in question occurred, but confirmed that he saw evidence of the slide when the dam was being constructed at an earlier time. Mr. Bellamy did not believe that the landslide itself was a threat to the impoundment (Tr. 80-89).

No. 3367668, 30 C.F.R. § 77.216(d) (Non S&S) (Exhibit P-12).

> The maintenance of the slurry impoundment is not being implemented in accordance with the plan approved by the district manager in that refuse has been allowed to block the main underdrain outlet. The refuse prohibits free flow from the underdrain.

The respondent withdrew its contest with respect to this citation and agreed to pay the proposed civil penalty assessment. Inspector Bellamy confirmed that the citation is distinguishable from the prior impoundment citation which he issued (Exhibit P-8), in that the water which was backed up in the blocked underdrain was seeping through the blocked drain and was not backed up and seeping through the embankment area above the underdrain.

No. 3158951, 30 C.F.R. § 75.1722(b) (S&S) (Exhibit P-13). "The No. 4 conveyor head roller was not adequately guarded a distance to prevent a person from reaching over the guard and becoming caught between the belt and conveyor head roller."

Inspector Justice confirmed that he issued the citation after observing that the guard over the conveyor head roller was insufficient to prevent someone from reaching in and contacting the pinch point. He stated that the head roller was partially guarded with pieces of metal but that it did not completely cover the pinch points. He believed that the cited condition was obvious.

Mr. Justice stated that while miners are prohibited from cleaning up, greasing, or performing other work around a moving conveyor, it is common knowledge that they do. If there is any slippage of the conveyor belt roller, it is a common practice to throw rock dust on the roller to dry it out and anyone doing this would be exposed to a hazard of getting their arm or had caught in the unprotected pinch point. He was aware of an incident at

another mine where a miner had his arm torn off when it was caught in an unguarded head roller while he was throwing rock dust into it. He also believed that anyone cleaning up or shoveling in the area could readily contact the pinch point if they were to fall into it and contact the pinch point. If this were to occur, a serious injury would result.

Mr. Justice had no knowledge that the respondent required anyone to rock dust the head roller, but it was his belief that this is done anyway regardless of any instructions to the contrary. The condition was abated at the time he next returned to the mine to terminate the citation and the head roller was protected with an adequate guard (Tr. 90-100).

No. 3158952, 30 C.F.R. § 75.1722(b) (S&S) (Exhibit P-14). "The No. 4 conveyor tail pulley was not adequately guarded to prevent a person from coming in contact with the conveyor tail pulley and belt. The tail roller was guarded with a piece of belt across the back of the tail roller."

Inspector Justice confirmed that he issued the citation after observing that the conveyor tail pulley was not adequately guarded to prevent a person from contacting the pinch point between the pulley and the belt. He stated that the tail pulley was guarded with a piece of belt material or a "flap" at the back of the pulley but that it did not cover the ends or sides of the pulley at the pinch points. He did not believe that the belting material, which was not rigid and could easily be pushed aside, constituted adequate guarding.

Mr. Justice confirmed that the hazards presented by the inadequate guard were the same as those which were present with respect to the previous citation which he issued for an inadequate guard on the conveyor head roller during the same inspection (Exhibit P-13; Tr. 100-105).

No. 3158953, 30 C.F.R. § 75.1715 (S&S) (Exhibit P-15). "The check-in and check-out system was not established at this mine. There was no positive identification of the persons underground who portal at the 1-A portal."

Inspector Justice confirmed that he issued the citation after determining that several miners who were working underground were not identified or "tagged" on the check-in and check-out board provided at the mine. He explained that seven miners who were assigned to work at a new mine area and who were checked in at one area were in fact working at another area, and that several miners working underground were not identified on the board as being underground.

Mr. Justice explained the required check-in and check-out system and stated that the identification tag which a miner

carries on his belt must conform to the one maintained on the board. He was aware of a prior incident at another mine where a miner who had worked a double shift had not checked in and was unaccounted for after a rock fell on him and he could not move. By the time rescuers reached him, he had died after being underground for 16 hours. Mr. Bellamy stated that miners are required to check in and out at the end of their shift in order to account for everyone who may still be underground at the end of their normal work shift (Tr. 105-114).

Docket No. KENT 90-163

This case concerns ten (10) section 104(a) citations, and they are as follows:

Section 104(a) non-"S&S" Citation No. 9979793, November 13, 1989, 30 C.F.R. § 70.207(a):

> The mine operator did not take five (5) valid respirable dust samples from the designated occupation 036 on MMU I.D. 003-0, for the bimonthly period of September-October as shown in the attached Advisory No. 010, dated November 7, 1989. Four (4) valid samples were received and credited to this bimonthly sampling cycle. Management shall collect and submit five (5) valid respirable dust samples from the Designated Occupation 036 on MMU I.D. 003-0. These samples shall be received by the Pittsburgh Respirable Dust Processing Laboratory on or prior to the termination due date listed on this citation.

Section 104(a) non-"S&S" Citation No. 3364696, January 5, 1990, 30 C.F.R. § 77.1109(d), which states: "A fire extinguisher was not provided for the main fan installation."

The contestant withdrew its contests with respect to Citation Nos. 9979793 and 3364696, and agreed to pay the proposed civil penalty assessments for these violations (Exhibits P-16 and P-19).

Section 104(a) "S&S" Citation No. 3364694, January 3, 1990, 30 C.F.R. § 75.503: "The roof bolter being used on the 002-0 section was not being maintained in a permissible condition. When checked with an approved device, the control panel cover had an opening in excess of .006 of an inch." (Exhibit P-17)

MSHA Inspector Lewis H. KlayKo confirmed that he issued the citation after conducting a permissibility inspection of the roof bolter. He used a feeler gauge and found an opening in excess of .006 of an inch in the bolter control panel cover. This was in excess of the required permissible opening of .004 of an inch.

Mr. KlayKo confirmed that he detected no methane in the cited area. However, the roof bolter was in operation and the area was dusty. Since there is always a chance of hitting a pocket of methane in a dusty environment, a spark or an arc through the control panel cover opening could ignite the methane and the dust could contribute to a methane ignition. If this were to occur, the miners working in the area would be exposed to lost work days and restricted duty injuries.

Mr. KlayKo stated that the respondent is required to conduct weekly inspections of its electrical equipment, including the roof bolter. He believed that the cited condition should have been detected during such an inspection or through the regular maintenance of the equipment. He stated that foreman Ted McGinnis informed him that he was having problems on the section and that he had a man off sick and was behind on his electrical maintenance of the equipment. Mr. KlayKo had no reason to dispute this, and he indicated that the maintenance of the equipment was "maybe not quite up to snuff."

Mr. KlayKo confirmed that the condition was abated within 15 minutes and that he had experienced no prior problems with the respondent with respect to permissibility violations other than the citations which he issued in this case. He also confirmed that the openings which he found in all of the cited equipment probably resulted from some maintenance work where the cover panels were not tightened sufficiently after they were removed and replaced (Tr. 120-125).

Section 104(a) "S&S" Citation No. 3364695, January 3, 1990, 30 C.F.R. § 75.503: "The Joy miner being used on the 002-0 section was not being maintained in a permissible condition. When checked with an approved device, the master control panel cover had an opening in excess of .006 of an inch. (Exhibit P-18)."

Inspector KlayKo confirmed that he issued the citation after checking the Joy continuous-mining machine master control panel with a feeler gauge and finding an opening in excess of .006 of an inch, which was in excess of the required permissible opening. The miner was cutting coal at the face at the time of his inspection, and it was backed out so that he could check it.

Mr. KlayKo confirmed that the hazards presented by the violation were more serious than those presented by the previous citation concerning the non-permissible roof bolter because the miner was cutting coal at the face and that a sudden release of methane could result in flame coming out of the control panel cover opening and causing an ignition which would endanger the seven men working the section.

Mr. KlayKo confirmed that he detected no methane and had no knowledge of any prior methane ignitions in the mine. He also confirmed that the violation was abated in 15 minutes and that Mr. McGinnis' explanation for the existence of the condition was the same as the one for the cited roof bolter (Tr. 125-129).

Section 104(a) "S&S" Citation No. 3364697, January 5, 1990, 30 C.F.R. § 77.1605(a), which states as follows: "The Caterpillar dozer S/N 92V12890, had broken windows in both doors of the cab." (Exhibit P-20).

Inspector KlayKo confirmed that he issued the citation after finding cracks in the windows of both doors of the cited bulldozer which was pushing coal on a surface storage pile. He stated that the dozer operator was not wearing any eye protection and he believed that a sliver of glass could have flaked off the cracked glass because of the vibration of the dozer while it was operating and found its way to the eyes of the operator injuring him. He believed that any sliver or flake of glass could have fallen on the gloves of the operator and that he could have inadvertently rubbed it in his eyes.

Mr. KlayKo believed that the condition existed for "a few days" and that the foreman or the equipment operator should have observed the condition and taken corrective action. He stated that foreman Chitti offered no explanation for the condition, and Mr. KlayKo indicated that the surface areas, including the equipment, was required to be preshifted. He also confirmed that the windshield was in good condition, and that the cracked door windows were safety glass. The violation was timely abated and the respondent replaced the cracked windows (Tr. 129-135).

Section 104(a) "S&S" Citation No. 3364698, January 5, 1990, 30 C.F.R. § 77.1605(b): "The International end loader Model H-90, used to spread sludge on the haul road was not equipped with adequate park brake. It would not hold when set." (Exhibit P-21).

Inspector KlayKo confirmed that he issued the citation after inspecting the cited end loader and finding that the parking brake would not hold when it was engaged and tested on a 5 to 7 degree grade. The loader was loading slag, or limestone rock and gravel, on trucks which were spreading it on a haulage road and the loader was also used to spread some of this material. Mr. KlayKo stated that the foot brakes were in good condition, and that the front bucket is often lowered to the ground to serve as an additional braking device.

Mr. KlayKo stated that the haul road was approximately 50 feet wide, and while there were other steeper grades along the road, the end loader would not be operated in those areas. He believed that the inadequate parking brake presented a hazard in

the event the operator decided to stop the loader with the engine running and got out to clear some debris from the roadway. If this occurred, the loader would roll back and possibly strike some of the trucks or the drivers who were out of their trucks while working on the roadway.

Mr. KlayKo stated that the equipment operator is required to check the brakes before operating the loader and to report any inadequate brake condition to his foreman. He confirmed that the operator of the loader informed him (KlayKo) that the parking brake was not working. Mr. KlayKo also confirmed that the equipment operator is required to make a maintenance report but that he did not check any such reports.

Mr. KlayKo stated that a possibility of an accident existed, and he confirmed that a loader operator would not normally park the machine on a grade. He also indicated that the parking brake may have malfunctioned during the course of the working shift (Tr. 135-146).

Section 104(a) "S&S" Citation No. 3364699, January 5, 1990, 30 C.F.R. § 77.400(c), states as follows: "The guards on the refuse conveyor belt drive had been removed and not replaced." (Exhibit P-22).

Inspector KlayKo confirmed that he issued the citation after finding that the guards on the refuse conveyor belt drive had been removed and not replaced. He observed the guards about 3 feet from the belt which was running, but he saw no one working in the area. He stated that he had walked by the belt a day or two earlier and the guards were removed, but since the belt was not running at that time he assumed that it was down for maintenance and did not issue a citation.

Mr. KlayKo conceded that subsection (d) of section 77.400, was more appropriate than subsection (c), and without objection, the petitioner was allowed to amend its pleadings to conform to its evidence and to reflect a citation of subsection (d) rather than (c).

Mr. KlayKo stated that foreman Chitti informed him that a roller had probably been changed out and that someone had neglected to replace the guards. Mr. KlayKo believed that the belt should have been preshifted, and he believed that anyone cleaning or greasing the belt while it was running could contact the unguarded pinch points and suffer serious injuries. The guards were reinstalled the same day, and Mr. KlayKo terminated the citation when he next returned to the mine on January 8, 1990 (Tr. 146-153).

Section 104(a) "S&S" Citation No. 3364700, January 8, 1990, 30 C.F.R. § 75.503: "The Joy miner being used on the 001-0

section was not maintained in a permissible condition. When checked with an approved device, the trailing cable junction box cover had an opening in excess of .008 of an inch." (Exhibit P-23).

Section 104(a) "S&S" Citation No. 3515144, January 9, 1990, 30 C.F.R. § 75.503: "The roof bolter being used in the 001-0 section was not being maintained in a permissible condition. When checked with an approved device, the cover for the lights junction box had an opening in excess of .009 of an inch." (Exhibit P-24).

Inspector KlayKo confirmed that he issued the permissibility violations after checking the miner machine and roof bolter with a feeler gauge and finding openings in the miner trailing cable junction box and the roof bolter lights junction box greater than permissible. The roof bolter opening was the largest that he has ever found. He confirmed that the hazards presented by the violations were the same as the previous permissibility violations which he issued, and that the miner and bolter were both operating immediately prior to his inspecting them.

Mr. KlayKo stated that foreman McGinnis "felt bad" about the violations and corrected them immediately within 15 minutes. Mr. KlayKo confirmed that his inspection was his first inspection visit at the mine and he was not aware of any prior compliance problems at the mine (Tr. 153-158).

Section 104(a) "S&S" Citation No. 3515145, January 9, 1990, 30 C.F.R. § 77.205(e), states as follows: "The steps to the parts trailer on the surface area of the 001-0 section was not provided with handrails." (Exhibit P-25).

Inspector KlayKo confirmed that he issued the citation after he observed that the steps at the parts trailer were not provided with hand rails. He stated that there were four steps leading up to the trailer interior. He believed that the steps were substantially constructed wooden steps approximately 40 inches wide and 10 inches deep. The highest step leading into the trailer was approximately 48 inches above ground level.

Mr. KlayKo believed that the lack of hand rails presented a slip and fall hazard. Miners who would visit the trailer to obtain parts could possibly slip on the stairs during the winter season if they were frozen. The ground conditions near the steps were wet and muddy and the freezing and thawing of the ground would contribute to the slipping conditions since the materials would be deposited on the steps. In the event someone slipped on the steps they would have nothing to hold onto to break their fall. If they were to slip off the stairs they could suffer a possible broken leg, back, or shoulder.

Mr. KlayKo stated that foreman McGinnis advised him that the lack of handrails was an oversight and that he would install them immediately. The condition was corrected and handrails were installed on both sides of the stairway (Tr. 158-166).

Findings and Conclusions

Fact of Violations

As previously noted, the respondent has stipulated that all of the conditions and practices cited by the inspectors in these proceedings constitute violations of the cited mandatory safety or health standards, and it has withdrawn its contests with respect to three of the violations (Citation Nos. 3367668, 9979793, and 3364696). Further, the respondent has presented no testimony or evidence to rebut the credible testimony of the inspectors in support of the violations which they issued in the course of their inspections. Under the circumstances, I conclude and find that the petitioner has established all of the contested violations by a preponderance of the credible and probative evidence presented in these proceedings, and all of the violations ARE 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, (August 1985), 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).

In United States Steel Mining Company, Inc., 7 FMSHRC 327 (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

The respondent presented no testimony or evidence to rebut the testimony and evidence adduced by the petitioner in support of the significant and substantial (S&S) findings made by the inspectors. Under the circumstances, and on the basis of the credible and probative testimony presented by the inspectors, I conclude and find that with the exception of Citation No. 3364697 (broken door windows on a bulldozer), and Citation No. 3364698 (inadequate parking brake on an end loader), (Docket No. KENT 90-163), all of the S&S findings made by the inspectors with respect to the remaining contested citations and order are supportable, and these findings ARE AFFIRMED.

With regard to Citation Nos. 3364697 and 3364698, the respondent's representative argued that the cited conditions did not present any hazards or a reasonable likelihood of an injury. The same argument was made with respect to Citation No. 351545 (lack of hand-rails on parts trailer steps) (Docket No. KENT 90-163).

With regard to Citation No. 3364697, concerning the "broken" windows in both doors of the cited bulldozer operator's cab, I take note of the fact that the inspector testified that the windows were "cracked" and he was concerned that a sliver of glass could have flaked off the glass and found its way to the eyes of the operator. He also believed that a flake or sliver of

glass could have fallen on the gloves of the operator and he could have inadvertently rubbed the glass in his eyes with his gloves.

The inspector confirmed that the bulldozer windshield, which is directly in front of the bulldozer operator, was in good condition, and that the cracked door windows were constructed of safety glass. Under these circumstances, and in the absence of any evidence as to the proximity of the doors to the operator's face while seated in his normal position at the controls of the machine, I find it highly unlikely that a sliver of glass from the cracked safety glass doors would contact the operator's eyes. I conclude and find that the inspector's belief that an injury was reasonably likely is unsupported speculation, and his S&S finding is vacated. The citation is modified to reflect a non-S&S violation.

With regard to Citation No. 3364698, concerning the cited end loader with an inadequate parking brake, the inspector confirmed that the service or foot brakes which are normally applied to stop the machine while it is working were in good condition.

The inspector confirmed that the loader would not be operated in roadway areas steeper than the 5 to 7 degree grade where the parking brake was tested. He believed that there was a possibility of an accident in the event the loader operator decided to stop the loader with the engine running and left his machine to clear some debris from the roadway. However, the inspector confirmed that the loader bucket is often lowered to the ground to serve as an additional braking device, and he conceded that a loader operator would not normally park the machine on a grade.

The inspector confirmed that the loader operator informed him that the parking brake was not working. However, the inspector apparently did not question the operator about his speculative conclusion that the operator would leave his machine with the engine running on a grade to clear debris from the roadway. In the absence of any evidence that this was in fact the case, I cannot conclude that the inspector's speculation concerning the possibility of an accident supports his S&S finding. Accordingly, his finding in this regard is vacated, and the citation is modified to reflect a non-S&S violation.

With regard to Citation No. 3515145, concerning the lack of protective handrails on the parts trailer steps, I conclude and find that the credible and unrebutted testimony of the inspector supports his S&S finding, and it is affirmed.

Unwarrantable Failure Violation

In Docket No. KENT 90-116, Citation No. 3369907, issued on October 4, 1989, and citing a violation of the ventilation requirements of mandatory safety standard section 75.316, was issued as a section 104(d)(1) unwarrantable failure citation.

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

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

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

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

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

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New

International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The inspector's credible testimony, which is not rebutted by the respondent, supports his conclusion that there was little or no ventilation in the cited area which had been driven for 120 feet. Given the distance driven, with no ventilation, the inspector's conclusion that the condition existed for at least two shifts, is supportable. The respondent did not dispute the inspector's testimony that the certified foreman present in the area was required to monitor the ventilation and did not deny that he was aware of the cited condition, and indeed admitted it (Tr. 17). Although the inspector confirmed that he detected no methane present, he nonetheless found that the absence of ventilation resulted in "real dusty" conditions and that the mining machine, shuttle cars, and scoops operating on the section constituted potential ignition sources which presented a fire or explosion hazard in the event of any methane liberation while coal was being cut.

The respondent presented no evidence or testimony to rebut the inspector's findings that a significant and substantial violation existed, nor did it present any reasonable explanation for the absence of ventilation in the cited area. In addition to the inspector's testimony that the section foreman, who was with him during his inspection, admitted that he was aware of the lack of ventilation, the inspector testified that the condition could not have been created on the on-going shift, and that the lack of ventilation existed for at least two, and possibly three prior shifts (Tr. 23). He also confirmed that in order to abate the condition and establish the required amount of ventilation pursuant to the ventilation plan, three breaks had to be cut through and this work was done the next day (Tr. 24-25). Under all of these circumstances, I conclude and find that the inspector's credible testimony supports a finding of aggravated conduct and his unwarrantable failure finding and citation IS AFFIRMED.

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

The parties agreed that the respondent employs approximately 100 miners, and that its annual production for 1989 was approximately two-million tons of coal. The annual production for the No. 1 Mine was one-million tons. The respondent's representative confirmed that the respondent operates eight mines and that the

No. 1 Mine consists of an underground mining operation, a surface plant, and an impoundment. The respondent stipulated that payment of the proposed civil penalty assessments in all of these proceedings will not adversely affect its ability to continue in business.

In view of the foregoing I conclude and find that the respondent is a large mine operator and that the payment of the civil penalty assessments that I have made for the violations which have been affirmed will not adversely affect its ability to continue in business.

History of Prior Violations

The MSHA computer print-out listing the respondent's compliance record for the period October 4, 1987, through October 3, 1989, reflects that the respondent paid civil penalty assessments in the amount of $18,742, for 160 violations, 44 of which were "single penalty" non-S&S violations. With the exception of one section 104(d)(1) order, one combined section 104(a) citation and 107(a) imminent danger order, and five combined section 104(a) citations and section 104(b) orders, all of the remaining violations were issued as section 104(a) S&S citations.

With regard to Docket No. KENT 90-116, I take note of the fact that the computer print-out reflects one prior violation of 30 C.F.R. § 75.316, issued on March 22, 1988, as a "single penalty" citation for which the respondent paid a civil penalty assessment of $20. No prior violations of sections 75.1103-4, 70.501, 77.216-3(a), or 77.216(d) are noted.

In Docket No. KENT 90-162, the computer print-out reflects no prior citations for violations of sections 77.216(d) and 75.1722(b). Six prior violations of the check-in and check-out requirements of section 75.1715, were issued on April 6, 1988, as "single penalty" citations which were assessed and paid at $20 each. I assume that the multiple citations were issued for failure to provide proper identification for six individual miners. In the instant proceeding, the inspector issued a single violation for failure to provide proper identification for seven miners working underground.

In Docket No. KENT 90-163, the print-out reflects no prior violations of sections 70.207(a), 77.1605(a), and 77.400(c). Three prior violations of section 77.1605(b) are noted, and they were all issued on April 4, 1988.

Although I cannot conclude that the respondent's history of prior violations is particularly good, for an operation of its size where the No. 1 Mine had an annual production of one million tons, I cannot conclude that it warrants any increases in the civil penalty assessments which I have made for the violations

which have been affirmed. In this regard, I have considered the fact that the respondent's history contains only a few repetitive violations, none of which I consider particularly egregious, and this is reflected in my civil penalty assessments.

Good Faith Compliance

The record in these proceedings establishes that the respondent timely corrected and abated all of the violations in good faith. In Docket No. KENT 90-163, the four permissibility violations were all abated within 15 minutes, and the handrails were installed in the parts trailer stairway immediately and prior to the time fixed by the inspector.

In Docket No. KENT 90-116, the ventilation violation was abated and the ventilation was restored within 30 minutes of the issuance of the violation. One of the slurry impoundment violations (2982728), was abated within 2 hours, and 1-day earlier than the time fixed by the inspector.

In Docket No. KENT 90-162, the check-in and check-out violation was abated within 3 hours, 2-hours earlier than the time fixed by the inspector.

I have taken the respondent's good faith and rapid abatement actions into consideration in the civil penalty assessments which I have made for the violations in these proceedings.

Negligence

Except for Citation Nos. 3369907 and 3364696, the inspectors found that all of the remaining violations resulted from a moderate degree of negligence. The inspector who issued Citation No. 3369907 concluded that it resulted from a high degree of negligence, and the inspector who issued Citation No. 3364696 concluded that it resulted from a low degree of negligence.

The respondent presents no testimony or evidence to rebut the findings of the inspectors. Based on these findings, which I conclude and find are supported by the evidence adduced in these proceedings, I further conclude and find that all of the violations were the result of the failure by the respondent to exercise reasonable care to prevent the cited conditions or practices which it knew or should have known existed. Under the circumstances, the negligence findings made by the inspectors are all affirmed.

In Docket No. KENT 90-163, with respect to the violation for the broken windows on the cited bulldozer, and the inadequate parking brake on the cited end loader, I have considered the fact that the equipment operators apparently failed to adequately inspect the equipment and did not report the violative conditions

to their respective foremen. The inspector testified that the end loader operator acknowledged that the parking brake was inadequate, and the broken glass on the bulldozer should have been readily obvious to the operator. Although the negligence of the equipment operators does not absolve the respondent of any liability for the violations, I have considered this in mitigation of the civil penalty assessments made for these violations.

Gravity

With the exception of the three citations which were issued as "single penalty" non-S&S citations (3367668, 9979793, and 3364696), I conclude and find that on the basis of the credible testimony presented by the inspectors, all of the remaining citations affirmed as significant and substantial (S&S) violations, were serious.

With regard to Citation Nos. 3364697 and 3364698, I conclude and find that the cracked safety glass windows in the doors of the cited bulldozer and the inadequate end loader parking brake were nonserious conditions.

Civil Penalty Assessments

Although the respondent presented no testimony or evidence with respect to the fact of each violation, its representative confirmed that the respondent contested the violations because it believed that the inspectors were issuing all citations at the mine as significant and substantial (S&S) violations, and that this has resulted in civil penalty assessments which the respondent believes are "high" for the conditions cited.

The respondent also took the position that the "high" penalty assessments resulted from MSHA's inappropriate consideration of its history of prior violations. In support of this assertion, the respondent believes that any prior violations issued on any of the mine working sections should be considered and limited only to those mine sections rather than the entire mine. The respondent further believes that it is unfair to combine all of the prior violations and consider them as part of the compliance record for the entire mine, rather than the separate mine sections, and that by considering them in totality, rather than separately, "double assessments" have resulted.

It is clear that I am not bound by MSHA's civil penalty assessment procedures found in Part 100, Title 30, Code of Federal Regulations. Nor am I bound by MSHA's proposed civil penalty assessments. All civil penalty cases contested by a mine operator before the Commission, an agency which is not part of the U.S. Department of Labor, are considered de novo by the presiding judge, and any civil penalty assessments are made in accordance with the criteria found in section 110(i) of the Act.

In the instant proceedings, my findings and conclusions with regard to the violations are based on the preponderance of the credible and probative evidence adduced on the record in the course of the hearings. The civil penalty assessments which I have made for the violations which have been affirmed are likewise based on the evidentiary record and the criteria found in section 110(i) of the Act.

The respondent's assertion that its history of prior violation should be considered separately for each mine section, rather than the entire mine, is rejected. I find no support for the respondent's conclusion that MSHA's consideration of its prior history of violations resulted in any "double" proposed civil penalty assessments. The respondent's history of prior violations for the purposes of any civil penalty assessments is reflected in the computer print-out which is a part of the record in this case. I have considered this compliance record as the overall compliance record for the No. 1 Mine, and I consider the violations noted in the print-out as the total history for the mine, regardless of the particular mine sections where the violative conditions may have occurred. Further, as noted earlier, I have taken this history into account in assessing the penalties for the violations in question, and I cannot conclude that the respondent has been unreasonably penalized or treated unfairly.

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

Docket No. KENT 90-116

Citation No.	Date	30 C.F.R. Section	Assessment
3369907	10/04/89	75.316	$950
3158954	12/18/89	75.1103-4	$165
3158955	12/19/89	70.501	$100
2982728	01/17/90	77.216-3(a)	$170
2982829	01/17/90	77.216(d)	$150

Docket No. KENT 90-162

Citation No.	Date	30 C.F.R. Section	Assessment
3367667	12/06/89	77.216(d)	$100
3367668	12/06/89	77.216(d)	$ 20
3158951	12/18/89	75.1722(b)	$175
3158952	12/18/89	75.1722(b)	$175
3158953	12/18/89	75.1715	$250

Docket No. KENT 90-163

Citation No.	Date	30 C.F.R. Section	Assessment
9979793	11/13/89	70.207(a)	$ 20
3364694	01/03/90	75.503	$160
3364695	01/03/90	75.503	$160
3364696	01/05/90	77.1109(d)	$ 20
3364697	01/05/90	77.1605(a)	$ 20
3364698	01/05/90	77.1605(b)	$ 20
3364699	01/05/90	77.400(d)	$125
3364700	01/08/90	75.503	$160
3515144	01/09/90	75.503	$160
3515145	01/09/90	77.205(e)	$170

ORDER

The respondent IS ORDERED to pay the civil penalty assessments shown above within thirty (30) days of the date of these decisions and order. Payment is to be made to MSHA, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Craig S. Preece, Comptroller, Beech Fork Processing, Inc., P.O. Box 190, Lovely, KY 41231 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 8 1991

DONALD F. RADOS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 90-186-D
BETH ENERGY MINES, INC., Respondent	:	PITT-CD-90-06
	:	Livingston Portal 84 Complex

ORDER OF DISMISSAL

Before: Judge Koutras

The complainant's unopposed request to withdraw his complaint in this matter **IS GRANTED**, and this case **IS DISMISSED.**

George A. Koutras
Administrative Law Judge

Distribution:

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ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 89-365 A.C. No. 05-00266-03556
v.	:	King Coal Mine
NATIONAL KING COAL, INC., Respondent	:	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Tom Bird, National King Coal, Inc., Durango, Colorado, for 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. § 801 et seq. (the "Act"). The Secretary charges National King Coal, Inc. (National), the operator of an underground coal mine, with a 104(a) significant and substantial violation of 30 C.F.R. § 75.606.

National filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Durango, Colorado. Oral and documentary evidence was introduced. Both parties have filed post-hearing briefs, which I have considered along with the entire record in making this decision.

STIPULATIONS

At the hearing, the parties entered the following stipulations into the record, which I accept.

1. National is engaged in the mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. National is the owner and operator of King Coal Mine, MSHA I.D. No. 05-0026-03556.

3. National is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

4. The administrative law judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary, upon an agent of respondent, on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. National is a small mine operator with 111,651 tons of production in 1988.

10. The certified copy of the MSHA assessed violations history, marked as Exhibit P-1, accurately reflects the history of this mine for the two years prior to the date of the citation.

11. If a violation of the requirements of 30 C.F.R. § 75.606 is found, the violation is properly designated "significant and substantial."

12. If a violation of 30 C.F.R. § 75.606 is found, the appropriate civil penalty under 110(i) of the Act for the violation is $168.00.

I

Cosme F. Gutierrez, the Federal Mine Inspector who issued the citation charging a violation of 30 C.F.R. § 75.606, testified as to his experience and qualifications as a mine inspector.

He has conducted inspections of the King Coal Mine once or twice a year since his transfer from West Virginia in 1984. His inspection includes the entire mine and take approximately two or three weeks to complete. The mine is an underground seam, approximately 4.5 to 5.5 feet thick. The mine has two sectors, generally, consisting of 001 and 002 sections.

On March 23 both, Federal mine inspectors Cosme Gutierrez and David L. Head were inspecting the King Coal Mine. Mr. Gutierrez was making a regular inspection. About 7:20 a.m., Inspector Gutierrez went underground and walked to the third east section which is the 001 section. He proceeded into the third entry where the continuous mine machine was operating and took an air reading. He then stood back away from the continuous miner to observe a mining cycle.

As aptly stated in Respondent's post-hearing brief, "in a typical continuous mining machine section of a coal mine there are several pieces of equipment. These are: the continuous mining machine that cuts coal from the working face, two shuttle cars (rubber-tired coal haulage vehicles) that move the cut coal from the tail-boom of the continuous mining machine outby to the feeder-breaker, and the feeder-breaker which is a stationary piece of equipment that feeds cut coal hauled by the shuttle car onto the conveyor belt system for transport out of the mine."

Inspector Gutierrez testified that he observed the mining cycle as he stood in the intersection between three and four entry. The power kicked off the miner and he saw Mr. Willie Lucero, the face boss and section foreman, go over to Tom Bird, the mine superintendent and tell him that the power kicked off the continuous miner because a shuttle car ran over the miner's trailing cable and damaged it. At the time he overheard this conversation, he was standing about 30 feet from the site of where the incident occurred.

After overhearing the section foreman tell the mine superintendent that the shuttle car ran over the miner's trailing cable, Inspector Gutierrez proceeded to walk the 30 feet to the site of the damaged trailing cable which was in the number three entry by the last open crosscut. Inspector Gutierrez saw the miner's trailing cable lying in the roadway where the shuttle car traveled back and forth. The cable was lying in the roadway three or four feet from the rib. Mr. Gutierrez knelt down and examined the trailing cable. The trailing cable was approximately two inches in diameter. The outer rubber covering had tire marks indented on it which, he observed, were the same type of tire marks that would have been made by the shuttle car that was still

setting approximately 10 feet back from the miner. Mr. Gutierrez testified that, once the shuttle car ran over the cable and the power shut off the miner, the shuttle car backed off about ten feet from the miner. At the time, the shuttle car was the only piece of equipment in the entry other than the continuous miner.

Inspector Gutierrez testified that he knew the cable had been damaged because the breakers in the power center had tripped or shut off, and he saw "tire marks and indentations in the slightly depressed rubber cable." He testified the miner's trailing cable was not adequately protected because it was in the roadway where the shuttle cars could run over it. He explained that "once you but a cable where it can be run over, there is no longer protection." 1/

Inspector Gutierrez stated that he observed the trailing cable being repaired and the damage he observed was not in an old pre-existing splice. He told the Superintendent Bird that he was going to issue a citation.

David L. Head has been a federal mine inspector for 14 years, specializing in electrical inspections. On March 23, 1989, Inspector Head, as well as Inspector Gutierrez, was making a regular inspection in the King Coal Mine. At the time the trailing cable power to the continuous miner "kicked off," Inspector Head stated he was in the second entry a short distance away from where Inspector Gutierrez was standing. He could see Inspector Gutierrez. He was only 25 to 30 feet from where he could see into the face area of entry number three. He also overheard the conversation in which the face boss Willie Lucero came to the mine superintendent Bird and told him "that the shuttle car had damaged the cable" and that the power to the miner had tripped." At the time Inspector Head overheard this conversation, he was 30 feet from the spot where the face boss Willie Lucero and the operator of the continuous miner Shane Hurst talked to the mine superintendent and told him that the shuttle car ran over the miner's trailing cable.

1/ A shuttle car is a piece of rubber-tired mobile equipment with a truck-like bed that is loaded with coal by the continuous miner. The shuttle car travels back and forth hauling the cut coal from where it is loaded by the continuous miner to a dump site. The shuttle car weighs approximately 15 to 20 tons and has a load capacity of about seven tons. (Tr. 27).

Inspector Head testified that mobile equipment was moving with high frequency through the area where the incident occurred. He stated that, in his opinion, a trailing cable in the roadway in tha area was not adequately protected and that it was very probable that it could be run over by mobile equipment.

Neither Inspector actually saw the shuttle car run over the miner's trailing cable. Neither saw any splice in the miner's trailing cable. The only witness called by Respondent was Mr. Tom Bird, the mine superintendent. His testimony conflicts with that given by Inspectors Gutierrez and Head. He testified that, when the power "kicked off" the continuous miner, he was at a distant point in entry number two, several hundred feet away from the continuous miner and that Inspector Gutierrez was with him. Mr. Bird stated that, when the power kicked off the continuous miner, the only two employees in that area near the face of the number three entry were the face boss Mr. Willie Lucero and the operator of the miner Mr. Shane Hurst. The face boss, along with the miner's operator, came to him and told him that they needed an electrician to repair the trailing cable. Mr. Bird testified that, when he asked why the "power kicked off," the face boss replied he "thought somebody had run over it with a shuttle car." Mr. Bird stated that they proceeded towards the miner. Mr. Bird, however, did not go directly to the miner. He testified, "I went back to the power center. I unplugged the cable, locked it, tagged it out.... I don't recall if anyone was with me then or not.... Then I proceeded back to the miner." He stated that, when he got to the miner, there was no shuttle car behind the miner.

Mr. Bird recalled that "somebody that was there" said smoke came out of a splice in the cable located about three feet behind the miner. When the splice in the cable was opened, he found the "black and red conductors (inside the cable) had rubbed together, causing a short-circuit, causing a considerable amount of damage inside the splice." It was Mr. Bird's theory that, as the miner was advancing, "pulling the cable taut" it caused the cable to break down.

Inspector Gutierrez early in the hearing explained that the miner's helper "normally" handles the continuous miner's trailing cable, frequently kicking it or moving it by hand to the rib, out of the way of the mobile equipment traversing the area. Mr. Gutierrez stated that it was the cable helper's job to continually move the cable "out of way" and the cable hadn't been moved out of the was in this case. Mr. Bird testified, "Generally, we don't use a cable helper," and that there was no helper or cable man at the time the power in the trailing cable of the miner "kicked off."

DISCUSSION

30 C.F.R. § 75.606 provides as follows:

> Trailing cables shall be adequately protected to prevent damage by mobile equipment.

The focus of this standard is to require operators to take appropriate steps to ensure the protection of trailing cables from damage by mobile equipment. The Secretary is correct in asserting that it does not have to prove that a cable was in fact damaged by a piece of mobile equipment in order to sustain a finding of a violation of section 30 C.F.R. § 75.606. See, Secretary of Labor (MSHA) v. United States Steel Mining Company, Inc., 6 FMSHRC 155.157 (January 1984). In that case, a violation of 30 C.F.R. § 75.606 was found even though the cable was not damaged, but had been lying out in the roadway three feet from the rib and was found therefore to not have been adequately protected.

The Secretary is also correct in asserting that there is no requirement that the Inspector be an eye witness to an event in order to issue a 104(a) citation for a violation arising out of that event. The language of 104(a) requires the Inspector to issue a citation when "upon inspection or investigation" the Inspector "believes that an operator of a coal mine or other mine... has violated the Act...." (emphasis added). Emerald Mines Co. v. Federal Mine Safety and Health Review Commission, 863 F.2d 51, 54 (D.C. Cir. 1988). In the case at bar, Inspector Gutierrez investigated the situation and reasonably concluded that there was a violation of 30 C.F.R. § 75.606.

I credit the testimony of Inspectors Gutierrez and Head. Based upon their credible testimony summarized above, I find and conclude that trailing cable of the continuous miner was not adequately protected to prevent damage by mobile equipment. Thus there was a violation of the cited mandatory safety standard.

Even though there was no eye witness who saw the shuttle car run over the cable, the evidence presented established that it was more probable than not that the shuttle car ran over the trailing cable while it lay in the roadway and damaged it. Thus, a preponderance of the evidence presented established the violation of the cited safety standard.

Even assuming the face boss and the operator of the continuous miner said they "thought" or "assumed" the shuttle car ran over the cable, it appears (aside from the testimony of the two

federal coal mine inspectors, one of whom saw tire marks on the trailing cable), the very fact that Respondent's face boss and its operator of the continuous miner "thought" that the shuttle car ran over the cable is indicative of the fact that they were aware that the trailing cable was lying in the roadway where it at least could be damaged by a shuttle car. The face boss, the operator of the miner, and the shuttle car operator were the only employees of the Respondent in the general area when the cable was damaged. None of these employees were called to testify. Respondent instead relied on hearsay statements as to what its face boss said and thought. On the other hand, the testimony of the mine inspector as to what they heard the face boss or section foreman tell the mine Superintendent was admissible hearsay even in a court of law where stricter rules of evidence are followed.

As previously stated, I credit the testimony of the two mine inspectors and on the basis of their testimony find there was a violation of the cited safety standard.

The evidence and the stipulations clearly established that the violation was significant and substantial and that, taking into consideration the statutory criteria in section 110(i) of the Act, the Secretary's proposed $168 penalty is an appropriate penalty for this violation.

ORDER

1. Citation No. 3412632, alleging a violation of 30 C.F.R. § 75.606, including its finding that the violation was significant and substantial, is AFFIRMED.

2. A civil penalty of $168 is ASSESSED for this violation.

3. The Respondent is directed to pay $168 to the Secretary of Labor within 30 days of the date of this decision, as a civil penalty for the violation found herein.

August F. Cetti

August F. Cetti
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 9 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 90-53
	:	A.C. No. 33-01173-03825
v.	:	
	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for the Secretary of Labor (Secretary); David M. Cohen, Esq., Lancaster, Ohio for Southern Ohio Coal Company (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 75.1403-10(h), charged in a section 104(a) citation issued January 5, 1990. The violation was designated as significant and substantial. It was based on a safeguard notice issued on March 31, 1989, pursuant to section 314(b) of the Mine Act.

Pursuant to notice, the case was called for hearing in Columbus, Ohio on September 26, 1990. Patrick H. McMahon testified on behalf of the Secretary. John Moore and Jon Merrifield testified on behalf of SOCCO. At the conclusion of the hearing, the Secretary argued her position on the record, and waived her right to file a post-hearing brief. SOCCO has filed a post hearing brief. The case was ably tried on both sides, and the issues are sharply defined. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, SOCCO was the owner and operator of an underground coal mine in Meigs County, Ohio, known as the Meigs No. 2 Mine. SOCCO is a large operator. There is no evidence that a penalty assessed in this case will have any effect on SOCCO's ability to continue in business, and I find that it will not. During the period from January 5, 1988 to January 4, 1990, the subject mine had 596 paid violations, of which 30 were violations of 30 C.F.R. § 75.1403. Considering the size of the subject mine, this history is not such that a penalty otherwise appropriate should be increased because of it.

II

During an inspection on March 31, 1989, Federal Mine Inspector Patrick H. McMahon discovered a rubber scoop being operated along the supply track in the subject mine with only 6 inches of side clearance. The scoop was taking on supplies from the supply cars, and was bumping the sides of the supply cars. Inspector McMahon issued a notice to provide safeguards requiring that a total of at least 36 inches side clearance (both sides combined) be provided for all rubber tired haulage equipment operated along the supply tracks in the subject mine. In issuing the safeguard notice, the inspector was primarily concerned that the scoop operator could be injured if the scoop struck the rib or a supply car. He also considered the fact that the track was a walkway, and miners using it as such could be injured.

III

On January 5, 1990, Inspector McMahon was conducting a regular inspection at the subject mine. He walked up the track entry in the 001 section and observed a scoop tractor parked between the coal rib and the supply cars. The scoop operator was loading supplies. The inspector measured the distance between the scoop operator's compartment and the coal rib which he found to be 24 inches. He then measured the distance from the other side of the scoop to the supply car, which he found to be 4 inches.

The rib line was uneven, and the bottom was rutted from vehicles operating in the area. There was a downhill slope toward the face area. The scoop operator's view was partially obstructed by the supplies which were on the scoop, some of which were stacked on the battery compartment with no structure to hold them in. Scoops are equipped with "articulated steering," which the inspector believed rendered them less controllable by the scoop operator. Inspector McMahon issued a citation charging a violation of 30 C.F.R. § 75.1403-10(h) referring to the prior safeguard notice.

REGULATION

30 C.F.R. § 75.1403 provides as follows:

> 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.

30 C.F.R. § 75.1403-10(h) provides as follows:

> 75.1403.10 criteria-haulage; general
>
> * * *
>
> (h) A total of at least 36 inches of unobstructed side clearance (both sides combined) should be provided for all rubber-tired haulage equipment where such equipment is used.

ISSUES

1. Whether the safeguard notice issued March 31, 1989, is valid?

2. If so, whether the evidence shows a violation of the safeguard as charged in the citation issued January 5, 1990?

3. If it does, whether the violation was properly designated significant and substantial?

4. If it does, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

I

SOCCO was subject to the provisions of the Mine Act in the operation of the Meigs No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

SOCCO challenges the safeguard notice on the ground that it is not mine-specific, that is, it is not directed to hazards peculiar to the subject mine. Safeguard notices are authorized by section 314(b) of the Mine Act which 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."

The Commission discussed safeguard notices and contrasted them with mandatory health and safety standards in Southern Ohio Coal Co., 10 FMSHRC 963 (1988). However, it declined to decide whether a safeguard notice must be mine-specific to be upheld.

In the case of Southern Ohio Coal Company, 9 FMSHRC 273 (1987), petition for discretionary review granted March 1987, Commission Judge Roy Maurer concluded that a safeguard "not issued under any of the specific criteria for safeguards contained in 30 C.F.R. §§ 75.1403-2 through 75.1403-11" is invalid unless "demonstrably related to same mine-specific hazard or unsafe condition sought to be corrected". The safeguard in Judge Maurer's SOCCO case was issued under 30 C.F.R. §75.1403 and was not related to a mine-specific hazard. Therefore, it was held invalid.

In Southern Ohio Coal Company, 10 FMSHRC 1564 (1988), Judge Avram Weisberger concluded that a safeguard notice requiring that all track haulage in the mine be properly maintained and aligned, was not mine-specific and was therefore invalid.

In the case of Beth Energy Mines, Inc., 11 FMSHRC 942 (1989), Judge Gary Melick found invalid a safeguard notice issued pursuant to 30 C.F.R. § 1403-10(e) which provides that positive active stopblocks or derails should be used to protect persons from danger of runaway haulage equipment. Judge Melick concluded that safeguards may not be used to impose general requirements on mines without regard to the circumstances present in the mine in question.

In Southern Ohio Coal Company, 11 FMSHRC 1992 (1989), petition for discretionary review granted November 1989, Judge Maurer concluded that a safeguard notice issued pursuant to 30 C.F.R. § 75.1403-9(a) which provides that shelter holes be provided on track haulage roads at intervals of not more than 105 feet was not issued on a "mine-by-mine" basis because of any peculiar circumstance in the subject mine, and was therefore invalid.

In Beth Energy Mines, Inc., 12 FMSHRC 761 (1990), petition for discretionary review granted May 1990, Judge William Fauver upheld a safeguard notice though the hazard was of a general rather than a mine-specific nature, when the safeguard was based on one of the criteria in 30 C.F.R. § 75.1403-2 through § 75.1403-11.

Judge Fauver's decision relied on the Court of Appeals decision in the case of United Mine Workers of America v. Dole, 870 F.2d 662 (D.C. Cir. 1989), which held that MSHA's implementing regulations including promulgated general criteria (not limited to mine-specific conditions) for roof control plan approval constituted a mandatory standard. Following the reasoning in the UMWA decision, Judge Fauver concluded that the published criteria for safeguard notices (1403-2 through 1403-11)

since they were promulgated pursuant to section 101(a) may be used as valid safeguard notices even though the hazards to which they apply are general and nonspecific.

The SOCCO cases before Judges Maurer and Weisberger, and the Beth Energy case before Judge Melick were following the rationale in the case of Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976) which held that a ventilation plan could not be used to impose general ventilation requirements on a mine. According to the Court, the latter should be the subject of a mandatory standard promulgated under section 101 of the Act. In the UMWA decision, the Court of Appeals, according to Judge Fauver, "clarified" the Zeigler decision when it held that the Secretary may require generally applicable plan approval criteria in mine plans. Since the criteria are promulgated pursuant to notice and comment requirements, incorporating them in a mine plan makes them mandatory standards. Similarly, incorporating published criteria in a safeguard notice, makes it in effect a mandatory safety standard.

I agree with the reasoning in Judge Fauver's decision, and conclude that the notice challenged in this case is valid since it cited and tracked the criterion in 30 C.F.R. § 75.1403-10(h).

III

SOCCO argues that the safeguard is invalid because it does not minimize but increases hazards with respect to the transportation of men and materials. The evidence does not support this contention. In fact the safeguard addresses and attempts to minimize hazards to the scoop operators and miners using the track entry as a walkway to the face. I accept the inspector's testimony on this issue. The fact that alternative means of transporting materials (e.g., carrying them by hand) might pose other hazards is not a defense to the violation of the safeguard notice. I conclude that the failure to maintain a total of at least 36 inches of clearance for the scoop being operated along the supply track was a violation of the safeguard notice issued April 14, 1989, and of 30 C.F.R. § 75.1403-10(h).

IV

A violation is properly cited as significant and substantial if there is a hazard contributed to by the violation and a reasonable likelihood that the hazard will result in an injury of a reasonably serious nature Cement Division/National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984). Inspector McMahon testified that the scoops operated in the haulage entry for only a "couple of minutes" per shift. A cage was present on the scoop operator's compartment and he was "probably fairly well protected, yes." (Tr. 52) Shelter holes were provided in the vicinity of the supply cars for miners walking toward the face. I conclude that the Secretary has failed to establish that the violation was reasonably likely to

result in injury. Therefore it was not properly denominated significant and substantial.

V

Although I have concluded that a serious injury is not likely to result from the violation, if an injury did occur, whether to the scoop operator, or to a miner walking the entry, it could be serious. I conclude that the violation was moderately serious. SOCCO has been cited for this violation previously, and has received 44 citations or orders under part 75.1400 during the prior 12 month period. I conclude that the violation resulted from SOCCO's moderate negligence. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $150.

ORDER

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

1. Safeguard Notice 3124669 is **AFFIRMED.**

2. Citation 3323861 is **MODIFIED** to delete the significant and substantial finding and, as modified, is **AFFIRMED.**

3. SOCCO shall pay a civil penalty in the amount of $150 within 30 days of the date of this decision.

/James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Patrick M. Zohn, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

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/ml

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

JAN 11 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-275-M A.C. No. 04-01937-05505
v.	:	Docket No. WEST 89-71-M A.C. No. 04-01937-05506
SANGER ROCK & SAND, Respondent	:	Sanger Pit and Mill

DECISION APPROVING SETTLEMENT
AFTER REMAND

Before: Judge Morris

On September 19, 1990, the Commission remanded the above case.

Prior to considering the issues raised in the order of remand, the parties filed a proposed settlement agreement.

Robert Pountney, the successor-in-interest and current representative of Respondent Sanger Rock and Sand, agreed to withdraw its notice of contest.

In view of Respondent's motion to withdraw, Petitioner agreed to dismiss the complaints.

The citations, the original assessments, and the proposed disposition are as follows:

Citation No.	Assessment	Disposition
3076869	$20	$20
3074994	$20	$20

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is APPROVED.

2. The above citations and proposed penalties are AFFIRMED.

3. Respondent is ORDERED to pay the sum of $40 to the Secretary of Labor within 15 days of the date of this decision.

4. Upon payment of said amount by Respondent to Petitioner, the cases herein are DISMISSED.

John J. Morris
Administrative Law Judge

Distribution:

Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

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/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 14 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 90-128
	:	A.C. No. 15-07253-03568
v.	:	
	:	No. 10 Mine
IKE COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Arnold D. Coleman, Secretary-Treasurer, Ike Coal Company, Inc., Elkhorn City, Kentucky, 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 $1,200, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.507. The respondent filed an answer denying the violation, and a hearing was held in Pikeville, Kentucky. The parties waived the filing of posthearing briefs, but I have considered their arguments made on the hearing record 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) whether the violation was "significant and substantial," and (3) the appropriate civil penalty that should be assessed based on the civil penalty

criteria found in section 110(i). Additional issues raised in this proceeding are identified and disposed of in the course of my decision.

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.

Discussion

Section 104(a) "S&S" Citation No. 3368426, issued by MSHA Inspector Thomas M. Charles on September 21, 1989, cites a violation of mandatory safety standard 30 C.F.R. § 75.507, and the cited condition or practice is described as follows:

> Evidence indicates that a nonpermissible power connection point in the form of a bulldozer is being used in the main return air course of this mine. There are numerous sets of bulldozer tracks extending underground through the No. 1 entry return portal. There is a diesel power Case 450 dozer parked next to the No. 1 return portal. The electrical system of this dozer is not permissible.
>
> A 107-A Order #3368425 has been issued in conjunction with this citation. No termination due date is set.

The aforementioned Imminent Danger Order No. 3368425, issued simultaneously by Inspector Charles on September 21, 1989, states as follows:

> Evidence indicates that a work practice which constitutes an imminent danger is being performed at this mine. There are bulldozer tracks (numerous) in the number one return portal. These tracks extend underground for an unknown distance. (Mine is idle no fan running). A diesel powered Case 450 bulldozer is parked next to the No. 1 return portal. Evidence indicates that the dozer has been used underground to pull equipment out of this mine. This dozer has an open nonpermissible electrical system. Given the equipment height and finished mining height of this area of the mine there can not be much clearance for the dozer operator. Also the internal combustion

engine of the bulldozer puts off harmful gasses which in the confined underground area of a mine could be fatal.

A citation number 3368426 is being issued in conjunction with this 107-A order. A special assessment will be asked for on this order, also a special investigation will be asked for.

Inspector Charles subsequently filed a report, which is included with the pleadings filed by the petitioner, requesting a special assessment for the cited violation, and the report states as follows:

Special assessments are requested. There is no way that the operator could not of been aware of this. This mine is nonproducing, the owners are in the process of pulling the equipment out, possibly doing this work their self. By using the bulldozer underground in a close clearance confined area in the main return air course a reckless disregard for health and safety has been demonstrated.

Petitioner's Testimony and Evidence

MSHA Inspector Thomas M. Charles testified that he has served as an inspector since 1978, and that he has 22 years of mining experience, including work as a mine foreman. He confirmed that he conducted a spot inspection of the mine on September 21, 1989, and that the mine was in a "non-producing, men working" status at that time. He stated that the mine gate was locked and that he walked onto the mine property and went past the mine fan to the mine opening at the number one return portal. He observed evidence of some "work activity" at the mine and observed a Case 450 bulldozer parked "around the hill from the portal" entry and observed dozer tracks in and around the area. He observed that the dozer had "greyish and blue" mud on it up and over the bulldozer "cat pads" for some 34 inches. Since he did not have his usual equipment with him, he only went 25 feet underground and used a stick or a reed to measure the width and length of the dozer cat pad tracks on the ground, and when he compared the measurements with those of the cat pads on the dozer, he found a "direct match."

Mr. Charles stated that he also observed a rubber tired battery tractor, a flatbed truck, and some scoops at the site, and he identified a sketch of the site which he prepared (exhibit P-4). There was no one working at the mine, but he saw a pickup truck parked at the mine office and a private security guard hired by the mineral owner was sitting in the truck. He did not observe any joy loader on the mine surface. He stated that the mine entry was approximately 6 feet high at the entry

portal, and he walked into the entry for a distance of 25 feet and observed the same dozer tracks which he had observed in and around the portal entry. He also observed that the dozer exhaust stack and roll-over protection had been removed and were lying on the flat bed truck. He assumed that this equipment had been removed from the dozer in order to allow it to clear the portal entry into the underground mine, and based on his observations and measurements of the tracks, he concluded that someone had taken the dozer inside the mine opening and used it underground. He then left the mine to call his supervisor, and returned to the mine to do his "paperwork." He placed a red closure tag at the mine and left a copy of the citation and order at the mine office.

Mr. Charles stated that the "blueish and greyish" mud and tracks which he observed outside the mine entry is the same kind of mud found underground and that it was not the usual kind of mud found on the surface. He confirmed that there was a mud hole with tracks around it outside of the portal entry, but that this surface mud was not the same kind which was underground. If the dozer exhaust stack and rollover protection had not been removed from the dozer, the machine could not have been taken underground because of the lack of clearance at the entry, and his assumption was that this equipment had been removed so that the dozer could go underground to help bring out some of the equipment which the respondent was removing from the mine.

Mr. Charles stated that after the citation and order were "conferenced" by the district manager in Pikeville, he was instructed to return to the mine to conduct a special investigation and he next returned to the mine with two other inspectors on September 26, 1989, to inspect the mine again, and that Ike and Rodney Coleman were there at that time. Mr. Charles stated that the inspection party went underground for a distance of approximately 800 feet, and he observed that a scoop had been used to "back-blade" or wipe out some of the dozer tracks, and that a scoop was stuck in the mud. He stated that the mine was wet and had "standing water and mud," and that he observed the same type of dozer tracks underground as he had previously observed on September 21, when he issued the citation and order.

Mr. Charles confirmed that on September 26, the dozer was still parked outside of the mine, and he measured the cat pads with a tape measure and found that they were 16 inches wide and 6 inches between the track blades. He compared these measurements with the tracks which he observed underground, and he again found the same match as he had found during his prior inspection of September 21. He also measured the finished mining height at the portal entry at 6 feet, and he indicated that the mining heights were higher inside the underground mine and were sufficient to allow the dozer to operate underground.

Mr. Charles stated that the respondent informed him that a Joy 1410 front-end loader was used underground to help retrieve some of the equipment and claimed that the tracks were made by the loader. Mr. Charles did not believe that the tracks were made by a loader because from his experience, any track prints on the ground made by the loader would be different from those made by the dozer. He explained that the Joy loader in question was a common piece of equipment, and that he had previously inspected the loader during two complete inspections of the mine which he had conducted prior to September 21, and that he was familiar with the loader tracks. He did not observe any loader at the surface or underground in the area where he traveled, and he confirmed that he did not travel to the mine face.

Mr. Charles identified exhibit P-5, as a picture of a Cat dozer which is representative of the type of "cleat" or gripping pattern of the dozer which he believes was used underground. He also identified a standard cat pad from a Joy 1410 loader which was produced in court for demonstration purposes by the petitioner's counsel. Mr. Charles explained that the loader pad gripping pattern and configuration was different from the dozer tracks which he observed underground, that the loader pad is 12 inches wide, and that any tracks left by the loader in the mud would be different from those made by the dozer.

Mr. Charles stated that he returned to the mine on September 27, to meet with the respondent in order to terminate the citation and order, and that he "looked over" the surface area of the mine, while one of his fellow inspectors, Billy Ramey, went underground to continue his inspection and investigation. Mr. Charles stated that the dozer was still parked on the surface, and the exhaust stack had been replaced. However, the rollover protection was still removed from the dozer at this time. Mr. Charles stated that there was no question in his mind that the bulldozer had been used underground at various times in the main return air course.

Mr. Charles stated that the bulldozer in question was a nonpermissible piece of equipment, and that its electrical components which constitute power connection points, are nonpermissible. He confirmed that the cited mandatory section 75.507, prohibits the use of such a piece of equipment underground in a return air course. He further confirmed that the use of such equipment underground in return air presents a dangerous and hazardous situation because the nonpermissible dozer, including its electrical system and components, are a potential ignition sources. In the event of any accumulation of methane underground, and given the fact that the dozer would be operating in a

confined area, an ignition was possible. If this had occurred, anyone working underground would be exposed to a serious ignition hazard and would likely suffer burns or fatal injuries (Tr. 8-63).

Mr. Charles stated that the mud which he observed on the bulldozer was "way up on the framework." He confirmed that he had not previously observed the dozer at the mine site, and in his opinion, it was brought to the site to pull the equipment out. Referring to his sketch, exhibit P-4, he confirmed that the measurement shown as 5.3, represents the measured height of the dozer which was five and three-tenths of a foot high, and that the measured height of the entry was 6 feet. He further confirmed the entry heights increased inby to heights of 8 and 9 feet and that it "rolled out in places," and that the next lowest height he found was in the low top area approximately 800 feet underground, and that this area was 6 feet high. He also confirmed that when he visited the mine on September 21 and 26, 1989, the power was on, but he observed no one working there (Tr. 64-68). He stated that the respondent would not have been given permission to use the dozer underground because it was nonpermissible and was not equipped with a scrubber to keep the diesel ignitions clean (Tr. 69).

MSHA Inspector Billy Ramey testified that he has served as an inspector since September, 1982, and he confirmed that he went to the mine on September 27, 1989, with Inspector Charles to conduct a spot inspection. Mr. Ramey stated that he was aware of the citation and order issued by Mr. Charles on September 21, 1989, and that he (Ramey) went underground for a distance of approximately 180 feet, or "three breaks," to check the conditions (Tr. 70-72).

Mr. Ramey stated that he observed equipment tracks underground along the left rib and that the "bottom rock" was clean. He also observed a pump cable lying in the roadway and determined that a piece of equipment had traveled over it and cut a piece of the cable. Although most of the underground mud on the bottom had been cleaned up or "drug over" by scoops, and he observed no tracks in the remaining mud, he did observe equipment track indentations on the mine rock bottom and over the pump cable. He measured the tracks which were in plain view, and found that they were 16 inches wide and 6 inches long. The bulldozer which had been cited by Inspector Charles was still parked on the surface, and after measuring the cat pads, Mr. Ramey found that his measurements conformed with the tracks measurements which he made underground, and he concluded that the tracks were made by the same bulldozer (Tr. 72-73).

Mr. Ramey stated that he observed some mud on the frame of the bulldozer but he could not find any muddy areas on the

surface where the bulldozer could have operated in mud deep enough to cause it to come up and over the frame of the machine.

Mr. Ramey confirmed that he was familiar with a 1410 Joy loader but that he did not observe one at the mine site when he was there. After examining a Joy loader cat pad used for demonstration purposes by the petitioner's counsel, Mr. Ramey was of the opinion that the tracks which he observed underground were not made by such a loader. He confirmed that the bulldozer exhaust stack was on the machine which was parked on the surface, and that Mr. Charles lifted it off and then replaced it. Mr. Ramey did not believe that the rollover protection was on the machine (Tr. 74-76).

On cross-examination, Mr. Ramey stated that he has never observed a piece of steel welded across a 1410 Joy loader cat pad. He confirmed that no one was at the mine when he was there on September 27, except for a security guard. He also confirmed that he helped Inspector Charles measure the height of the bulldozer, but he could not recall the measurements. He did recall that Mr. Charles measured the height of the portal entry, but he could not recall the measured height. Mr. Ramey confirmed that the mine was still closed and "red-tagged" when he was there (Tr. 77-79).

Mr. Ramey stated that he observed 10 or 12 "good pad marks" underground which he believed were made by the bulldozer. He confirmed that he observed a gob pile outside the portal entry with mud which appeared to be from inside the mine, but he did not see any evidence of any bulldozer tracks in the job pile area (Tr. 79-81).

Mr. Ramey stated that he has never observed a loader being used to pull any equipment out of a mine and he did not believe that a loader would be used for this purpose. He confirmed that he detected no methane with his methane spotter while he was underground and he did not observe any loader at the mine site when he was there on September 27. He did observe the bulldozer, a battery tractor motor, 30 to 40 feet of cable inside the mine, and more cable on the outside, but he did not see any scoops (Tr. 70-86).

Inspector Charles was recalled, and he confirmed that while he believed that someone had gone underground between September 21 and 26, and wiped out some of the dozer tracks, he did not issue any citation or further order for a violation of his closure order because he did not observe this happen and did not know who may have gone underground, and since this would have been a "willful" offense, he did not believe that he had enough evidence to establish such a violation (Tr. 89).

Mr. Charles confirmed that he discussed the use of the dozer underground with the respondent, but that the respondent denied using it underground and claimed that a loader was used and that the tracks were caused by the loader. Mr. Charles confirmed that he had previously observed a loader at the mine prior to his inspection of September 21, but he did not see it on the surface after he issued his closure order, nor did he know where it was at (Tr. 90). He did not find the absence of the loader unusual because he and the respondent "had a pretty rough relationship going right at that time" and that the conversations about the dozer being used underground "were confined to a few questions and gruff replies and yes and no, you know, try to take care of business and get out" (Tr. 91). Mr. Charles confirmed that during the 7-month period when he conducted inspections at the mine he had never observed any dozer at the mine and he believed it was rented or leased (Tr. 93). Given the conditions he observed on September 21, he believed that a loader would have had difficulty tramming on the soft mine bottom because it does not have much bottom clearance and he did not believe it would have been capable of pulling any other equipment out of the mine in the mud (Tr. 94).

Respondent's Testimony and Evidence

Rodney Coleman testified that he is employed by the respondent as a maintenance person, and after viewing the "cat pad" produced in court by the petitioner, he stated that "it looks like a loader track, but not like we use," and he explained the differences (Tr. 95-96). Mr. Coleman stated that the 450 Case dozer in question was not used underground and that it was used in front of the surface drift mouth in the area of a "big mud hole." He denied that any 5/8 inch steel cable hooked to the winch of the dozer was used in the mine to pull out the equipment, and he stated that the respondent had two 1410 loaders (Tr. 96). He stated that when it was necessary to clean the drift mouth, the materials removed from the mine bottom were pushed to the mud hole. He could not recall the height of the portal entry but stated that he could probably touch his head to the beams across the portal (Tr. 97).

Mr. Coleman stated that no men were employed at the mine from September 8 to 21, 1989, and he confirmed that when Inspector Charles closed the mine on September 21, no one was there and the "paperwork" was left at the office and he found it 2 days later (Tr. 97). Mr. Coleman confirmed that "several times" he has hooked a chain to a 1410 loader and pulled a piece of equipment around with the loader, and in his opinion, this can be done. He indicated that the loader has a ground clearance of 7 inches "between the tracks," and that this was approximately the same clearance as a scoop (Tr. 98).

In response to further questions, Mr. Coleman stated that prior to September 21, the equipment which was underground consisted of two small scoops, a flat bottom feeder, a 11-RU cutter and a 16 cutter. He believed that they were trying to remove the flat bottom feeder by pushing it on one end with a scoop and pulling on one end with a loader, and he confirmed that it was removed from underground (Tr. 99). He again denied that the dozer was used underground to remove any of the equipment, and he confirmed that he did not go underground with any of the inspectors in September 26 (Tr. 101).

When asked about the respondent's relationship with Inspector Charles, Mr. Coleman stated that "he kept the men tore up. Kept all the men in an upset mood. With his arrogant way of going about his job. Instead of doing the job, he would always have to criticize them and made them feel bad" during his prior mine inspections (Tr. 101). Mr. Coleman confirmed that he did not get along with Mr. Charles, and that he was the only inspector that he ever had a problem with (Tr. 102).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.507, which provides as follows: "Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air."

In its answer filed on July 23, 1990, the respondent denied that the cited bulldozer was used underground. The respondent asserted that it was closing the mine because the company was insolvent and that it used a Joy loader to bring the underground equipment to the mine surface. The respondent further asserted that Inspector Charles never observed any nonpermissible equipment underground, and that his opinion that the nonpermissible bulldozer was used underground was not fair. Rodney Coleman testified that "we all" drafted the answer and that Branson Coleman signed it in his capacity as president of the company (Tr. 103).

Inspector Charles' credible and unrebutted testimony establishes that the cited diesel powered bulldozer was a nonpermissible piece of equipment, and that its electrical components constituted nonpermissible power connection points. His credible and unrebutted testimony further establishes that the use of this equipment in an underground return air course is prohibited by section 75.507.

Neither Inspector Charles or Inspector Ramey actually ever observed the cited bulldozer operating underground. Inspector Charles' belief that the dozer was used underground to help remove some mine equipment was based on his personal observations of certain equipment tracks which he observed in the soft and muddy roadway underground. He went underground for a distance of 25 feet on September 21, 1989, and 800 feet on September 26, 1989. On each occasion, he observed the tracks, and confirmed that they extended some 300 feet inby the portal entry on September 26. Inspector Ramey, who went to the mine with Inspector Charles on September 27, 1989, confirmed that he went underground that day for a distance of approximately 180 feet, and also observed the tracks in the soft mine roadway.

Inspector Charles' conclusion that the tracks which he observed were made by the dozer was based on certain measurements which he made of the tracks in the roadway and the dozer which he found parked outside of the portal entry. He made these measurements on two separate occasions on September 21, and 26, and in each instance he found that his measurements of the tracks, when compared to his measurements of the dozer cat-pads, were an "exact match." Inspector Ramey also measured the tracks which he observed in the roadway while he was underground on September 27, 1989, and he testified that they conformed with the measurements which he made of the dozer cat pads that same day. He testified that he observed approximately 10 to 15 "good marks" in the roadway, and based on these measurements and observations, he too concluded that the dozer was used underground.

In addition to his measurements and comparisons of the tracks with the configuration and measurements of the dozer cat-pads, Mr. Charles measured the height of the dozer and the portal entry and concluded that the mining heights at the entry, as well as inby, were sufficient to allow the dozer to operate underground. This conclusion was further supported by his observation that the dozer exhaust stack and rollover protection had been removed from the dozer in order to allow the dozer to be taken through the portal entry and be operated underground with sufficient roof clearance. Inspector Ramey believed that the rollover protection was not on the dozer when he observed it, and although the exhaust stack had been replaced when he observed it, he stated that Inspector Charles easily removed it with his hand and then replaced it.

The respondent denied that the cited dozer was taken and used underground to help remove its underground equipment, and it asserted that the tracks observed by the inspectors were made a Joy 1410 loader. Inspector Charles and Ramey testified that they observed no loader at the mine during their September inspections, and they both confirmed that they were familiar with the type of loader in question, had previously observed it, and they described it as a common piece of equipment used in mining. They

were also familiar with the loader cat-pads and testified unequivocally that the tracks which they observed and measured were not made a loader. They also were in agreement that given the poor roadway conditions and the operational parameters of a loader, it was not likely that a loader was used to help remove the equipment from the underground mine.

During closing arguments on the record, Mr. Arnold Coleman stated that during the period in question when the dozer was cited, approximately $10,000 worth of tools and supplies were stolen from the mine. Mr. Coleman denied that the cited dozer was used by the respondent underground and he indicated that "anything was possible," and suggested that someone else could have gone to the mine and taken the dozer underground (Tr. 112). When reminded of the inspector's testimony that he had not previously observed any dozer at the mine prior to his September 21, inspection, and believed that it was a leased piece of equipment, Mr. Coleman responded "I say it's roughly that time when they went in and stole all that stuff" (Tr. 112).

I take note of the fact that when Inspector Charles went to the mine on September 21, 1989, he found a security guard there and the mine entrance had been secured. Mr. Coleman indicated that supplies and tools had been stolen from the mine, but he did not indicate that any underground equipment had been stolen. Under these circumstances, I find it highly unlikely that any thieves would have taken a dozer to a secured mine and used it underground in an attempt to steal equipment.

The respondent suggested that the dozer remained outside of the portal entry while a length of cable was attached to the dozer winch and was used to remove the equipment which was underground. Inspector Ramey confirmed that he observed 30 to 40 feet of rusty cable on the dozer winch outside of the mine (Tr. 84). Inspector Charles confirmed that on September 26, the respondent mentioned something about winching the equipment out of the mine with a cable, but that when he observed the cable on September 27, he estimated that it was 60 to 80 feet long. Since the roadway where the equipment was located was approximately 400 feet underground, and the respondent was experiencing some difficulty in moving the equipment through the roadway, Inspector Charles believed "there was no way that the rope would be long enough to reach" the equipment (Tr. 31).

Rodney Coleman testified that the equipment which the respondent was attempting to remove from the mine was located in "a real rough area" 500 feet inside the mine in an uphill area which was "real muddy" (Tr. 99). Although he alluded to a 5/8 inch steel cable hooked to the dozer winch, Mr. Coleman denied that the dozer was used underground to do this (Tr. 96). However, I find no testimony from Mr. Coleman that the equipment was removed by using the cable. Indeed, Mr. Coleman testified

that he was attempting to remove a flat bottom feeder by pushing one end with a scoop and pulling on one end with a loader (Tr. 99).

Mr. Coleman's testimony concerning the roadway conditions where the equipment which was being removed was located corroborates Inspector Charles' testimony that the worst roadway conditions were 400 to 600 feet inside the mine where the roadway could not be maintained and where "you couldn't hardly get a piece of equipment in and out of the mine" (Tr. 39). In view of these conditions, Mr. Charles believed that the dozer was probably being used to move the equipment through this area (Tr. 40).

Rodney Coleman further testified that he had used a Joy 1410 loader on prior occasions to pull a piece of equipment around, and in his opinion, the loader could be used for such a purpose. Inspector Charles confirmed that during his mining experience he has observed mine operators use a Joy 1410 loader to pull shuttle cars around under good tramming conditions (Tr. 46). However, the fact that such a loader may have been used on prior occasions to pull equipment around, and is capable of doing such a job, does not per se establish that it was used underground for that purpose, or that the tracks observed by the inspector were loader tracks rather than dozer tracks. Given the roadway conditions testified to credibly by Inspector Charles, conditions which were not rebutted by the respondent, I find the inspector's belief that it was not likely that a loader would be used in the muddy soft bottom roadway in an attempt to remove the equipment to be credible.

Although the respondent maintained that the loader was used underground, there is no evidence that at any time during the inspections of the mine on September 26, or 27, 1989, did the respondent offer to show the loader to the inspectors, and Inspector Charles' credible testimony that he saw no loader and could not determine its whereabouts when he was at the mine during his inspections remains unrebutted. The absence of the loader, and the respondent's failure to bring it to the attention of the inspectors, or to account for it, particularly when it was claiming that it was used, raises a strong inference that the loader was not at the mine during the inspections.

After careful review of all of the testimony and evidence in this case, and having viewed the inspectors in the course of the hearing, I find them to be credible witnesses. Notwithstanding the fact that the inspectors never observed the dozer operating underground, I conclude and find that the evidence they developed during their inspections to support their conclusions that the dozer was used underground to help remove some of the equipment, albeit circumstantial, supports their conclusions in this regard. I further conclude and find that the respondent has presented no credible or probative evidence to support its assertion that the

equipment tracks were made by a loader, rather than the cited dozer, and that it has not rebutted the conclusions made by the inspectors to the contrary.

Although there is no direct evidence as to who may have used the dozer underground, the fact remains that the respondent was the operator of the mine and that it was under its control. Further, the respondent admits that it had decided to cease mining operations and was at the mine conducting work to recover its equipment which was underground. Under the circumstances, I believe one can reasonably conclude that the dozer was taken underground by the respondent and used to recover some of the equipment. As the responsible mine operator, the respondent is accountable and liable for any violations which may occur at the mine.

On the basis of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of the standard by a preponderance of the credible and probative evidence adduced in this case, and the contested citation issued by the inspector IS 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, (August 1985), the Commission stated further as follows:

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

Although the evidence establishes that the mine was not actively producing coal when the inspectors conducted their inspections, the power was on and inspector Charles confirmed that methane liberations were possible at any time in an underground mine (Tr. 39, 67). Although Inspector Ramey confirmed that he did not detect any methane with his methane spotter during prior mine inspections, he believed that methane was present in certain bottle air samples which he had taken at the mine (Tr. 82). Further, in its answer filed in this proceeding, the respondent conceded that the operation of a nonpermissible bulldozer in its underground mine would be hazardous.

Inspector Charles' credible and unrebutted testimony establishes that the nonpermissible dozer and its electrical components were potential ignition sources, and that the operation of the dozer underground where there was a possible build up of dangerous pockets of gas presented an ignition hazard which exposed anyone underground to burns or fatal injury. He indicated that the mine was idle for certain periods of time, and anyone going underground to attempt to remove the equipment would be exposed to pockets of gas which could have been present (Tr. 31-32). The inspector also confirmed that the nonpermissible diesel powered dozer was not equipped with a scrubber to keep the diesel ignitions clean (Tr. 69).

The respondent presented no evidence to rebut the inspector's credible testimony with respect to the hazards associated with the operation of a nonpermissible dozer in the underground mine. Under the circumstances, I conclude and find that the evidence presented by the petitioner supports the inspector's significant and substantial (S&S) finding, and IT IS AFFIRMED.

History of Prior Violations

Exhibit P-1 is an MSHA computer print-out reflecting the respondent's history of prior violations for the period September 21, 1987, through September 20, 1989. The information presented establishes that the respondent was served with 186 assessed violations, 145 of which were designated as "significant

and substantial" (S&S) violations. Six violations received "special assessments" totalling $2,750, and 30 violations were designated as "single penalty assessments." Twenty-five citations attributable to the No. 10 Mine reflect that they were issued in conjunction with section 104(b) withdrawal orders for noncompliance or failure to take timely action to abate the cited conditions.

The computer print-out further reflects proposed civil penalty assessments totalling $18,591, for all of the aforementioned violations, and that the respondent has paid only $1,025.46, of this amount. MSHA has apparently served the respondent with "delinquency letters" for the assessments which remain unpaid. Petitioner's counsel had no additional information with respect to the status of these unpaid assessments or whether or not they have been referred to the Department of Justice for collection action.

I conclude and find that for an operation of its size, the respondent has an extremely poor compliance record, and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

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

The information contained in MSHA's pleadings, Proposed Assessment Form 1000-179, reflects that the respondent's overall coal production in 1989 was 85,110 tons, and that the No. 10 Mine had an annual coal production of 24,290. Mr. Arnold (Ike) Coleman agreed that the No. 10 Mine had an annual coal production of approximately 24,000 tons when it was producing in 1989, and that it employed 10 miners. In the absence of any evidence to the contrary, I conclude and find that the respondent is a small mine operator and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Mr. Arnold (Ike) Coleman, stated that he is the secretary-treasurer of Ike Coal Company, and that his father, Branson Coleman, served as the company president. Although Branson Coleman was present in the court room, he was not called to testify in this proceeding. Arnold Coleman confirmed that his family is no longer mining coal and that the company is out of business. He stated that he was unable "to work the mine" because of the "attitude" of the MSHA inspectors. He maintained that most of the citations reflected in MSHA's computer print-out were issued at the No. 10 Mine by Inspector Charles and contributed to his decision to close the mine (Tr. 104).

Mr. Coleman confirmed that the respondent also operated the C-22 and C-23 mines, and he asserted that the prior violations issued at those mines resulted from conditions which had existed

when they were operated by the previous owner. However, he conceded that the violations were issued to his company, that his company owned the equipment and was responsible for maintaining the permissibility of that equipment (Tr. 105-106).

The respondent's history of prior violations, as corroborated by copies of the citations and orders produced by the petitioner, reflect that violations were issued at several mining locations operated by the respondent under MSHA mine identification numbers associated with mines operated by the respondent and which are identified as the No. 3, No. 7, B.C. Energy C-22, and B.C. Energy C-23. Citation No. 3360514, issued on January 5, 1989, at the No. 3 Mine (Exhibit P-52), reflects that the mine "has been abandoned for more than 90 days." No information was forthcoming with respect to the current status of the other mines, but it would appear that as of the dates the violations were issued, the mines were actively producing coal.

Twenty (20) of the prior citations and orders issued at the No. 10 Mine were issued by three different inspectors, and 15 were issued by Inspector Charles, four of which were non-S&S violations. The citations were issued to the respondent under its mine identification number, and with the exception of one citation served on an individual identified as Bill Wetsel, the remaining citations and orders were served on Arnold "Ike" Coleman and Rodney Coleman, and another individual (Ralph Coleman), who I assume is a member of the coleman family that operated the mine. Under the circumstances, and contrary to Arnold Coleman's assertions, I cannot conclude that these violations involved preexisting conditions resulting from the operations of the mine by an operator other than the respondent. The violations include electrical and permissibility violations, roof control and ventilation violations, conveyor belts and fire warning devices, sump pumps, underground cables, a roof-bolting machine, and a loading machine. Under the circumstances, and in the absence of any probative evidence to the contrary, I conclude and find that all of this equipment belonged to the respondent and was used by the respondent while it was operating the mine, and that the conditions cited were within its control and resulted from its operation of the mine.

I find no credible evidence in this case to support any conclusion that any of the inspectors who issued the aforementioned citations at the No. 10 Mine, including Inspector Charles, harassed the respondent, and the cited conditions and practices, on their face, reflect conditions which prompted the inspectors to issue the citations and orders in question. Accordingly, the respondent's suggestion that he was forced to close the mine because of the "attitude" of the inspectors is rejected. To the contrary, I can only conclude that any effect the citations and orders had on the respondent's decision to close the mine and

cease mining coal came about as a result of its failure to stay in compliance with the required mandatory safety standards.

No probative information or documentation was forthcoming from the respondent with respect to its current financial condition, and the respondent has produced no tax, financial, or net-worth statements conclusively establishing that it is insolvent or has filed for bankruptcy. Although the petitioner's counsel alluded to a $200,000 debt owed to the respondent for contract work which it performed for an unknown company or individual, Arnold Coleman indicated that he has not collected this debt and has sued the individual for the money, but that this individual has declared bankruptcy (Tr. 109).

No information was forthcoming with respect to the status of the mining equipment which was removed from the No. 10 Mine, as well as the equipment used by the respondent at its other mining operations, and I have no basis for determining whether or not this equipment is owned or mortgaged, or whether it is still in the possession of the respondent as part of its corporate assets. Under all of these circumstances, and in the absence of any evidence to the contrary, I cannot conclude that the respondent has established that it cannot pay the civil penalty assessment which I have made for the violation which has been affirmed in this case.

Negligence

In his inspection report filed in connection with the order and citation which he issued, Inspector Charles took the position that by using the cited nonpermissible dozer underground, the respondent exhibited a "reckless disregard" for safety. He made the same finding of "reckless disregard" on the face of the citation which he issued. In support of this negligence finding, the petitioner argued that assuming that the fact of violation is established, it would be obvious that the respondent knew about this violation, and it pointed out that in its answer filed in this case, the respondent conceded that using a nonpermissible dozer underground would be hazardous (Tr. 111). I agree with the inspector's negligence finding of "reckless disregard," and IT IS AFFIRMED.

Gravity

In view of my "significant and substantial" (S&S) findings, I conclude and find that the violation was serious. Indeed, in its answer filed in this proceeding, the respondent conceded that operating the nonpermissible bulldozer underground would be hazardous.

Good Faith Compliance

The evidence in this case reflects that in conjunction with the citation which he issued, the inspector also issued a section 107(a) imminent danger order "red-tagging" or closing down the entire underground area of the mine. Since there is no evidence that the respondent timely contested the issuance of the order, it is not in issue in this case. I take note of the fact that in issuing the citation, the inspector did not establish an abatement time and it seems obvious that the inspectors never observed the dozer being operated underground. On the facts here presented, although I conclude and find that the violation was abated, it was effectively abated by the inspector when he closed the underground mine area, and not by the respondent who denied that the dozer was used underground. Under the circumstances, I have no basis for finding that the respondent abated the violation in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $950, is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $950 for the section 104(a) "S&S" Citation No. 3368426, September 21, 1989, 30 C.F.R. § 75.507. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of 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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 14 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL L. PRICE AND JOE JOHN VACHA, Complainants and UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor v. JIM WALTER RESOURCES, INC., Respondent	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 87-87-D No. 4 Mine

DECISION DISMISSING TEMPORARY REINSTATEMENT PROCEEDING

Before: Judge Broderick

Following a hearing on June 29, 1987, I issued an order directing Respondent to immediately reinstate complainants Price and Vacha to the positions from which they were discharged on March 2, 1987. The order of temporary reinstatement was affirmed by the Commission on August 3, 1987. 9 FMSHRC 1305 (1987). The Commission's decision was affirmed by the Court of Appeals for the 11th Circuit. Jim Walter Resources, Inc. v. FMSHRC, No. 87-7484, (11th Cir., December 21, 1990). In the meantime, I issued a decision following a hearing on the merits in Docket No. SE 87-128-D, ordering JWR, inter alia, to permanently reinstate Price and Vacha. 10 FMSHRC 896 (1988). The Commission reversed in part and remanded the case to me in August 1990. 12 FMSHRC 1521 (1990). On December 20, 1990, I issued a decision on remand again ordering JWR to permanently reinstate Price and Vacha. 12 FMSHRC _____ (1990).

Under the above circumstances the Temporary Reinstatement Proceeding is moot. Accordingly, the above docket is DISMISSED.

/James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1991

DRUMMOND COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 91-10-R
	:	Citation No. 3020151;
SECRETARY OF LABOR,	:	10/4/90
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 91-11-R
Respondent	:	Citation No. 3020153;
	:	10/4/90

DECISION

Appearances: David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama, for the Contestant; William Lawson, Esq., U. S. Department of Labor, Office of the Solicitor, Birmingham, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case:

These cases are before me based upon Notices of Contest filed by the Operator (Contestant) on October 26, 1990. On the same date Contestant filed a Motion to Expedite a Hearing on the issues raised by the Notice of Contest. In a conference call on October 29, 1990, between the undersigned and counsel for both Parties, it was agreed that a hearing be scheduled for November 14 and 15, 1990, and a hearing was subsequently held on those dates in Hoover, Alabama. Walter Deason and Sidney Hill testified for the Secretary (Respondent). George Capps, John M. Busby, Billy J. Johnson, and Larry Lee, testified for the Contestant.

At the close of the hearing, Contestant indicated that it sought an opportunity to submit Proposed Findings of Fact and a Brief, and the Parties were allowed to file same within 15 days after receipt of the transcript of the proceedings. The Parties were further granted a right to file a reply brief 5 days thereafter. Respondent filed a Brief on December 17, 1990, and Contestant filed Proposed Findings of Fact and Conclusions of Law on December 20, 1990. Contestant and Respondent filed Reply Briefs on December 27 and 26, respectively.

Findings of Fact and Discussion

I.

On October 4, 1990, while inspecting Contestant's Mary Lee No. 2 Mine, MSHA Inspector Walter W. Deason, issued a Citation alleging a violation of 30 C.F.R. § 75.400 in the area of the 4315 conveyor belt drive. Section 75.400, supra, provides, as pertinent, that, inter alia, coal dust, including float coal dust deposited on rock-dusted surfaces, and loose coal shall not be permitted to accumulate.

The 4315 section conveyor belt transports coal from the face outby to the 430 belt line. In essence, Deason indicated that he measured an accumulation of float coal dust, up to 19 inches deep, beneath the take-up rollers and extending outby. The accumulation also extended across the 36 inch wide belt. Deason described the material as powdery dry, like gun powder, and real fine. After he issued the Citation in question, he had some miners shovel under the rollers to clean the accumulation. He indicated that the material that was shoveled was powdery dry.

According to Deason, he measured the material around the tight side of the belt with a ruler, and it was 16 inches deep. He described the material as black. He indicated that he stuck his stick in it, and opined that it was dust all the way through. However, according to Deason, he doubted he could have put his hand in the material, as it was compacted. On cross-examination he conceded that coal dust becomes compacted when it is wet.

Sidney Hill, Jr., an international representative employed by the United Mine Workers of America, who performs safety inspections, testified that he traveled with Deason on October 4, and that in the belt header there ". . . was indeed perhaps one of the worst cases of accumulation that I had observed." (Tr. 209). He described an accumulation of coal along the main rollers beneath the belt, which he estimated to be a foot and a half deep. He indicated that the material was loose and ". . . dry in some cases." (Tr. 209). Hill testified that subsequent to the discovery by Deason of the accumulation, it was removed with a shovel. Hill said he then got down on his hands and knees and examined the coal "and I would say for the most part it was dry coal." (Tr. 211).

I find that the testimony of Contestant's witnesses do not rebut the testimony of Respondent's witnesses which I find

establishes an accumulation of coal in the area in question. George Capps, a miner employed by Contestant who served as the Chairman of the Union's Mine Safety Committee on the dates in question, testified that he measured with a ruler the depth of coal indicated on a walking stick that Deason had inserted in the coal, and it showed a depth of only 9 inches. In the same connection, John M. Busby, Contestant's evening shift safety inspector, testified that the material, in essence, was at most 10 inches deep, and that on the tight side it tapered down from that level. I find the detailed testimony of Capps with regard to the procedure that he used in measuring the depth of the coal to be persuasive. I conclude, however, that the coal in the area in question to a depth of 9 inches, as testified to by Capps, is nonetheless indicative of an accumulation within the purview of Section 75.400, supra.

Capps indicated that with regard to the accumulation in the area where Deason measured the depth of the coal at the top of the take-up, "it was just mush, mushy stuff." (Tr. 230). He said that the material had some rocks in it, and that when he shoveled under the belt after the condition had been observed by Deason, the material was not dry. Busby indicated that, in the area where the power center is close to the belt line, he was a foot to a foot and a half from the material, and it contained rock dust coal and muck. He described it as hardened and ashen gray in color. However, he indicated that, on the tight side of the belt, the accumulation that was opposite the power center and between the two rollers contained some dry material. He also indicated that he saw float coal dust around the conveyor drive. He also agreed that under the take-up roller, where a roller was missing, the material "in general" was dry (Tr. 374-375). He described the accumulation that the belt was touching, as a mixture of lump coal, fine lump coal, and ashen particles, and that there was a "smattering" of black on top. (Tr. 337).

The testimony of Deason is confusing with regard to whether he termed the material in question coal dust or float coal dust. However, I conclude that Contestant's witnesses have not rebutted the testimony of Deason and Hill that the material in question, to a depth of at least 10 inches, contained coal that to some degree was not solid and was loose. Although Busby described the material as damp and wet, he indicated that it was not "running wet" (Tr. 388). Capps indicated that the material that he shoveled under the belt was not dry, and that at the at the top of the take-up it was wet and mushy.

I find the testimony of Busby and Capps inadequate to rebut either the testimony of Hill who indicated that he was on his hands and knees when he observed that the coal was dry for the most part, or the testimony of Deason that at least in some areas the coal was fine and powdery dry. Further, although Contestant's witnesses disagreed with Deason with regard to the

texture of the material in question, they, in essence, agreed with him that the belt was running in the material. Taking this fact into account, and considering the depth of the material being at least 10 inches, and the extent of the material, consisting of loose coal, which was found across the 36 inch belt and under the take-up rollers and extending outby thereby, I conclude that there was an accumulation of loose coal. As such I find that Contestant herein did violate Section 75.400, supra, as alleged.

II.

In the Citation at issue, Deason indicated that the violation was significant and substantial. None of Respondent's witnesses contradicted the testimony of Deason that a roller was missing from the take-up unit, and as a consequence the conveyor belt was rubbing against metal creating friction, which is a source for ignition. According to Deason, the belt, under the bottom of the rollers, was running in an accumulation of coal that was "powdery dry" (Tr. 29). He noted that the belt was "flipping it up in the air" (Tr. 29). Hill indicated that he was on his hands and knees and ". . . for the most part it was dry coal" (Tr. 211). On the other hand, Capps, while agreeing that the belt was turning in an accumulation of coal, testified that he shoveled under the belt and "it wasn't dry" (Tr. 264). Busby, who also shoveled the coal, indicated that the material that the belt was touching was "caked" (Tr. 376), and that "It was a mixture of lump coal, fine lump coal ashen particles. There was some rock dust in it and there was a smattering of black on top" (Tr. 337). However, on cross examination he agreed that "in general," the mixture was dry in consistency (Tr. 375). Also, although he testified that the material was damp to dry and was not "dusty dry" (Tr. 386), on cross examination, he indicated that the material directly underneath the missing roller "was fairly dry" (Tr. 385). Also, although he indicated that he did not see "a great deal of dust" being "stirred" by the belt, he nonetheless indicated that "there was float coal dust on the surface" (Tr. 348).

Thus, taking into account the presence of significant amounts of coal accumulation, the running of a conveyor belt in coal, the existence of dry coal particles, and the presence of friction, an ignition source, I conclude that, given the continuation of the violative condition herein, a hazard of a fire would have been reasonably likely to have occurred. Further, inasmuch as the flow of air went from the area in question inby, smoke from a fire in this area would be carried inby. It was the conclusion of Deason, which has not been rebutted by testimony from any of Contestant's witnesses, that serious injuries to miners would have resulted due to smoke inhalation or other hazardous conditions occasioned by a fire. Hence, I conclude that there was a reasonable likelihood of an

injury of a reasonably serious nature. I thus conclude that it has been established that the violation herein was significant and substantial (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

III.

Deason indicated that the violation herein was as a result of Contestant's unwarrantable failure. It thus is incumbent upon Respondent to establish that the accumulation herein resulted from Contestant's aggravated conduct (Emery Mining Corporation, 9 FMSHRC 1997 (1987)). For the reasons that follow, I conclude Respondent has not met this burden.

a. History of Accumulations at Conveyor Belts

At 1:03 a.m., on October 2, 1990, two days before Deason issued the Citation in question, he cited Contestant for an accumulation of coal beneath and around the take-up unit at the slope belt. According to Deason, he found that shift inspectors were not placing their initials in places they inspected. Deason testified that he then told Carl Ware, the foreman of the owl shift, to tell the fire bosses that they needed to make inspections and to place their initials on inspection reports. The following day at 4:16 p.m., Deason served Contestant with a Citation alleging an accumulation of coal under the belt line drive and the take-up unit of the 40 North No. 1 Conveyor Belt. On October 4, at 4:48 p.m., Deason served Contestant with a Citation alleging an accumulation of coal beneath the belt drive and a take-up unit of the 40 North No. 3 Conveyor Belt. Ten minutes later, Deason cited Contestant for an accumulation of coal from the end drive rollers to the discharge rollers at the 4050 section conveyor drive.

According to Deason, the accumulation at the slope belt was 13 inches deep as measured by him, and extended from rib to rib. He indicated that the accumulation 20 to 30 feet away from the take-up unit had been there for an extended period of time as it was impossible for coal to spill that far back off the belt. This testimony was not contradicted or otherwise impeached by Contestant.

According to Deason, the accumulation at the 40 North No. 1 Belt extended 50 to 60 feet and was 35 inches deep at the deepest point. Deason indicated that this condition was readily visible. He indicated that the material consisted of small particles of coal, and hence was not considered to be a spillage which is lumpy and is usually on the side of a belt. In contrast, the accumulation at the 40 North No. 1 belt was at the bottom of the belt. According to Deason it takes time for material to accumulate on the bottom. Hence, according to Deason, this accumulation did not occur overnight. Deason discussed this

condition with Busby as follows: "I just -- basically I just told him, you know, we had to clean the accumulations up and got with him on the, you know, discussing the amount of time that it would take to clean the accumulations up, you know, and establish an abatement time" (Tr. 61). (sic).

In essence, Deason testified that the accumulation at the 40 North No. 2 Belt was up to 12 inches deep and the belt was rubbing against the accumulations for a distance of approximately 30 feet. This testimony was not impeached or contradicted by Contestant.

Essentially it was the testimony of Deason that the accumulations at the 4050 section conveyor drive extended 20 to 30 feet outby the belt and between the tracks. He indicated that the accumulations were up to 13 inches deep and consisted of small particles and that the material was not lumpy. He opined that a driver of a vehicle in the area would be able to see the accumulations.

After noting the accumulations in the 4050 section conveyor drive, Deason went to the area in question (4315 section conveyor belt) and in the neutral entry saw coal dust extending a distance of 7 crosscuts.[1]/ He described the material therein as float coal dust and black, which led him to conclude that it presented a serious hazard. He then went to look for the source of the dust he had observed in the neutral entry, and went to the 4315 header where he observed dust being flipped in the air.

In general, Hill testified that on October 3 while inspecting the mine with Billy Ray Powell, a member of the Local Union's safety committee, he asked Powell the reason why the amount of coal had accumulated, and the latter told him that " . . . in the past they had some problems on the belt line and the conditions were ones that were being worked upon, . . ." (Tr. 207). However, Hill did not describe the nature of these problems, nor did he indicate that they were prevalent in the area in question.

b. The Length of Time the Coal Was Allowed to Accumulate

With regard to the accumulations in the areas in issue, Deason indicated that because the consistency of the material therein was powdery and real fine it had to have been ground. He thus concluded that the accumulations could not have occurred in the time that elapsed from the end of the previous day shift. Hill opined that inasmuch as there was no indication of any blockage on the belt which would have caused a rapid accumulation

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[1]/ Each crosscut is 70 feet in length.

(spillage), the accumulations herein occurred over a period of time. Neither Deason's nor Hill's testimony was impeached or rebutted by Contestant.

c. Visibility of the Accumulations

Deason, testified to having observed powdery dry accumulations at the 4315 header which were 19 inches deep. However, he did not indicate with any degree of specificity as to where he was when he observed this condition, and as to whether this condition was readily observable from the walkway side. Hill indicated in this connection that he walked with Deason from the tail roller to the take-up unit, and that "along the belt roller, the main roller, there was accumulations of coal beneath the belt and extended in varying degrees all the way back to the belt take-up unit. The coal was very deep." [sic] (Tr. 209). He indicated that these conditions were readily visible to him and ". . . they would be visible to a person walking by them, I would think" (Tr. 214).

According to Capps, when he made his own inspection of the area in question immediately prior to the arrival of Deason, the area "looked good" (Tr. 251), and there were no hazards. He indicated, essentially, that he was not able to see the belt running in accumulations or rubbing against the frame where the roller was missing, as the guards had not been removed.[2/] He also indicated that the belt line was clean and that, specifically, the area under the rollers was clean. However, he indicated that the take-up area was not clean, and that he would have seen that area if he would have looked through the screens.

Busby indicated that the area of the header is difficult to see because of the mesh screens, but conceded that the area in which the rollers are located is susceptible to spillage, and hence demands a closer inspection than other areas of the belt. Indeed he indicated that he kneeled down along the walkway or travel side of the belt, looked over the guards to the belt line, and saw an area of hardened material which extended under the belt to a depth of about 10 inches. He noted that he was standing one to one and a half feet away when he made this observation.

d. Analysis

I conclude that the weight of evidence establishes that Contestant did not use due diligence in inspecting for accumulations in the area in question. The weight of the

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[2/] On the date in issue 7 mesh guards measuring approximately 4 by 8 feet were in place.

evidence specifically establishes that the accumulations in question would have been noticed upon a careful inspection. Due to the extent and depth of the accumulations (see I, infra), I conclude that it is highly likely that they existed at least 4 hours earlier when the preshift examination was made.

In its Brief, Respondent asserts that Contestant knew of the violation herein and did not abate it until cited by Deason. The record fails to establish such knowledge on the part of Contestant of the specific accumulations at the specific locations in issue, i.e., the 4315 section conveyor belt. (c.f., Southern Ohio Coal Company, 12 FMSHRC 1498 (1990)). The fact that accumulations on four other belt lines were found and cited by Deason, on October 2-4, 1990, does not per se establish either knowledge or aggravated conduct with regard to the specific accumulations herein at the 4315 belt header (see, Eastern Associated Coal Corporation, 12 FMSHRC 239 (1990)). There is insufficient evidence that Deason had any discussion with any of Respondent's personnel prior to the issuance of the Citation in issue, with regard to problems with accumulations at the belt lines. The only evidence proffered by Respondent is the testimony of Deason with regard to his conversation with Busby after he (Deason) found an accumulation at the 40 North No. 1 belt on the evening of October 3, 1990. (III, a, infra). A plain reading of this testimony reveals that it does not establish that Deason informed Busby of the need either to take care of accumulations in general on belt lines, or to be aware of such problems in the area in question. It would appear that Deason's comments to Busby were related solely to abating the accumulations at the 40 North No. 1 header. Similarly Deason's conversation with Ware on October 2, in which he told Ware to tell fire bosses of the ". . . need to be making these examinations and need to putting dates and times and initials. . ."(Tr 48), was in the context of Deason's concern with the failure by inspectors to enter their initials upon making examinations. There is no evidence that Respondent was informed by Deason of the need to make a thorough inspection of the area in question. Thus, the fact that Deason found accumulations after he spoke to Ware and Busby does not, per se, establish aggravated conduct.

Further, I reject the argument advanced by Respondent, that Contestant made a conscious decision not to stop production of coal to clean the accumulations, but rather to wait until the idle owl shift to do so. This argument is based on the testimony of Busby that, "normally," he would have had the cited conditions cleaned during the owl shift when the guards would be removed

allowing the area on the tight side to be cleaned (Tr. 377).[3]/ Since the record does not establish that Respondent had knowledge of the accumulations herein, I do not place much weight on what Busby would have done, had he in fact known of the accumulations. I find this testimony too speculative. I place more weight on evidence of what Contestant actually did with regard to the removal of the accumulations.

In this connection, neither Deason nor Hill saw anyone shoveling coal from under the belt on October 4, prior to the issuance of the Citation. Busby also indicated that no one was shoveling when he walked into the 4315 area. On the other hand, Capps, in essence, testified that a miner was shoveling out from under the belt about 200 to 250 feet inby the headers. I find Capps' testimony credible inasmuch as none of the other witnesses who were present indicated specifically that they did not see a miner cleaning from under the belt, 200 to 250 feet inby the headers. Also, Busby testified that at the time of Deason's inspection he was told by Don Clark, the evening shift mine foreman, that the latter had previously assigned an employee to shovel. In addition, Deason, in essence, indicated that he saw that some accumulations had been shoveled on the tight side in the area of the header. In this connection, Busby testified that the first 25 or 30 feet inby the area in question, from the walkway across to the tight side, was clean and that "the residue with shovel markings was wet" (Tr. 393). This testimony has not been rebutted. I thus conclude that Respondent made some efforts to clean up the accumulations.

Based on all the above, I conclude that the record is insufficient to support a conclusion that the accumulations at issue resulted from Respondent's aggravated conduct. Hence, the violation herein is not the result of Respondent's unwarrantable failure.

Docket No. SE 90-11-R

On October 4, 1990, Deason issued Citation/Order No. 3020153 alleging a violation of 30 C.F.R. § 75.303 in that "adequate belt examinations" were not conducted on the day and evening shifts

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[3]/ In this connection, Respondent in its Brief, also refers to the testimony of Capps that , in essence, screens (guards) are "never" taken down while the belt is running, and that "usually" this is done during the owl shift when the belt is shut down (Tr. 297). I do not place much weight on these conclusions, as the record does not establish the basis for these conclusions. There is no evidence that Capps had personal knowledge of these matters, nor does the record indicate the source he relied on for his conclusions.

"in that the record books indicate none observed" on the 40 North, Nos. 1, 2 and 3, 430, and 4315 section belts.[4]/

Section 75.303, supra, in essence, provides that within 3 hours immediately preceding a shift, certified persons shall examine every working section, and that "belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." Section 75.303, supra, further provides as follows:

> Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.

In order for Respondent to establish a violation herein for a failure to examine, it must first be proven that there were hazardous conditions that were not reported in an area required to be examined, i.e., "active workings." That term is defined in 30 C.F.R., Section 75.2(g)(4) as ". . .any place in a coal mine where miners are normally required to work or travel." In essence, the testimony of Deason described accumulations of coal, for which he cited Contestant, at the slope belt, 40 North No. 1 belt, 40 North No. 3 belt, and 4050 Section drive. (Docket No. SE 91-10-R, III, (a) infra). Contestant has not rebutted or impeached Deason's testimony in this regard. Deason indicated in his testimony that the 40 North belt No. 1, and the area cited concerning the 4050 belt, were areas that were regularly traveled. Deason also indicated that in the area of the slope belt that contained an accumulation of coal, the take-up unit and rollers were not guarded, in violation of 30 C.F.R. Section 75.1722(a), as the guards had rusted and were torn. He noted that this was in an area that was traveled daily and where miners worked daily. None of these conclusions were rebutted or

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[4]/ The Section 104(d) Order in issue is predicated upon the underlying Section 104(d)(1) Citation, discussed in Docket No. SE 91-10-R, infra, wherein I found that the violation therein was not the result of Contestant's unwarrantable failure. Hence, the Order should be amended to a Section 104(d) Citation.

impeached by Respondent. I thus conclude that it has been established that there were violative conditions in areas required to be examined.

Deason indicated that if one would walk by, one could not help but see the condition of the guarding at the slope belt. This opinion was not rebutted or impeached. In addition, Deason's testimony that guards had been removed on the tight side of the 4315 belt header, was corroborated by Capps and Busby.

Although there were accumulations and a guard missing in the 4315 header area, these facts were not reported in the Preshift Mine Examiner's Report, for the period from September 25, 1990, through the evening shift of October 4, 1990. The 2:00 p.m. to 2:30 p.m. examination of October 3, 1990, indicates "belt needs cleaning," but did not specify the specific accumulations at the header, nor did it note the missing guard. In the same fashion, the Preshift Report for the period from 8:00 p.m. to 10:30 p.m., October 3, 1990, indicates "cleaned on belt," but does not specify the area that is in question.[5]/

Contestant did not offer the testimony of any of its examiners to attempt to establish that the violative accumulations at the 40 North No. 1 and 4050 belts were examined and reported to the Operator.[6]/ Nor did Respondent offer any testimony to establish that the violative condition of missing guards at the 4315 belt was examined and reported.

Similarly the Preshift Mine Examiner's Reports for the 4050 Section conveyor drive for the period from September 25, 1990, through the night shift of October 4, 1990, do not report any accumulations at the rollers. The remarks for the 6:00 a.m., examination of September 25-28, October 1-3, were not accorded any probative value as they were not legible and could not be understood.

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[5]/ Entries in the preshift examination section in the Examiner's Reports for: 10/1/90, 10/2/90 for the period 5:10 a.m. to 5:12 a.m., 10/3/90 for the period 5:10 a.m. to 5:12 a.m., and the remarks for October 4, 1990, for the time period 4:00 a.m. to 4:12 a.m., were not accorded any probative value as they were not legible and could not be understood.

[6]/ Busby indicated that, within the scope of his duties, he normally examines the belt line, although there is a designated belt examiner. However, he did not make any examination on October 3 or 4, and could not state when he last examined it prior to the date the Citation herein was issued, i.e., October 4.

The Preshift Mine Examiner's Report for the period from September 25, 1990, through the day shift of October 4, 1990, did not indicate any of the accumulations at the slope, 40 North No. 2 and 3 belts, as set forth above, infra.

Hence, it is concluded that inasmuch as Contestant did not report the conditions set forth above, infra, it did violate Section 75.303. supra.[7]/

Deason had told Ware on October 2, to inform the fire bosses of the need to make inspection and enter dates, times, and initials. Subsequently, Deason observed hazardous conditions of missing guards at the 4315 header, and accumulations of coal at the 40 North No. 1 and 4050 belts, areas that were regularly traveled. The record fails to establish that these areas containing hazardous conditions were examined. No evidence was presented to excuse Contestant's actions in this regard. In this circumstances, I conclude, that the failure to examination was the result of Contestant's unwarrantable failure (See, Emery, supra).

ORDER

Docket No. SE 91-10-R.

It is **ORDERED** that, the Notice of Contest is sustained in part in that Citation/Order No. 3020151 shall be **AMENDED** to reflect the fact that the Citation therein was not the result of Contestant's unwarrantable failure.

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[7]/ Thus, since a violation of Section 75.303, supra, has been established, it is not necessary to resolve the conflict in testimony between Busby and Deason with regard to the distance of the unguarded area at the 40 North No. 3 belt, and as to whether or not the area that was unguarded at the 40 North No. 2 belt was regularly traveled or not.

Deason also cited missing guards at the 4050 belt. However, there was not a mandated requirement to make a preshift examination of the area of the 4050 belt where the guard was missing, as Busby's testimony that no one works around the tail piece, was not contradicted by Deason who indicated that the area was not heavily traveled. Further, although Deason indicated that people go to that area to clean the belt, Busby indicated that, in such an event, the belt is turned off. Since this area did not have to be inspected, it is not necessary to resolve the conflict between Deason and Johnson with regard to whether the missing guard at the 4050 belt drive exposed a pinch point.

It is further **ORDERED** that, in all other respects the Notice of Contest is **DISMISSED.**

Docket No. SE 91-11-R

It is **ORDERED** that the Notice of Contest is sustained in part in that Citation/Order No. 3020153 shall be **AMENDED** to reflect that it is to be reduced from Section 104(d) Order to a Section 104(d)(1) Citation. It is further **ORDERED** that, in all other respects, the Notice of Contest be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 14 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 90-11-M
	:	A.C. No. 30-01212-05519
v.	:	
	:	McConnellsville Plant
WHIBCO, INCORPORATED, Respondent	:	

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Mr. David E. Hergert, Vice President, Production, Whibco, Inc., Leesburg, New Jersey, 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 $300, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.14101(a)(1). The respondent filed a timely answer denying the alleged violation, and a hearing was held in Syracuse, New York. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the hearing record 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) whether the violation was "significant and substantial," and (3) the appropriate civil

penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act.

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 agreed that the respondent is subject to the Act and that the presiding judge has jurisdiction to hear and decide this matter. The respondent's representative stated that the respondent has annual mining revenues of approximately 12 million dollars, and that its McConnellsville plant generates revenues of approximately $700,000 annually. He confirmed that the plant has five employees and a plant manager, and the parties agreed that the plant is a small mining operation, and that the respondent is a small-to-medium size operator.

Discussion

Section 107(a) - 104(a) "S&S" Order-Citation No. 3045987, issued on December 12, 1989, by MSHA Inspector Harold Adams, cites a violation of mandatory safety standard 30 C.F.R. § 56.14101(a)(1), and the cited condition or practice is stated as follows:

> Service brakes on Terex loader, Ser. # 53437, are in very poor condition. Loader could not be stopped with an empty bucket on a 2 percent grade (approx) by use of service brakes.
>
> Condition has existed for approx. 30 days. Suspected cause as stated by supervisor is cold weather. When loader was checked, air pressure gauge did not register. Loader was removed from service.

Petitioner's Testimony and Evidence

MSHA Inspector Harold Adams confirmed that he inspected the respondent's plant on December 12, 1989, and issued the contested citation after finding that the service brakes on the cited Terex loader would not hold the loader when it was tested on an approximate grade of 2 percent. He stated that the loader had just dumped a load of sand into the processing plant, and the loader operator advised him that the brakes were "not very good." The

loader normally operates on level ground, but it travels up a ramp of approximately 2 percent grade to the plant where it dumps its bucket load of sand. After dumping the load, the operator applied the brakes at the top of the ramp, and the loader, with an empty bucket, drifted backwards down the ramp to level ground, and the brakes had no effect and would not hold the loader.

Mr. Adams described the route of travel taken by the loader, and he confirmed that it made several trips a day with a loaded bucket along the same route. He stated that service and vendor trucks use the same roadway traveled by the loader, and that mine personnel also walk along the roadway on occasion. He confirmed that the loader operator informed him that the cited brake condition had existed for about 30 days, and that Jeff Scott, the plant manager, told him that the condition was caused by the cold weather and that the loader air receiver had to be drained nitely because of moisture accumulations in the air line caused by the cold weather conditions. Mr. Adams confirmed that the brakes would not stop the loader when it was tested, and he also issued an imminent danger order taking the loader out of service.

Mr. Adams stated that he discussed the citation and order with Mr. Scott when he issued them, and that Mr. Scott informed him that there was an air leak. Mr. Adams stated that his supervisory inspector was with him when he cited the loader and that his supervisor got into the cab of the loader and observed that the air pressure gauge showed no air pressure. Mr. Adams believed that the lack of pressure could have resulted from an air leak or a defective pressure gauge, but that when he next returned to the plant he was advised that an air leak had caused the brake condition and that an air line or hose had to be replaced. He then checked the brakes again with a full bucket of sand on the ramp and found that the brakes would hold the loader and that the air pressure gauge indicated 120 pounds of air pressure in the system.

Mr. Adams confirmed that he made a gravity finding of "reasonable likely" and that he based this on the fact that the loader routinely traveled along the roadway to and from the plant with a full and empty bucket and that its route of travel took it by the plant office and employee parking lot. In view of the presence of other vehicular traffic on the roadway, and occasional foot traffic by employees who used the roadway, he believed that the loader with inadequate service brakes would reasonably likely have an accident. If an employee or other vehicle were struck by the loader, which is a heavy piece of equipment, he believed that an injury resulting in lost work days or restricted duty would reasonably likely occur if the loader were continued to be used with service brakes which would not stop it.

Mr. Adams confirmed that he made a negligence finding of "moderate." He believed that Mr. Scott knew that the brake condition had existed for approximately 30-days prior to the inspection and that the loader had a leaky hose. Mr. Adams confirmed that he made no inquiry as to whether the loader had been used during this 30-day period, but based on his observations and the fact that this may have been the only loader, he concluded that it had been used during this time. He further confirmed that in making his negligence finding he considered the fact that Mr. Scott had taken steps to try and correct the condition by bleeding the brakes of all moisture on a daily basis prior to the inspection. Mr. Adams also confirmed that he issued a separate citation on the loader after finding that it had a cracked windshield and cracked side windows (Tr. 9-19).

On cross-examination, Mr. Adams confirmed that he had previously visited the plant, but he could not recall whether it was during the summer or winter months. He confirmed that his supervisor Jim Green was with him on the day of the inspection in question. Mr. Adams further confirmed that he has not inspected any other plants operated by the respondent and that his prior inspection experience with "cold weather operations" were limited to open pit copper mines in Arizona, but that they did not present any equipment freezing problems. He confirmed that the weather conditions at the time of the inspection were "cold and freezing" and that there was "a couple of inches of snow" on the ground. He further confirmed that the respondent did explain to him that the loader air pressure tank was being bled at the end of each shift prior to the inspection and that this was done to remove the moisture from the air system to prevent freezing.

In response to further questions, Mr. Adams confirmed that there were no particular hazards on the plant ramp where the loader dumped its load, and that the loader was equipped with an adequate hand brake and operable backup alarm. He also confirmed that the loader bucket could also be used as a braking device and that the loader normally travelled at a speed of 5 miles per hour or less. Mr. Adams further stated that he checked the respondent's "accident lost time" records, and had no knowledge that the respondent had any prior lost time accidents (Tr. 19-22).

Respondent's Testimony and Evidence

Jeffrey Scott, plant manager, testified that at the time the problem developed with the cited loader, Inspector Adams was in the plant conducting his inspection. Mr. Scott stated that there was approximately 6 to 8 inches of snow on the ground, and that once the loader brake problem was identified the loader was put in the garage and the air pressure gauge line was replaced and the loader was allowed to warm up before being used. He believed that the freezing weather conditions and moisture in the air line caused the braking problem found by the inspector and Mr. Scott

did not believe that there was any serious risk with the loader prior to the time it was cited. He identified the loader operator as Philip Pike and stated that he was an experienced loader operator. Mr. Scott confirmed that the respondent had no lost time accidents (Tr. 27-28).

On cross-examination, Mr. Scott confirmed that he was not with Inspector Adams when he asked the loader operator to test the loader brakes on the plant ramp. Mr. Scott further confirmed that he was aware of the braking problem, and that due to the cold weather, the loader had experienced similar freezing problems "off and on" on three or four occasions, and each time, the loader was taken to the garage so that the air lines could be bled to remove the moisture and to permit the loader to warm up in the garage. He experienced no braking problems with the loader when the weather was not cold and freezing. He described the loader as an old machine, and he indicated that the air dryers were not too efficient.

Mr. Scott stated that the roadway used by the loader was 75 to 80 feet wide, and he confirmed that seven or eight large trucks or tractor trailers were in and out of the plant roadway area on any given day and that employees would also be travelling on foot along the roadway. He stated that the air leak was in the air pressure gauge itself and did not directly affect the braking system. He did not believe that the lack of pressure in the air gauge would affect the efficiency of the brakes, and that the only hose or line which was replaced was the one connected to the air pressure gauge (Tr. 29-32).

Mr. Scott stated that after the loader was taken out of service by the inspector on December 12, 1986, it was returned to service that same afternoon within approximately 5 hours. During this time, no servicing was done on the brake system, and the brakes "worked good" (Tr. 34). However, when the loader was tested, one brake was not adjusted properly and three of the four wheels were locking up. The brake pads had to be adjusted so that the one wheel would brake (Tr. 34). He did not believe that the three wheels which were locking up made much difference in stopping the loader (Tr. 35).

Mr. Scott stated that the cited loader was not used on a daily basis at the plant and it is only used when another loader which is normally used at the plant is at the pit area doing other work (Tr. 35). Mr. Scott stated that the inspector allowed him to use the loader after the brakes were adjusted on December 12, and after he retested it because it was needed on the night shift (Tr. 37).

Mr. Scott stated that he was not aware of the condition of the loader when it was tested by the inspector on December 12, but he confirmed that he had problems with the loader prior to

this time and the operator would leave it in the garage for as long as it took to thaw out. He further confirmed that no one would observe the loader during the shift to determine whether the brake system was operating correctly (Tr. 38).

Mr. Scott confirmed that the drivers of the contractor trucks at the plant were familiar with the plant, and that the drivers and plant employees were familiar with safely maneuvering around a loader (Tr. 39).

In response to further clarifying questions, Mr. Scott confirmed that the pressure gauge line was replaced and the loader was allowed to warm up in the garage after it was cited by the inspector and that nothing was done to the loader prior to the inspection. The inspector observed the loader "fresh for the first time" on the morning of his inspection "in the condition that it was in" (Tr. 40). He confirmed that he was not present when the operator applied the brakes and the loader drifted, but that he was present and did observe it drift down the ramp when the brakes were applied when the inspector took him to the loader and had the operator test it a second time. Mr. Scott did not dispute the fact that the loader brakes would not hold the machine on the ramp, regardless of what caused the condition (Tr. 41).

Inspector Adams was recalled by the petitioner and he stated that he did not recall informing Mr. Scott that he could place the loader back in service on December 12. He stated that he next inspected the loader on December 14, when he terminated his order (Tr. 42). He stated that on December 12, the mechanic who was working on the loader informed him that there were air leaks. Mr. Adams stated he did not observe the loader in operation before leaving the mine that day and December 14, and did not see it in operation after he cited it (Tr. 43-44).

Mr. Adams stated that he returned to the plant on December 14, at which time Mr. Scott provided him with information about the corrections made to the loader, and he terminated the order on that day (Tr. 44). Mr. Adams stated that once a section 107(a) order is issued taking a piece of equipment out of service, the mine operator must advise MSHA that the cited condition has been corrected before he can place the equipment back in service. However, if a citation is issued, the equipment may be placed in service after the condition is corrected and MSHA need not be notified (Tr. 47). Mr. Adams could not recall any conversation with Mr. Scott which would have led him to believe that once the loader was repaired it could be placed back in service (Tr. 47). Mr. Adams could not recall whether there were two loaders at the plant (Tr. 48).

Mr. Scott was recalled by the court, and he reiterated that after the loader brakes were adjusted on December 12, after it

was taken out of service, the inspector allowed it to be placed back into service that same day (Tr. 49).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.14101(a)(1), which provides as follows:

> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

The credible and unrebutted testimony of the inspector establishes that the cited loader service brakes were in poor condition and would not hold the loader and keep it from drifting down the plant ramp when the brakes were tested. The respondent does not dispute the fact that the brakes would not hold, and its defense is that the loader is required to be used at all times while the plant is in operation during the winter season and that the poor braking condition was caused by the operation of the loader in sub-freezing weather. Although I recognize the operational difficulties in operating equipment under adverse weather conditions, the cited standard makes no allowances or exceptions and it requires as a minimum that the service brakes be maintained so that they are capable of stopping and holding the equipment with its typical load on the maximum grade it travels. In this case, the evidence establishes that when the loader operator tested the loader brakes in the presence of the inspector, they would not hold or stop the machine, and plant manager Scott did not dispute this fact. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced in this case, and the contested citation issued by the inspector IS 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, (August 1985), 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).

I take note of the fact that the "narrative findings" supporting the "special assessment" made by MSHA in this case reflects that when the cited loader was tested on the 2 percent grade it could not be stopped and that it could have become uncontrollable and collided with another vehicle, a stationary object, or a pedestrian. However, there is no evidence in this case that the loader was "uncontrollable" when it drifted down the ramp, nor is there any evidence that any other vehicular traffic or people were present, or are normally present, in the ramp area. Further, except for the ramp area, there is no evidence that the roadway where the loader travelled was other than level, and the inspector confirmed that he perceived no collision hazards in the immediate ramp area.

Although the loader travelled at a relatively low rate of speed, it nonetheless was driven on the roadway traveling to and from the stockpile area to the processing plant. Although the roadway was 75 to 80 feet wide, there is no evidence that the loader, other traffic, or individuals on foot, were restricted to any particular part of the roadway, and the respondent confirmed that seven or eight large trucks or tractor trailers were on the roadway on a daily basis coming and leaving the plant area, and that employees would also be walking on the roadway. Since the loader was apparently used throughout the winter season with snow on the ground, I believe one can reasonably conclude that in the normal course of travel, any slippery or adverse road conditions would contribute to the hazard presented by a loader whose service brakes would not hold or stop the loader when they were applied. Although the loader was equipped with a serviceable parking brake and backup alarm, and the bucket could be used as a braking mechanism, these devices would only be relevant when the loader is backing up or parked. There is no evidence that the loader operator would lower his bucket if it were full to stop the machine in an emergency situation to avoid a collision with another vehicle or someone on foot on the roadway, and the inspector's unrebutted testimony reflects that it would be more difficult to stop the loader with a full loaded bucket than it would if the bucket were empty.

In view of the presence of other large trucks coming and going from the plant at any given time while using the roadway, and the presence of plant employees on foot on the roadway, particularly under inclement weather conditions, I conclude and find that the operation of the cited loader on the roadway with brakes which would not stop or hold the loader when they were applied, presented a situation which would reasonably likely result in an accident. In the event the loader collided with another vehicle, or struck someone walking along the roadway, I believe that this would result in injuries of a reasonable serious nature. Although there is no evidence that the loader brakes were tested on a level portion of the roadway, and the parties offered no evidence to establish whether the loader was capable of stopping on a level area if the brakes were to be applied, I nonetheless conclude and find that a loader with brakes which were incapable of holding or stopping the machine on the 2-percent grade where they were tested presented a hazard to vehicles and pedestrians using the roadway. The roadway was at the bottom of the ramp, and the loader would be backed down the ramp after dumping its load (Tr. 11, 15).

Although there is a dispute as to whether or not the inspector permitted the loader to be placed back into service after he issued the order-citation, the fact remains that at the time the inspector observed the loader in operation and had the brakes

tested, they would not hold or stop the machine. Under all of the aforementioned circumstances, I conclude and find that the inspector's significant and substantial (S&S) finding is supportable, and IT IS AFFIRMED.

History of Prior Violations

The petitioner did not produce a computer print-out reflecting the respondent's history of prior paid assessed violations. However, petitioner's counsel stated that according to the information he has received the respondent was assessed for 26 violations in 1987, two in 1988, and three in 1989. Counsel confirmed that this information may apply to the respondent as the corporate operate and that the violations may apply to all of the plants which it operates rather than the particular plant in question. He further confirmed that he had no information to indicate that the respondent had been previously cited for a violation of the same mandatory standard cited in this case (Tr. 50-53).

The respondent's representative confirmed that the plant in question has been inspected two or three times annually by MSHA, and he believed that two or three citations may have been issued during each of these inspections. He agreed that the 22 violations for the past 24-months noted as part of MSHA's proposed assessment information found on MSHA Form 1000-179, which is part of the pleadings, appears to be accurate. Under all of these circumstances, and in the absence of any further evidence of record, I cannot conclude that the respondent's compliance record warrants any additional increase in the amount of the civil penalty which I have assessed for the violation in question.

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

I conclude and find that the respondent is a small-to-medium size mine operator, and that the civil penalty assessment which I have made for the violation is appropriate. In the absence of any evidence to the contrary, I cannot conclude that the payment of the assessment will adversely affect the respondent's ability to continue in business.

Good Faith Compliance

The respondent's representative stated that the respondent has always timely corrected any cited conditions and has in the past paid the civil penalty assessments for those violations which is has not contested. The parties are in agreement that the cited loader brake conditions were corrected and that the

respondent abated the violation in good faith (Tr. 53-55). I conclude and find that this was the case, and I have taken this into consideration.

Gravity

Based on the credible testimony of Inspector Adams with respect to the hazards associated with the violation, I conclude and find that it was serious.

Negligence

Although plant superintendent Scott acknowledged that he was aware of the cited loader brake condition, the evidence establishes that he at least made an effort to check the condition by taking the loader to the garage to bleed the moisture out of the air pressure system and to allow the loader time to warm up. Although Mr. Scott's assertion that the inspector allowed the loader to be placed back into service after it was taken to the garage on the day of the inspection was disputed by the inspector, the fact remains that the loader brakes would not hold when the inspector had it tested and Mr. Scott was not with the inspector at that time. Under the circumstances, I agree with the inspector's moderate negligence finding and it is affirmed.

Civil Penalty Assessment

In its answer, the respondent took issue with MSHA's proposed "special assessment," including the "narrative findings" supporting the proposed assessment. However it is clear that I am not bound by MSHA's proposed civil penalty assessment, and that once a penalty is contested and Commission jurisdiction attached, a judge's determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $150 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $150 for the violation in question, and payment is to be made

to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
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 15, 1991

PRESTIGE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 91-25-R
v.	:	Citation No. 3416484; 8/29/90
	:	
	:	Docket No. KENT 91-26-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 3416485; 8/29/90
	:	
	:	Docket No. KENT 91-27-R
	:	Order No. 3416486; 8/29/90
	:	
	:	Mine ID 15-16582

ORDER OF DISMISSAL

Before: Judge Merlin

These cases are notices of contest filed by the operator seeking to challenge citations issued by an inspector of the Mine Safety and Health Administration under section 104(a) of the Federal Mine Safety and Health Act of 1977.

The citations were issued on August 29, 1990. The notices were not received by the Commission until October 19, 1990.

Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in relevant part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 * * * the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing * * * *

On November 9, 1990, the Solicitor filed her answer to the notices of contest in which she stated that the citations were properly issued and therefore the contests should be denied. The

Solicitor's answer did not raise the issue of timeliness.[1] Thereafter, on November 20, 1990, an order was issued pointing out the time interval between the issuance of the citations and the filing of the notices. In addition, the order noted the general view that the 30 day filing requirement of section 105(d) is jurisdictional and that unless the contest is brought within the prescribed time, it must be dismissed. In light of these circumstances, the parties were ordered to submit memoranda setting forth their positions with respect to the timeliness of the operator's pleadings which they have now done.

The Solicitor's memorandum concurs with the November 20th order regarding the date the citations were issued and date the contests were served on the Commission. The Solicitor argues that the notices of contest were due on October 3, 1990.[2] According to the Solicitor, the cases cited in the November 20, 1990, order regarding timeliness supports the conclusion that the 30-day requirement for contesting the issuance of a citation or order is jurisdictional. Therefore, the Solicitor moves that these cases be dismissed for the operator's failure to serve the notices within the statutorily prescribed time.

The operator asserts that the notice of contests were not filed earlier because it had sought to exhaust other administrative remedies provided by the Mine Act, referring to its attendance at a conference with MSHA on September 28, 1990. The operator notes that the contests were filed within 30 days of that conference. In the alternative, the operator argues that since the three citations were subsequently modified by MSHA on November 13, 1990, in a manner favorable to it, MSHA has acquiesced in the timeliness of its filing.

As stated in the November 20th order, a long line of decisions going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be

---

[1] In her memorandum filed in response to the November 20 order, the Solicitor defends this oversight by highlighting the short time frame in which she has to answer the contests. While I understand that the short period does not allow an in-depth review of the citations, it would appear rudimentary that the timeliness of the contests would be checked and that it would be possible to alert this matter to the presiding judge.

[2] The Solicitor's reference to 29 C.F.R. 2700.8(b) is erroneous since that provision applies to responsive pleadings. In her answer the Solicitor had used the date October 15, 1990, as the date of service, referring to 29 C.F.R. § 2700.7(b), which provides that service is complete upon mailing. Whether the filing date is October 15 or October 19 has no effect on the result.

brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); See Also, Peabody Coal Co., 11 FMSHRC, 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990). The time limitation for contesting issuance of citations must therefore, be viewed as jurisdictional.

The notices of contest in these cases were filed over 50 days after the citations were issued which was 20 days late. The Mine Act and applicable regulations afford no basis to excuse tardiness because the operator mistakenly believes it can pursue avenues of relief with MSHA before coming to this separate and independent Commission to challenge a citation. The Act clearly provides otherwise. Nor does relevant case law suggest support for any such approach. Finally, the subsequent modifications of the citations cannot affect the operator's duty to file its contests within the prescribed time. Accordingly, the operator's arguments cannot be accepted.

The operator should be aware, however, that the issues it seeks to raise here may be litigated in the penalty suit when MSHA proposes a monetary assessment.

In light of the foregoing, it is **ORDERED** that these cases be, and are hereby, **DISMISSED.**

Paul Merlin
Chief 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 16, 1991

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT J. RICHARDSON, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 91-104-DM Star Point No. 2 Mine
v.	:	
J. S. REDPATH CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

On December 31, 1990, the Solicitor filed a stipulation of settlement, consent and motion in the above-captioned discrimination case. The stipulation sets forth the proposed agreement as follows:

> The Respondent has authorized the Secretary to represent the following agreements and stipulations to the Court:
>
> 1. Respondent hereby agrees to compensate Robert Richardson in the amount of $480.00 for loss of back wages and other expenses resulting from his discharge.
>
> 2. Robert Richardson's employment record will be expunged of any adverse references relating to this matter.
>
> 3. The Secretary hereby agrees to withdraw his request for a penalty in this case, based upon the Respondent's good faith and willingness to resolve this matter.
>
> 4. Complainant and the Secretary hereby accept the above stipulations as full settlement of the case filed herein.

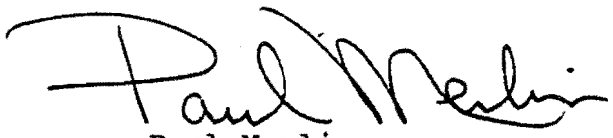
The parties jointly move for an order requiring respondent within 30 days to (1) tender to Robert Richardson the sum of $480.00, and (2) expunge from Robert Richardson's employment records any adverse reference to this matter

Robert Richardson has been fully paid in this matter and has authorized the Secretary to represent to the Court that he consents to the settlement of his discrimination claim against respondent in accordance with settlement (sic) agreement contained in the above stipulation.

Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

In light of the foregoing, I find the settlement appropriate under the circumstances.

Accordingly, it is **ORDERED** that the proposed settlement be **APPROVED** and the operator within 30 days of the date of this order **EXPUNGE** from Robert Richardson's employment records any adverse reference to this matter. The operator having paid, it is further **ORDERED** that this case be **DISMISSED.**



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 16 1991

BEAVER CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 89-396-R Citation No. 3411573; 7/13/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 89-408-R Citation No. 3411781; 8/3/89
	:	Docket No. WEST 89-410-R Citation No. 3411783; 8/3/89
	:	Trail Mt. No. 9 Mine
	:	Mine ID 42-01211
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 90-40 A.C. No. 42-01211-03562
v.	:	
BEAVER CREEK COAL COMPANY, Respondent	:	Docket No. WEST 90-103 A.C. No. 42-01211-03564

DECISION

Appearances: David M. Arnolds, Esq., Atlantic Richfield Company, Denver, Colorado, for the Contestant/Respondent;
Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" to challenge four citations issued by the Secretary of Labor (Secretary) against the Beaver Creek Coal Company (Beaver Creek) and for review of the civil penalties proposed by the Secretary.

Prehearing the Secretary filed a Motion to Approve Partial Settlement and Order Payment. The motion requested approval to vacate Citation No. 3411573 contained in Docket No. WEST 89-396-R, and also requested approval to redesignate section 104(d)(1) Citation No. 3411783 as a section 104(a), non-significant & substantial violation and to reduce the proposed penalty from $1100 to $200. I granted the motion on the record (Tr. 5).

Therefore, there remained for trial two section 104(a) citations: Citation No. 3411781, contested in Docket No. WEST 89-408-R and assessed in Docket No. WEST 90-40 for a $213 penalty, and Citation No. 3412086, an uncontested citation assessed at $259 in Docket No. WEST 90-103. Pursuant to notice, these cases were tried before me in Provo, Utah on June 20, 1990. Both parties have filed post-hearing proposed findings of fact, conclusions of law, and briefs which have been considered by me in the course of making this decision.

The general issues before me concerning each of the remaining citations and its accompanying civil penalty petition are whether the citations were properly issued, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" as well as the appropriate civil penalty to be assessed for the violation should any be found. Included as part and parcel of any determination of these questions is whether or not the inspector who issued the citations properly collected the dust samples which allegedly substantiate the violations.

STIPULATIONS

The parties stipulated to the following (Joint Exhibit No. 1):

1. Beaver Creek Coal Company is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Beaver Creek Coal Company is the owner and operator of Trail Mt. No. 9 Mine, MSHA I.D. No. 42-01211.

3. Beaver Creek Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by duly authorized representatives of the Secretary upon an agent of respondent Beaver Creek Coal Company on the dates and places

stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent Beaver Creek Coal Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Beaver Creek Coal Company's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. Beaver Creek Coal Company is a medium mine operator with 244,097 tons of production in 1988.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

THE APPLICABLE STANDARD

Both citations herein involved were issued by MSHA for alleged violations of 30 C.F.R. § 75.403, which states in pertinent part:

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

I. Docket No. West 89-408-R, and WEST 90-40; Citation No. 3411781

Citation No. 3411781, issued pursuant to section 104(a) of the Act, charges as follows:

> Rock dust was not applied to the ribs and roof and maintained in such quantities that the incombustible content shall not be less than 65 per centum in the No. 4 entry of the main North working section. The effected area was in the No. 3 entry from 40' outby the face to the intersection a distance of about 65'. They were roof bolting inby the affected area. A sample was taken to verify the citation. The ribs slough heavily in this section.

FINDINGS OF FACT

1. On August 3, 1989, Inspector Fred L. Marietti, accompanied by his Supervisor, William E. Poncerhoff, arrived at Beaver Creek's Trail Mountain No. 9 Mine to perform a regular triple-A inspection. Marietti and Poncerhoff were joined by Gary Curtis, the Maintenance Supervisor at the mine, and they proceeded underground. They were joined underground by Dan Lucy, the Safety Director for the mine, and Dan Meadors (misspelled "Metters" in the transcript). Mr. Meadors was the Operations Manager at the mine at the time.

2. The inspection party proceeded to the No. 3 or 4 entry (it doesn't matter which) where Inspector Marietti described the condition of the entry as black from 40 feet outby the face to the intersection, a distance of about 65 feet. The ribs and the roof were black. He opined that just by visual observation, he could tell that there was not a sufficient amount of rock dust applied to maintain the required 65 percent incombustible content.

3. The inspector then proceeded to take a sample to verify the violation he felt existed. He used a dust kit--a brush, a pan and a sieve screen. He went across the right rib and then the left rib with his brush and pan, collecting dust. Then because Mr. Meadors was commenting to him about a "band sample" being more representative, he also went across the roof with his brush and pan. He did not, however, collect any material from the floor in this area because the floor was wet and he was satisfied that the dampness itself would suffice to make that material incombustible.

4. The dust sample collected by the inspector was subsequently analyzed by the MSHA laboratory at Mt. Hope, West Virginia. The analysis showed that only 13% of the sample was incombustible. Therefore, 87% of the sample was combustible.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The inspector went on to opine that this presented a very dangerous situation. In the event that you had an ignition, there was a reasonable likelihood that there would be fatal injuries to miners working on the section. He went on to state that there were numerous ignition sources present in this particular area that could instigate an explosion and/or a fire.

Mr. Curtis testified that this entry had previously been rock dusted and the inspector conceded that it had been at some prior time, but that it was not an adequate amount of rock dust at the time it was cited. The inspector also stated that the ribs slough heavily in this area and therefore heavier and more frequent applications of rock dust are required to maintain the

65 percent incombustible content in the intakes and 80 percent in the returns.

Both Curtis and Lucy opined that the entry was adequately rock dusted. Obviously, this testimony is diametrically opposed to Inspector Marietti's. In order to reconcile this difference of opinion or choose between the two, it is necessary to examine the entire record, including the method the inspector used to obtain the dust sample that corroborates his opinion.

Mr. Curtis did not observe the inspector take the sample. Mr. Lucy did. He testified that Inspector Marietti sampled only one spot on the right rib of about 1 foot by 1-1/2 feet, where a piece of coal had fallen out and that he had dug his pan into the sloughage on the floor, picking up coal fines. Lucy testified that he was present the entire time and that the inspector did not sample the remainder of the right rib or the roof and left rib as he claims to.

I believe and have found as a fact that the inspector obtained the sample as he claimed (Finding of Fact No. 3). The inspector is a very experienced and well-trained coal mine safety and health inspector who I felt testified in a truthful and forthright manner. Furthermore, his field notes, made contemporaneously with the incident, as well as the form he used to submit the dust sample to the Mt. Hope Laboratory state that the sample was taken from the roof and both ribs. Mr. Lucy, on the other hand, has a mere three months of underground coal mining experience, and I therefore assign little relative weight to his descriptions and opinions concerning the adequacy of the rockdusting or the dust sampling.

The senior company representative on the scene at the time, Mr. Meadors, had asked the inspector to take a "band sample" to include the roof, the floor and both ribs. The company felt that this would be a more representative sample of the area. They feel that the 65% criteria applies on an averaging basis to the roof, floor and ribs. The inspector declined to do so because the floor was wet.

There is some precedent for their request. The MSHA Underground Manual, which was published on March 9, 1978, considered the "band sample" to be the most accurate method of measuring incombustible content. However, this manual was rescinded and replaced by the MSHA Program Policy Manual in December 1988. The new manual provides no guidance on dust sampling methodology.

Another MSHA publication, however, entitled The Explosion Hazard in Mining, published in 1981, contains the following excerpt at page 50 (Gov't Exhibit No. 5):

> Band sampling, or the combining of the mine dust into a single sample from collection from the floor, ribs, and roof (perimeter) was adopted in 1952 by the Bureau of Mines. Band sampling reduces the time required for collection, quartering, packing, handling, and chemical analysis, thus promoting the possibility of sampling in more locations in mines. In most mines the quantity of dust on the floor is many times greater than that on the ribs and roof. Consequently, band samples tend to represent the dust on the floor. Thus, band sampling should only be used where it is obvious from visual examination that the rib-roof surfaces are adequately rock-dusted. Dust on all mine surfaces--namely, the ribs, roof, and floor--should be neutralized by rock dust. Where an obvious deficiency in rock dust exists on one of these surfaces separate samples should be taken. (Emphasis Added).

In my judgment, whichever methodology is the more correct, or the "best", neither is proscribed for use. The inspector is free to use his judgment as to which technique to employ in the particular circumstances.

An administrative appellate decision with respect to this issue can be found at North American Coal Corporation, 1 MSHC 1130, 1134 (1974). It is a decision of the Interior Board of Mine Operations Appeals, the predecessor to the Federal Mine Safety and Health Review Commission in which the Board held:

> With respect to Order 3 TJD, August 16, 1971; 1 JF, September 3, 1971, and 1 TJD, September 16, 1971, North American challenges the findings of violation on the ground that the samples relied on reflected only the incombustible content of the floor. North American urges that the samples should have reflected the combined incombustible content of the roof and ribs, as well as the floor, at the cited locations.
>
> Section 304(d)[1] was designed to prevent the occurrence of conditions which could lead to a fire, or still worse, an explosion. The floor samples in the instant case, falling as they did within the proscribed area indicated a dangerous condition because a spark might very well have led to at least a fire. We hold therefore that a floor sample standing alone may be the basis of a finding that a section 304(d) violation has occurred. Accordingly, we conclude that the Judge did

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[1] Section 304(d) of the 1969 Coal Act is identical in language to 30 C.F.R. §75.403.

not err by determining that these alleged violations occurred.

I am satisfied with the inspector's explanation of why he took no sample from the wet floor and his method of obtaining, handling and packaging the sample he did take for shipment to the laboratory. During cross-examination (Tr. 68), the inspector was asked if every spot in the mine more than 40 feet from the face must be rockdusted in accordance with 30 C.F.R. § 75.403. He replied that:

> I would say that no inspector, including myself, is going to go throughout the mine and look where there has been a little sloughage on a rib or a spot on the floor that don't have rock dust and issue you a violation. It would be a considerable area involved.

Given the fact that I find the sample was properly obtained, and that analysis of it demonstrated that only 13% of the sample was incombustible, I must disagree with Curtis and Lucy that the affected area was adequately rockdusted. Rather, I make that credibility choice in favor of the Secretary since the inspector's visual observation and evaluation was subsequently verified by laboratory analysis. Accordingly, I find that a violation of 30 C.F.R. § 75.403 existed as the inspector cited it. Furthermore, I also believe the violation was significant and substantial (S&S).

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).

Coal dust has long been recognized as an active cause of coal mine explosions and its suppression is of primary concern to those involved in the profession of mine safety. The principal suppression measure utilized is the dilution of coal dust with calcium carbonate, better known as rock dust. In underground coal mining operations, rock dust must be applied to all areas within 40 feet of a working face unless those areas are inaccessible, unsafe to enter, too wet or too high in incombustible content to propagate an explosion.[2]

The danger presented by these combustible dust accumulations is a mine fire or a mine explosion. Furthermore, where you have accumulations of combustible materials, there is always the possibility that you will have a methane ignition in the face area and these accumulations would cause the ignition to probably spread or propagate into other areas of the mine, depending how fine, dry and pulverized the accumulations are. There was a lot of electrical equipment on the section at the time as well. Serious injuries were reasonably likely to occur to the section crew such as smoke inhalation in the event of a mine fire, which occurrence I find to be reasonably likely. If a fire were to occur, it would be reasonably likely that the miners would be exposed to smoke and fire hazards and suffer disabling injuries

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[2] 30 C.F.R. § 75.402

of a reasonably serious nature. The focus is clearly and properly on the potential of the risk involved and I find that there was plenty of potential for a mine fire here given the conditions the inspector found. All the ingredients were present: accumulations of certifiably combustible materials and nearby ignition sources. If you had a methane ignition which propagated into a mine dust explosion, then it could be fatal. Therefore, I concur with the inspector that the violation was "significant and substantial", and serious.

He also marked the negligence as moderate. I concur that the appropriate level of negligence established by inference in the record is ordinary or moderate negligence.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for the violation is $213, as originally proposed by the Secretary.

II. Docket No. WEST 90-103; Citation No. 3412086

Citation No. 3412086, issued on October 16, 1989, pursuant to section 104(a) of the Act, charges as follows:

> The analytical results of seven spot dust samples collected on 7-31-89 by a MSHA inspector showed that all seven of the samples fall below the required amount of incombustible content. A copy of the dust sampling lab report is attached to this citation.

FINDINGS OF FACT

1. Citation No. 3412086 was issued by Inspector Robert Jones on October 16, 1989, based on the lab analysis of dust samples taken by Inspector Marietti on July 31, 1989.

2. On July 31, 1989, Inspector Marrieti went underground with Mr. Curtis to the Second Left Section Return. He took seven spot samples at different locations in the return in what he considered to be a representative area. He performed the sampling function generally as previously described in Finding of Fact No. 3 in the previous section utilizing his rock dust kit.

3. Mr. Curtis objected to this spot sampling and asked the inspector to take a "band sample" in each of those spots. The inspector refused because he believes that all surfaces of the mine, roof, ribs and floor must have the required amount of incombustible content.

4. The Dust Sampling Lab Report from Mt. Hope, West Virginia, indicates that four of the samples were taken solely from the right rib; one sample was taken from the roof and one rib and the other two were taken from both ribs. The amount of

incombustible material in the seven samples ranged from a low of 38% to a high of 74.6%. Inspector Marietti admitted on cross-examination that if he had taken a "band sample" of the roof, both ribs and the floor at each of those spots, the samples would possibly have exceeded the required 80% incombustibility.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The inspector also believed this to be a S&S violation. It presented a dangerous situation because of the same reasoning that applied in the previous section of this decision--only more so. This violation occurred in a return entry which is carrying dust and liberated methane gas from the face area into the return entry during the mining cycle.

Rather than repeat myself, for the same reasons I gave in the earlier part of this decision, I find the samples were properly obtained within the inspector's discretion to do so and do substantiate an S&S violation of 30 C.F.R. § 75.403. I also once again find a moderate degree of negligence on the part of the operator and considering the statutory criteria in section 110(i) of the Act find and conclude that the appropriate civil penalty for the violation is $259, as originally proposed by the Secretary.

To reiterate the major point of these cases, I do not believe that the operator can impose a requirement of "band sampling" on the inspector as a precondition to his citing a violation of 30 C.F.R. § 75.403. The Interior Board of Mine Operations Appeals has so held and the Commission has not chosen to reverse that precedent to date.

ORDER

1. Citation No. 3411573 IS VACATED.

2. Section 104(d)(1) Citation No. 3411783 IS MODIFIED to a non-S&S section 104(a) citation and AFFIRMED.

3. Citation Nos. 3411781 and 3412086 ARE AFFIRMED.

4. Beaver Creek Coal Company is ordered to pay the sum of $672 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

Distribution:

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/ml

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

JAN 17 1991

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 89-266-R
v.	:	Citation No. 2873916; 4-17-89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 89-280-R
	:	Citation No. 2875275; 4-06-89
	:	Docket No. WEST 89-281-R
	:	Citation No. 2875274; 4-06-89
	:	Southfield Mine
	:	Mine I.D. 05-03455
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 89-356
	:	A.C. No. 05-03455-03568
v.	:	
	:	Southfield Mine
ENERGY FUELS COAL, INC., Respondent	:	

DECISION
ORDER TO PAY
DISMISSAL OF CONTEST CASES

Appearances: Phillip D. Barber, Esq., John S. Cowan, Esq., WELBORN, DUFFORD, BROWN & TOOLEY, Denver, Colorado, for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent with violating 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 scheduled for three days commenced in Denver, Colorado, on December 18, 1990. At the hearing, the parties announced they had reached an amicable settlement of all issues not previously settled in the eight remaining citations in Civil Penalty Docket No. 89-356. 1/

1/ Two of the original 10 citations in this penalty docket, Citation Nos. 2840175 and Citation No. 2873917 were vacated by an earlier order.

Energy Fuels agrees to pay in full MSHA's initial penalty assessment for the five of the citations in Civil Penalty Docket No. WEST 89-356, as reflected in the summary shown below.

Citation Number	Proposed Penalty	Agreed Disposition
2874086	$68.00	$68.00
2874087	$85.00	$85.00
2864088	$68.00	$68.00
2864090	$68.00	$68.00
2873916	$68.00	$68.00

Pursuant to this settlement, MSHA seeks modification of Citation Nos. 2874091, 2815274, and 2875275 to delete the "Significant and Substantial" designations thereon, and the parties agree that the penalty should be reduced to $50.00 each for Citation Nos. 2874091 and 2875274, and reduced to $61.00 for Citation No. 2875275. Thus the total penalty for the eight citations is $518.00. The deletion of the "Significant and Substantial" designation was based on insufficient evidence.

In support of their motion, the parties have further submitted information relating to the statutory criteria for assessing civil penalties in 110(i) of the Act.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be and is APPROVED.

ORDER

1. Citation Nos. 2875274, 2875275, and 2874091 are MODIFIED to delete the designation "Significant and Substantial" and, as so modified, are AFFIRMED.

2. Citation Nos. 2874086, 2874087, 2874088, 2874090, and 2873916 are AFFIRMED.

3. Penalties are ASSESSED in the amounts agreed to by the parties, as shown above, totaling $518.00.

4. Contest Proceeding Docket Nos. WEST 89-226-R, WEST 89-280-R, and WEST 89-281-R are DISMISSED.

5. Contestant/Respondent is ORDERED to pay to the Secretary of Labor the sum of $518.00 within 30 days of the date of this decision and, upon payment, Civil Penalty Proceeding Docket WEST 89-356 is DISMISSED.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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/ek

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

JAN 17 1991

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 89-283-R
v.	:	Citation No. 3298277; 5-11-89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 89-284-R
	:	Citation No. 3298276; 5-11-89
	:	
	:	Docket No. WEST 89-285-R
	:	Citation No. 3298275; 5-11-89
	:	
	:	Docket No. WEST 89-286-R
	:	Citation No. 3298274; 5-11-89
	:	
	:	Docket No. WEST 89-287-R
	:	Citation No. 3298273; 5-11-89
	:	
	:	Docket No. WEST 89-305-R
	:	Citation No. 2875247; 5-11-89
	:	
	:	Docket No. WEST 89-309-R
	:	Order No. 2875243; 5-11-89
	:	
	:	Docket No. WEST 89-311-R
	:	Citation No. 2875241; 5-11-89
	:	
	:	Southfield Mine
	:	Mine I.D. 05-03455
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 89-449
	:	A.C. No. 05-03455-03569
	:	
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION and ORDER TO PAY
and
DISMISSAL OF CONTEST PROCEEDINGS

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado,
for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating 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 commenced in Denver, Colorado, on December 18, 1990.

At the hearing, the parties announced they had reached an amicable settlement of all issues not previously settled.

The citations, the original assessments, and the proposed disposition of all matters in controversy are as follows:

Citation Number	Contest Case Number	Proposed Penalty	Modification & Disposition	
3298277	WEST 89-283-R	$170	Non S&S	$170
3298276	WEST 89-284-R	$170	Vacated	
2875247	WEST 89-305-R	$ 79	Non S&S	$ 50
2875243	WEST 89-309-R	$ 79		$ 79
2875241	WEST 89-311-R	$ 79	Non S&S	$ 50

Pursuant to their settlement agreement, the Secretary moves to amend Citation Nos. 3298277, 2875241, and 2875247 to delete the characterization "significant and substantial." Based on the fact on review, the Secretary finds the violations alleged therein do not contribute significantly and substantially to the cause and effect of a mine safety or health hazard and there is insufficient evidence to prove otherwise.

The parties advise that Contest Proceeding Nos. WEST 89-285-R, WEST 89-286-R, and WEST 89-287-R, involving respective Citation/Order Nos. 3298275, 3298274, and 3298273 carry no penalties. Energy Fuels Coal, Inc., agrees to withdraw its contest filed in each of these dockets. Consequently, these three contest proceedings, along with all the above-captioned contest proceedings, are dismissed pursuant to the proposed settlement agreement.

The settlement was considered under the statutory criteria for civil penalties in section 110(i) of the Act. I find the settlement is reasonable and in the public interest. It is APPROVED.

ORDER

1. Citation Nos. 3298277, 2875241, and 287247 are MODIFIED to delete the "Significant and Substantial" designations thereon and, as so modified, are AFFIRMED.

2. Citation No. 2875243 is AFFIRMED.

3. Citation No. 3298276 is VACATED.

4. Contest Proceedings Docket Nos. WEST 89-283-R, WEST 89-284-R, WEST 89-305-R, WEST 89 309-R, WEST 89-311-R, WEST 89-285-R, WEST 89-286--R, and WEST 89-287-R are DISMISSED.

5. The penalties agreed to by the parties in the total sum of $349 are here ASSESSED and Energy Fuels Coal, Inc., is ORDERED to pay the same to the Secretary of Labor within 30 days from the date of this Decision. Upon said payment, Civil Penalty Proceeding Docket No. WEST 89-449 is DISMISSED.

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 17 1991

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 89-304-R
v.	:	Order No. 2930823; 5-11-89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 89-308-R
	:	Order No. 2875244; 5-11-89
	:	Southfield Mine
	:	Mine I.D. 05-03455
SECRETARY OF LABOR, SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-437-A
	:	A.C. No. 05-03455-03574
v.	:	Southfield Mine
ENERGY FUELS COAL, INC. Respondent	:	

DECISION
ORDER TO PAY
DISMISSAL

Appearances: Phillip D. Barber, Esq., John S. Cowan, Esq., WELBORN, DUFFORD, BROWN & TOOLEY, Denver, Colorado, for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent with violating 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 commenced in Denver, Colorado, on December 18, 1990. At the hearing, the parties announced they had reached an amicable settlement of all issues not previously settled.

Contest Proceeding No. 89-308-R

Order No. 2875244 in this docket was issued to Respondent as a Section 104(d)(1) order for a violation of 30 C.F.R. § 75.400 because loose coal and coal dust were allegedly permitted to accumulate under the Long Airdox coal feeder and the tail pulley of the 2 north belt conveyor in piles ranging from six to eight inches, for a distance of about six feet.

At the hearing, the Secretary moved to amend the order to a 104(a) citation with a $500.00 penalty, and Energy Fuels agreed to withdraw its objection to the amended citation and penalty.

Contest Proceeding No. 89-304-R

Order No. 2930823 in this docket is a Section 104(d)(1) Order with a proposed penalty of $850.00 in the civil penalty docket. This order was issued to Respondent for the alleged violation of 30 C.F.R. § 75.220 because the approved roof-control plan was not being complied with in the 1 right entry on the 2d south 003 section. The plan required that, when heads or roof-bolt supports are dislodged or sheared off, additional supports are to be installed to provide adequate support of the mine roof.

MSHA charged that additional roof supports were not installed in the roof area in the 1 right entry, where roof-bolt supports had been sheared off or pulled down by the mining equipment. The affected area in the 1 right entry started at the intersection and extended inby for a distance of about 30 feet. MSHA contends the mine roof was not being adequately supported to protect the miners in the area from falls-of-the-roof.

At the hearing, Energy Fuels agreed to withdraw its contest and any objection to the Order as written and to the $850.00 proposed penalty.

The parties, with the approval of the undersigned Judge, agreed that the order is deemed effective as of the date it was written and not as of the date of the settlement. The mine has gone through a clean unwarrantable failure cycle since the order was issued, and therefore it is deemed effective as of the date of its issue to ensure this settlement does not trigger a new cycle.

Thus, the Order No. 2930823 in this contest case, the original assessments, and the proposed disposition of all matters in controversy are as follows:

Order Number	Contest Case No.	Proposed Penalty	Modification & Disposition	
2875244	WEST 89-308-R	$650.00	104(a)	$ 500.00
2930823	WEST 89-304-R	$850.00	104(d)(1)	850.00
		TOTAL		$1,350.00

I have considered the proposed settlement disposition of this matter. I find the proposed settlement is reasonable, consistent with the Act, and in the public interest. The settlement disposition should be and is APPROVED.

ORDER

1. Order No. 2875244 is MODIFIED to change the type of action from a 104(d)(1) Order to a 104(a) Citation, and, as so modified, is AFFIRMED. A civil penalty of $500.00 is ASSESSED.

2. Order No. 2930823, with its finding that the violation is "Significant and Substantial" is AFFIRMED. A civil penalty of $850.00 is ASSESSED.

3. Contest Proceeding Docket Nos. WEST 89-308-R and WEST 89-304-R are DISMISSED.

4. Respondent Energy Fuel Coal Inc. is ORDERED to pay to the Secretary of Labor the sum of $1,350.00 within 30 days of the date of this decision, as and for the civil penalties assessed herein. Upon such payment, this proceeding is DISMISSED.

August F. Cetti
Administrative Law Judge

Distribution:

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

JAN 17 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 89-433 A.C. No. 05-03455-03570
v.	:	
	:	Southfield Mine
ENERGY FUELS COAL, INCORPORATED, Respondent	:	

DECISION

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent with violating 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 commenced in Denver, Colorado, on December 18, 1990. At the hearing, the parties announced they had reached an amicable settlement of all issues not previously settled in the 11 remaining citations in this docket.

At the hearing, the Secretary's counsel moved to modify Citation Nos. 3077189, 3077190, 3077191, and 3977192, to delete the "significant and substantial" characterization of the violations on the grounds that there was insufficient evidence to prove the violations were "significant and substantial" and to reduce the proposed civil penalties of each of the four citations to $50 each, as indicated in the summary table below.

The Secretary was permitted to amend Item 10 D of Citation Nos. 3077185 and 3077187 to show in each citation that the "number of persons affected" was two (2) rather than ten (10), and to reduce the proposed penalty in each of the two citations from $147 to $100, as indicated in the summary table below. The other five

citations and their proposed penalties were not amended or modified. Respondent withdrew its contest as to these five citations and agreed to pay the Secretary's original proposed penalties in the amounts indicated in the summary table below.

The citations, the regulation, the original assessments, and the proposed disposition of all citations in controversy are as follows:

SUMMARY TABLE

Citation Number	30 C.F.R. §	Proposed Penalty	Disposition
2931193	75.208	$105.00	$105.00
2931194	75.400	$112.00	$112.00
3077174	75.400	$ 85.00	$ 85.00
3077184	75.1722(a)	$ 79.00	$ 79.00
3077185	75.1707	$147.00	$100.00
3077186	75.400	$126.00	$126.00
3077187	75.202(a)	$147.00	$100.00
3077189	75.1723(a)(2)	$ 79.00	$ 50.00
3077190	75.400	$ 85.00	$ 50.00
3077191	75.400	$ 79.00	$ 50.00
3077192	75.1725(a)	$ 79.00	$ 50.00

The settlement disposition was considered in light of the statutory criteria in section 110(i) of the Act, and the parties' representtion as to lack of sufficient evidence in specified cases. I find the settlement is reasonable and in the public interest. It is APPROVED.

ORDER

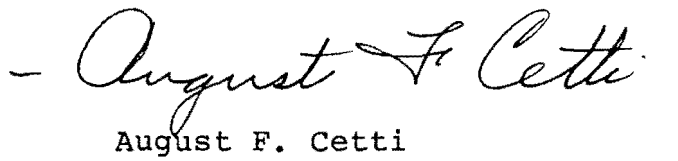
1. Citation Nos. 3077189, 3077190, 3077191, and 3077192 are modified to delete the characterization "significant and substantial" and, as so modified, are AFFIRMED.

2. Citation Nos. 2931193, 2931194, 3077174, 3077184, 3077186 are AFFIRMED.

3. Citation Nos. 3077185 and 3077187 are amended to show in item 10 D of each citation that the number of persons affected is two (2) rather than twelve (12) and, as so modified, are AFFIRMED.

4. The civil penalties agreed to by the parties, as specified in the summary table above totaling $907.00, are ASSESSED.

5. Respondent Energy Fuels Coal Inc. is ORDERED to pay to the Secretary of Labor the sum of $907.00 as and for the civil penalties assessed herein. Upon such payments, this proceeding is DISMISSED.



August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

JAN 17 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-91 A.C. No. 05-03771-03520
v.	:	Raton Creek Mine No. 1
ENERGY FUELS MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Phillip D. Barber, Esq., WELBORN, DUFFORD, BROWN & TOOLEY, Denver, Colorado, for Respondent.

Before: Judge Cetti

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). Petitioner seeks civil penalty assessments for alleged violations of mandatory safety standards 30 C.F.R. §§ 75.1704 and 70.400. Respondent filed a timely answer contesting the alleged violations. Pursuant to notice to the parties, a hearing was held in Denver, Colorado, on December 18, 1990. At the hearing, the parties announced they had reached an amicable settlement of all matters at issue.

Citation No. 2931280 was issed as an S&S violation of 30 C.F.R. § 75.1704 with a $74.00 proposed civil penalty. Pursuant to their proposed agreement, the Secretary amended the citation to delete the S&S characterization of the violation and amended the proposed penalty to $50.00. The Secretary based her amendments upon insufficient evidence to prove the violation was "Significant and Substantial." Respondent withdrew its objection to the citation and penalty as amended.

Citation No. 2340524 alleges an S&S violation of 30 C.F.R. § 75.400 and has a proposed penalty of $54. At the hearing, Respondent withdrew its contest to the citation as originally issued and to the Secretary's original proposed penalty of $54.00.

This settlement disposition was considered and approved. It is found reasonable and in the public interest.

ORDER

1. Citation No. 2931280 is MODIFIED to delete the "Significant and Substantial" designations and, as so modified, is AFFIRMED. A penalty of $50.00 is ASSESSED.

2. Citation No. 3412632, alleging a violation of 30 C.F.R. § 75.400, including its finding that the violation was "Significant and Substantial," is AFFIRMED, and a civil penalty of $54.00 is ASSESSED.

3. Respondent is directed to pay $104.00 to the Secretary of Labor within 30 days of the date of this decision, as a civil penalty for the violations found herein. Upon payment, this proceeding is DISMISSED.

August F. Cetti

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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FALLS CHURCH, VIRGINIA 22041

JAN 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-6-M A.C. No. 08-01046-05508
v.	:	
	:	Green's Pit
GFD CONSTRUCTION CO., INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Secretary of Labor (Secretary); Anthony Green, Sr., Owner, GFD Construction Co., Pensacola, Florida, for GFD Construction (GFD).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for three alleged violations of mandatory health and safety standards by GFD. Pursuant to notice, the case was called for hearing in Pensacola, Florida, on November 27, 1990. Anthony Green was called as an adverse witness by the Secretary; Ralph Hawks and Lawrence Richardson testified on behalf of the Secretary; Anthony Green, Sr., testified on behalf of GFD. Both parties were given the opportunity to file post-hearing briefs. The Secretary filed such a brief. GFD did not. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

I

GFD is the owner and operator of a masonry sand extraction operation in Pensacola, Florida, known as Green's Pit. The sand is separated from foreign material and trucked by GFD to home builders, the U.S. Naval Air Station, the State of Florida, Escambia County, Florida, the city of Pensacola and other purchasers. GFD has drills, pumps, a separator, front end loaders, drag lines and trucks. About 17 to 18 persons are

employed by GFD. It has been in business in Pensacola for 19 years. It is a small operator.

II

On July 11, 1989, MSHA cited GFD for failing to file a quarterly report for the first quarter of 1989. GFD had been cited on 3 prior occasions for the same violation. The citation was terminated the same day it was issued.

III

On October 18, 1988, Federal Mine Inspector Lawrence Richardson conducted an inspection of Green's Pit. He found that the LK 600 Kobelco front-end loader had an inoperative reverse signal alarm. The loader was classified as heavy duty mobile equipment. Its wheel diameter was about 5 feet, the overall height was about 12 feet, and its length was over 25 feet. The vehicle had a rear motor protruding out approximately 8 feet which obstructed the operator's view to the ground at the rear of the vehicle. Inspector Richardson issued a 104(a) citation alleging a violation of 30 C.F.R. § 56.9087 (now § 56.14132). No work activity was observed at the time, but two employees were proceeding to the dredge.

The citation was not issued in written form on the date the violation was observed, because Mr. Green ordered the inspector off the mine property. It was later served by mail. The citation was terminated July 11, 1989, after the back-up alarm had been repaired.

Mr. Green contended that the front-end loader was in the shop at Pensacola Ford Tractor, Inc. on October 18, 1988, and was not on the mine property. He submitted a repair estimate dated October 12, 1988, estimating repairs at $7,231. I have carefully considered this evidence and the testimony of Mr. Green and Inspector Richardson. I find that the loader was at the mine on October 18, 1988, and did not have an operative back-up alarm.

IV

On October 18, 1988, the automatic reverse signal alarm on the Kobelco LK 700 front-end loader was not operative. The LK 700 loader is larger than the LK 600. The operator of this machine also has obstructed vision to the rear. The citation was terminated July 11, 1989, after the back-up alarm had been repaired.

V

GFD had five prior violations of the regulation requiring back-up alarms between March 1978 and October 1988. When the

cited equipment was purchased by GFD, they did not have back-up alarms; GFD had them installed. The machines cost over $100,000 each; the back-up alarms cost about $30 each. Because of the nature of GFD's operation, the wires to the back-up alarms are frequently cut and have to be repaired.

REGULATIONS

30 C.F.R. § 50.30(a) provides in part as follows:

> Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 . . . and submit the original . . ..

30 C.F.R. § 9087 provides as follows:

> 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.

ISSUES

1. Whether the cited violations were established by a preponderance of the evidence?

2. If so, what are the appropriate penalties?

CONCLUSIONS OF LAW

I

GFD is subject to the provisions of the Mine Act in the operation of Green's Pit, and I have jurisdiction over the parties and subject matter of this proceeding. Green's Pit is a mine; it produces and sells a mineral, masonry sand, to private business entities, and to local, state and Federal government agencies. Its equipment or some of it, was manufactured in other states and foreign countries. Its business affects interstate commerce.

II

There is no dispute concerning the violation of 30 C.F.R. § 50.30(a). A quarterly report was not timely filed. The violation was not serious, but resulted from GFD's negligence. I conclude that $50 is an appropriate penalty for the violation.

III

The two violations cited for inoperative front-end loaders were established by a preponderance of the evidence. They were moderately serious, and resulted from GFD's ordinary negligence. There is no evidence concerning the abatement of the violations. The fact that Mr. Green ordered the inspector off his property was presumably the subject of another citation (and a criminal proceeding in the Federal District Court), and is no part of this case. I conclude that a penalty of $300 is appropriate for each of these violations.

ORDER

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

1. Citations 2856056, 2856057 and 3429647 are **AFFIRMED.**

2. Respondent GFD Construction Company shall, within 30 days of the date of this order, pay to the Secretary, the sum of $650 for the violations found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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Anthony J. Green, GFD Construction Co., Inc., 470 East Ensley Street, Pensacola, FL 32514 (Certified Mail)

slk

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

JAN 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-63-M A.C. No. 05-04390-05501
v.	:	Brighton Quarry
BRIGHTON SAND & GRAVEL, Respondent	:	

DECISION

Appearances: S. Lorrie Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ronald W. Loser, Owner, Brighton Sand and Gravel, Brighton, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), alleges Respondent Brighton Sand and Gravel violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 802 et seq. (the "Act").

After notice to the parties, a hearing on the merits was held on November 19, 1990, in Denver, Colorado.

The parties waived the filing of post-trial briefs and submitted the issues on the evidence and oral arguments.

Threshold Issues

The evidence shows MSHA conducted a CAV 1/ inspection of the operator in April 1989. Four months later the same MSHA inspector conducted a regular inspection of the site.

The operator argues MSHA, in its CAN inspection, should have inspected all areas of the plant including the equipment repair shed. Hence the operator asserts any violations not detected in the CAV inspection should be vacated.

1/ Courtesy Assistance Visit

The operator has misconstrued the scope of CAV inspections. The program was initiated in 1979 to provide technical assistance to mine operators under certain conditions. A copy of the initial memorandum prepared by the Assistant Secretary of Labor for CAV inspections is attached to this decision. (The memorandum was not offered in evidence by either party but it is attached to show MSHA's policy for its program.)

When a CAV inspection takes place, MSHA cannot guarantee that all areas of a mine will be inspected, nor can it guarantee that all possible violations will be detected by the inspector. This is because the primary obligation for compliance with the regulations rests with the mine operator.

For these reasons, the operator's threshold objections are denied. However, under the broad umbrella of statutory good faith, I note the operator fully abated the 13 CAV notices of violation 2/ and further abated the violative conditions in this case.

Citations

The five citations in this case were issued under the authority of Section 104(a) of the Act.

Background

Jake J. DeHerra, a federal mine inspector and a person experienced in mining, inspected Respondent's plant on August 21, 1989. The operator's owner, Mr. Ron Loser, only accompanied the inspector when he entered the tool shed.

Mr. Loser has been in business for 40 years. No disabling injuries have occurred in the business and he does not permit unsafe conditions to exist. He has also received awards for safety.

Citation No. 3451630

In the tool shed, the inspector found the grounding plug was missing from a service cord, a battery charger, a bench grinder, a power saw, a vacuum cleaner, and a ventilating fan.

2/ The 13 CAV notices are contained in Exhibit P-1.

Since all of this equipment was electrically powered, the inspector concluded that a violation of 30 C.F.R. § 56.12025 3/ existed.

The operator argued that this equipment was double insulated and no grounding plug was required. The equipment itself was marked "UL." 4/

On this credibility issue, I credit the inspector's testimony: the equipment was not protected against shock, since it was not enclosed in plastic nor was it marked with the "Double D," ("DD") symbol.

In the presence of the inspector, Mr. Laser immediately abated these violations by cutting the ends off the plug. He intended to prevent the equipment from being used.

Citation 3451630 should be affirmed.

The operator was negligent, since he should have known of this condition. Further, I accept the inspector's view that the gravity was moderate.

Citation No. 3451631

Inspector DeHerra observed that a piece of conduit was broken loose from the connection box.

He originally cited this condition as a violation of 30 C.F.R. § 56.12005, but he later changed the regulation to 30 C.F.R. § 56.12004.

Exhibit P-3 was drawn by the inspector to illustrate his testimony.

3/ § 56.12025 Grounding circuit enclosures

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

4/ Underwriters Laboratory

It is true that the conduit had broken loose at the main electrical box. However, the condition as described, does not fall within the purview of 30 C.F.R. § 56.12004.

Citation No. 3451631 and all penalties therefor should be vacated.

Citation No. 3451632

Mr. DeHerra wrote this citation when he saw an unguarded tail pulley. 5/ The witness further illustrated his testimony in drawing Exhibit P-4.

The tail pulley was not in a normal work area but there was a nearby walkway. If a worker fell or slipped into the pinch points, he could be injured.

The uncontroverted evidence establishes a violation of the regulation. The citation should be affirmed.

Concerning civil penalties:

This condition could have been observed by the operator. A failure to remedy it indicates the operator was negligent.

Since the unguarded equipment was not in a regular work area, the gravity is low.

5/ The cited regulation reads:

§ 56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed mov- moving parts are at least seven feet away from walking or working surfaces.

Citation No. 3451634

During the inspection, Mr. DeHerra observed a discharged fire exinguisher. 6/ A needle on the extinguisher gauge indicates whether it is charged or discharged. If discharged, there would be no pressure in the equipment.

However, there was a pressurized replacement fire extinguisher in the operator's office but there was no record of the date it was inspected.

The uncontroverted evidence establishes a violation of the regulation. Citation No. 3451634 should be affirmed.

Since there was a nearby replacement fire extinguisher (even without an inspection tag), these factors indicate the operator's negligence and gravity were low.

Citation No. 3451635

Mr. DeHerra testified that the regulation 8/ involved here requires a test of the grounding system. Although the system was grounded, it had not been checked. When the inspector asked for the records, Mr. Loser stated he had contacted an electrical contractor but no action had been taken.

7/ The cited regulation reads:

§ 56.4203 Extinguisher recharging or replacement.

Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge.

8/ The cited regulation 30 C.F.R. § 56.12028 reads:

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

The facts establish that the continuity of the equipment grounding conductors had not been checked since the plant was moved. These facts establish a violation of the regulation which requires the system be tested immediately after installation.

In this case, it is uncontroverted that a test was made by an electrical contractor. However, the check was after the citation had been issued.

Citation No. 3451635 should be affirmed.

I consider the operator's negligence to be moderate since the company was aware of the testing requirements. However, the gravity is low, since the electrical system was grounded.

CIVIL PENALTIES

Respondent argues the regulations involved here are "Mickey Mouse." I disagree. The regulations clearly relate to safety and, given unfavorable factual circumstances, severe injuries could result. I further note that the Mine Act mandates that a penalty be assessed if a violation is found to exist.

Section 110(i) of the Act further establishes certain criteria to be considered in assessing civil penalties.

In this case, the Secretary proposed penalties of $20 for each violation. The evidence as to negligence, gravity and good faith have been previously discussed.

In connection with the remaining criteria, I find the operator must be considered as small, even miniscule, since only Mr. Loser and his son customarily operated the business. Mr. Loser also indicated he has now sold the business.

The operator's prior history is very favorable. The computer printout, Exhibit P-2, fails to establish any prior violations.

On balance, I consider the penalties as hereafter assessed to be proper.

For the foregoing reasons, I enter the following:

ORDER

1. Citation No. 3451630 is AFFIRMED and a penalty of $20 is ASSESSED.

2. Citation No. 3451631 and all penalties are VACATED.

3. Citation No. 3451632 is AFFIRMED and a penalty of $10 is ASSESSED.

4. Citation No. 3451634 is AFFIRMED and penalty of $10 is ASSESSED.

5. Citation No. 3451635 is AFFIRMED and a penalty of $10 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

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Ronald W. Loser, Owner, BRIGHTON SAND & GRAVEL, 695 North 11th Avenue, Brighton, CO 80601 (Certified Mail)

/ek

U. S. Department of Labor

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

NOV 13 1979

MEMORANDUM FOR: THOMAS J. SHEPICH

FROM: ROBERT B. LAGATHER
Assistant Secretary for
Mine Safety and Health

SUBJECT: Compliance Assistance Visits

In the past MSHA has received many requests from mine operators for MSHA inspectors who, by virtue of their training and experience, possess significant expertise in mine safety and health and knowledge of mine safety and health standards and regulations, to assist the operators in their efforts to comply with the Mine Act of 1977. Operators have requested that MSHA representatives visit their mines for the purpose of pointing out any conditions or practices which are in violation of the Act or standards so that the operator may correct them, but that no monetary civil penalties be assessed.

In response to the operators' requests, MSHA has analyzed the question and has concluded that inspectors may make visits to mines in certain situations to point out potential violations without monetary civil penalties being proposed. Section 502 (b) of the Mine Act directs the Secretary "* * * to the greatest extent possible, /to/ provide technical assistance to operators in meeting the requirements of this Act and in further improving the health and safety conditions and practices in coal or other mines."

The situations in the mining industry where such a program would be feasible are: (1) new mines not yet producing, (2) seasonal, closed or abandoned mines prior to reopening, and (3) new installations in mines prior to their becoming operational. A common element in all these situations is that the mine has either been closed (or has not yet been opened) or that there is a new installation not yet operational. MSHA experience and statistics show that the start-up period for a mine, new construction, or new equipment is a particularly high-risk period. It is also a period when practices initially started tend to become a permanent part of future operations. If the new operations are begun correctly, there are indications that there will be fewer accidents, injuries, and fatalities during both the initial start-up period and the later operations.

Therefore, beginning immediately, I am instituting a program for metal/nonmetal of making inspectors available upon the request of operators to conduct compliance assistance visits (CAV) in the following categories:

1. New mines not yet producing;
2. Seasonal, closed, or abandoned mines prior to reopening;
3. New facilities or new installation of equipment in an operating mine.

A CAV would be conducted pursuant to a request made by an operator to the appropriate subdistrict manager. In order that MSHA may be most responsive, such requests should be made at least one to two weeks in advance of the date on which the operator wants the visit. The CAV would cover one or more of the following areas as requested by the operator:

1. Miscellaneous iron installations (guards, walkways, stairways, etc.);
2. Equipment with moving parts (conveyor belts, crushers, screens, etc.);
3. Mobile equipment (trucks, loaders, etc.);
4. Proposed plans and designs;
5. Planned training, and
6. Other areas as appropriate.

The inspector, while conducting a CAV, will issue notices of violation whenever he observes a potential violation or imminent danger situation. Each notice will be clearly marked "CAV-NONPENALTY" and will not be included in any fashion in the assessment process. The purpose of the notice is to alert the operator to a potentially hazardous condition or practice so that the operator may correct it prior to the beginning of operations, or use of the installation, equipment or plan, etc. Operators should be aware, however, that regular inspections will be made of the operations once they have begun and that during the regular inspections the inspector will look at all of the notices issued during the CAV to insure that the conditions and practices noted have been corrected. If the correction has not been made, an appropriate citation or withdrawal order will be issued. No additional penalty, monetary or otherwise, will be proposed solely because of the previous CAV.

With regard to the CAVs of new mines or new installations of equipment in operating mines, the CAV is limited to the future

use of the mine, installation or equipment under construction. The inspector, in conducting a CAV, is to proceed directly to the site of the CAV and is not to conduct a regular inspection of the premises. However, should an imminent danger situation be observed, an appropriate order will be issued.

This is a new program and like any new program, problems and questions will arise and adjustments will have to be made. I want to encourage resolution of the problems and questions at the field level; however, I want to be timely advised of the problems and questions and their resolutions. I also want to encourage suggestions for improvement of the program.

I firmly believe that this program will increase the cooperation between MSHA and the mine operators, will reduce accidents, injuries, and fatalities and will, in general, enhance the safety and health of the miners. Therefore, I want each of the district and subdistrict managers to give their personal attention to insuring that the program achieves these goals.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-122
	:	A.C. No. 46-01438-03830
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $482, for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent filed a timely contest and a hearing was held in Pittsburgh, Pennsylvania.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether the violations were "significant and substantial," and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory safety standards 30 C.F.R. §§ 77.505 and 77.516.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The respondent's mine is subject to the Act and the presiding judge has jurisdiction to hear and decide this case.

2. The contested citations were issued to the respondent by a duly authorized representative of the Secretary of Labor and they were properly served on the respondent.

3. The payment of civil penalty assessments for the violations will not adversely affect the respondent's ability to continue in business.

4. With regard to cited mandatory safety standard 30 C.F.R. § 77.516, the applicable National Electrical Code referred to therein is the 1968 Code.

5. Independent contractor R. G. Johnson was issued a citation identical to the one served on the respondent for a violation of mandatory safety standard 30 C.F.R. § 77.505.

Discussion

Section 104(a) "S&S" Citation No. 2896648, issued by MSHA Inspector Spencer A. Shriver on January 22, 1990, cites a violation of mandatory safety standard 30 C.F.R. § 77.505, and the cited condition or practice is described as follows: "On the contractor 3 phase 480 volt power at 4 north airshaft, the 600 MCM conductors do not enter the safety switch through proper fittings. Mine operator connected to contractor load while this violation existed."

Mandatory safety standard 30 C.F.R. § 77.505, provides as follows:

§ 77.505 Cable fittings; suitability.

Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Section 104(a) "S&S" Citation No. 2896649, initially issued by Mr. Shriver on January 22, 1990, and subsequently modified on January 29, 30, and 31, 1990, cites an alleged violation of 30 C.F.R. § 77.516, and the cited condition or practice is described as follows:

At 4 north substation, operator provided power to contractor by three 333 KVA 124070-480 volt transformers. Connected primary ungrounded wye/secondary grounded wye. This transformer connection will not permit sufficient current to flow to operate protective devices and clear a ground fault. A phase-to-ground fault was found on the 480 cable which served the 3-phase space heaters in the hoist house.

Reference article 110-2, 1968 National Electric Code. A phase-to-ground fault on 480 volt circuit which is not cleared, would result in phase-to-phase voltage across the primary transformer winding or 12470 volts on windings rated 7200 volts.

Mandatory safety standard 30 C.F.R. § 77.516, provides as follows:

§ 77.516 Electric wiring and equipment; installation and maintenance.

In addition to the requirements of §§ 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electric Code in effect at the time of installation.

MSHA Inspector Spencer A. Shriver, an electrical engineer who holds a master's degree in electrical engineering, confirmed that he issued the citations in the course of his inspections at the mine, and he testified in support of the violations and explained his negligence and gravity findings, including the significant and substantial (S&S) nature of the violations (Tr. 19-152; 314-317). Supervisory Inspector Paul M. Hall, chief electrical engineer, who accompanied Mr. Shriver during his inspections, and Mr. Elio L. Checca, an electrical engineer from MSHA's Bruceton Safety Technology Center, also testified on behalf of the petitioner (Tr. 153-255; 361-363).

In defense of the violations, the respondent presented the testimony of Mr. Gary S. Harvey, an electrical engineer responsible for electrical construction activities, and Mr. John M. Burr, electrical engineering manager (Tr. 256-318).

On November 19, 1990, I issued an order affording the parties an opportunity to file posthearing arguments and briefs. Thereafter, by letter dated November 27, 1990, the petitioner's counsel advised me that the parties reached a proposed settlement for both of the alleged violations. The parties then submitted a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement of the case. Pursuant to the terms of the settlement, the petitioner has agreed to vacate Citation No. 2896649, and to modify Citation No. 2896648, to allege a non-significant and substantial violation. The respondent has agreed to pay the full amount of the proposed civil penalty assessment of $241, for this violation, and has represented to the petitioner that there are presently no transformers on mine property with an ungrounded wye, grounded wye configuration and that, in the future, no transformers with such a configuration will be allowed on any mine property subject to the Act.

In support of the proposed settlement, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. The petitioner has also submitted a reasonable justification for the approval of the settlement. With regard to the vacated citation, the petitioner points out that it is concerned that the contested citation, as modified, failed to adequately inform the respondent of the specific provisions of the National Electrical Code of 1968 which the issuing inspector believed the transformer installation violated. In view of this possible defect in the citation, and the respondent's expressed representations regarding present and future transformer installations, the petitioner has determined that, in this instance, vacating Citation No. 2896649 furthers the purposes of the Act.

Conclusion

After careful review and consideration of the entire record in this case, including the arguments advanced by the parties in support of the settlement disposition of this case, I conclude and find that the proposed settlement is reasonable and in the public interest. Accordingly, the motion to approve the settlement IS GRANTED, and the settlement IS APPROVED.

ORDER

1. Section 104(a) "S&S" Citation No. 2896649, initially issued on January 22, 1990, and subsequently

modified on January 29, 30, and 31, 1990, citing an alleged violation of 30 C.F.R. § 77.516, IS VACATED.

2. Section 104(a) "S&S" Citation No. 2896648, issued on January 22, 1990, citing a violation of 30 C.F.R. § 77.505, IS MODIFIED to delete the significant and substantial ("S&S") finding, and as modified, the citation IS AFFIRMED.

3. The respondent IS ORDERED to pay a civil penalty assessment of $241, in satisfaction of Citation No. 2896648, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

JAN 22 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CLYDE C. COLE, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. WEST 90-165-DM MD 89-24 Soledad Canyon Mine
v.	:	
CANYON COUNTRY ENTERPRISES, d/b/a CURTIS SAND & GRAVEL, CORPORATION, Respondent	:	

DECISION

Before: Judge Lasher

On December 14, 1990, the Complainant (Secretary of Labor on behalf of Clyde C. Cole), and Respondent filed a "Stipulation for Dismissal" indicating that, discovery having been completed, both parties agree that this matter should be dismissed with prejudice as far as the Secretary of Labor is concerned. These two parties also agree, among other things, that the dismissal of this proceeding shall not be construed to create or abrogate any rights beyond those available to Clyde C. Cole under the Act at the time of the filing of this action.

Individual Complainant, Mr. Cole, has substituted David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, AFL-CIO, as his attorney by a pleading filed on January 17, 1991. This Union had previously "intervened" for this purpose in this proceeding by a pleading received June 9, 1990. Through Attorney Koppelman, Complainant opposes the Secretary of Labor's request for dismissal of this proceeding. It appears that Complainant Cole wishes to continue this proceeding originally brought by the Secretary of Labor by substituting himself as Complainant. However, Section 105(c) of the Act apparently contemplates two situations: (a) where the Secretary brings the action under Section 105(c)(2), and (b) where, if the Secretary "upon investigation" declines to prosecute, the action is brought under (c)(3) by the individual complainant in his own behalf. Here, after proceeding to prosecute under 105(c)(2), the Secretary, upon further investigation, has determined a violation did not occur and seeks dismissal of this (c)(2) action. Such rights as Mr. Cole has would appear to be provided in Section 105(c)(3) of the Act.

I do not rule on or delineate such at this point. The request of the Secretary of Labor is found authorized and dismissal of this proceeding is found warranted, since the party charged with the responsibility bringing the prosecution (MSHA) no longer feels a violation was committed by Respondent.

ORDER DISMISSING PROCEEDING

The motion of the Secretary of Labor to withdraw her complaint is GRANTED and, pursuant to the provision of Commission Procedural Rule 11 (29 C.F.R. § 2700.11), this proceeding is DISMISSED with prejudice to the Secretary of Labor to renew any further prosecution as provided in Paragraph III of the aforesaid Stipulation for Dismissal between the Secretary of Labor and Respondent.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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Dana R. Corey, Esq., GILL & BALDWIN, 1444 North Brand Boulevard, Glendale, CA 91203 (Certified Mail)

Mr. Clyde C. Cole, 8237 Soledad Canyon Road, Acton, CA 93510 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 23 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-302
	:	A.C. No. 46-01318-03959
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Wanda Johnson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for the Petitioner;
Walter J. Scheller, III, Esq., Consolidation Coal Co., Pittsburgh, PA 15241, for the 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 the hearing, the parties filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $3,504 in full. 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 $3504 within 30 days of this order.

Gary Melick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 23 1991

USS, A DIVISION OF USX CORP., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 90-28-RM
	:	Citation No. 3469434; 1/3/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 90-29-RM
	:	Order No. 3469435; 1/3/90
	:	Docket No. LAKE 90-30-RM
LOCAL UNION NO. 1938, UNITED STEELWORKERS OF AMERICA, DISTRICT NO. 33, Representative of Miners	:	Order No. 3469437; 1/3/90
	:	Docket No. LAKE 90-31-RM
	:	Order No. 3469438; 1/8/90
	:	Docket No. LAKE 90-32-RM
	:	Order No. 3469439; 1/8/90
	:	Docket No. LAKE 90-33-RM
	:	Order 3469440; 1/8/90
	:	Docket No. LAKE 90-36-RM
	:	Order No. 3469471; 1/24/90
	:	Minntac Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 90-35-M
v.	:	A.C. No. 21-00820-05588
	:	Docket No. LAKE 90-65-M
USX CORPORATION, Respondent	:	A.C. No. 21-00820-05594
	:	Docket No. LAKE 90-66-M
LOCAL UNION NO. 1938, UNITED STEELWORKERS OF AMERICA, DISTRICT NO. 33, Representative of Miners	:	A.C. No. 21-00820-05595
	:	Docket No. LAKE 90-92-M
	:	A.C. No. 21-00820-05599
	:	Minntac Plant

DECISION

Appearances: Billy M. Tenant, Esq., Pittsburgh, Pennsylvania, for USS, a Division of USX Corp. (USS); Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for the Secretary of Labor (Secretary); James Ranta, Staff Representative, United Steelworkers of America, Virginia, Minnesota, for for the Representative of Miners (USWA).

Before: Judge Broderick

The above proceedings involve one citation and six withdrawal orders concerning which USS has filed notices of contest, and 16 alleged safety violations charged in 10 citations and 6 withdrawal orders (including the contested citation and orders) for which the Secretary seeks civil penalties. The citations and orders were issued between November 28, 1989, and January 24, 1990, during an inspection at the Minntac Plant. Therefore, they were consolidated for purposes of hearing and decision. Local Union 1938, USWA requested and, without objection, was granted party status in the proceeding. Pursuant to notice the case was called for hearing in Duluth, Minnesota, on October 17 and 18, 1990. James King and John Keating testified on behalf of the Secretary; John Keating also testified on behalf of USWA; Ronald Rantala, Bruce Long, Tom Hakala, and Randall Pond testified on behalf of USS. All parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

USS is the owner and operator of the Minntac Plant located in St. Louis County, Minnesota. It produces taconite pellets from low-grade iron ore. The plant includes a mine, a crusher, a concentrator and an agglomerator. During the year prior to the citations and orders involved herein, approximately 1,159,284 hours of work were performed at the Minntac Plant, and over 3 million hours were performed by the controlling entity. USS is a large operator. Between January 24, 1988 and January 23, 1990, there were 414 paid violations of mandatory health and safety standards at the subject facility, including 178 assessed violations of 30 C.F.R. § 56.11001, and 28 assessed violations of 30 C.F.R. § 56.20003. In view of the size of the facility, this history is not such that penalties otherwise appropriate should be increased because of it. Payment of the proposed penalties in these cases will not affect the ability of USS to continue in business. All of the citations and orders involved in these proceedings were abated promptly and in good faith.

The inspection which resulted in the citations and orders was of the milling facility of the plant and particularly, the agglomerator. The agglomerator is the last step in the taconite

producing process, and the pellets are formed there. It is located in two separate buildings, each with six floors. One building has about 800,000 square feet of floor space, the other about 400,000. There are 169 conveyor belts in one building and 125 in the other. They carry approximately 52,000 tons of material each day in order to produce about 41,000 tons of pellets. About 240 miners are employed in the agglomerator.

CITATION 3444248

On November 28, 1989, a citation was issued for an alleged violation of 30 C.F.R. § 56.11001 because an area of the washdown floor in the agglomerator was covered with wet slurry across the entire walkway. There were also washdown hoses lying on the floor. The slurry was about 1 or 2 inches deep and covered an area of about 20 feet by 30 feet. No one was cleaning the area when the citation was issued, and no employees were present in the area. The area was frequently used as a travelway to other areas of the plant. It was not the sole route to these areas however. The violation was abated the following day when the cited area was cleaned.

CITATION 3469424

On January 2, 1990, a citation was issued for an alleged violation of 30 C.F.R. § 56.20003 because of an accumulation of dust and other extraneous materials including tools on a walkway adjacent to a conveyor belt. There was also dust on machinery in the area of the walkway. The dust on the walkway was about 1 to 2 inches deep. The walkway was about 10 feet wide and 60 to 70 feet long. Dust on the machinery was 4 to 5 inches deep. Employees did not regularly work in the area, and no one was in the area at the time the citation was issued. Footprints were seen in the dust. The violation was abated on or before the termination date, January 8, when the walkway was cleaned.

CITATION 3469425

This citation was issued January 2, 1990, alleging a violation of 30 C.F.R. § 56.20003 because of an accumulation of dust, hoses and tools on an elevated walkway adjacent to the head end of the conveyor. No employees were working in the area and it was travelled only infrequently. The accumulation varied from 1 to 2 inches deep and covered an area of about 20 feet by 20 feet. On the day in question the wash pumps were inoperative, and it was not possible to hose down the area. The pumps had been down for about 3 days. The violation was abated on or before the termination date of the citation when the walkway was cleaned.

CITATION 3469426

This citation was issued January 2, 1990, charging a violation of 30 C.F.R. § 56.11001 because of an accumulation of

ore up to 8 inches deep along a walkway. The area covered was approximately 10 feet by 3 feet. The material was dry . This area also could not be washed down because the pump was inoperative. The conveyor was seldom used and employees worked infrequently in the area. However, there were footprints and a heater in the cited area. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469427

A violation of 30 C.F.R. § 56.20003 was charged because of an accumulation of ore, hoses and other materials along a walkway adjacent to a conveyor. The walkway was used by attendants who were supposed to clean the areas where they worked. As in the previously cited areas, this area could not be washed down because the pump was inoperative. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469428

A violation of 30 C.F.R. § 56.20003 was cited because slurry and ore as well as hoses were permitted to accumulate in a walkway of a washdown floor. The slurry and ore accumulation varied from 1 to 3 inches deep. It was slippery. Employees were not working in the area at the time the condition was cited. The area had been partially washed down before the pumps became inoperative. The violation was abated on or before the termination date when the walkway area was cleaned.

CITATION 3469429

A violation of 30 C.F.R. § 56.11001 was alleged because of an accumulation of slurry in a walkway of a washdown floor. The accumulation was 3 to 4 inches deep and covered an area 5 feet wide and approximately 500 feet long. Hoses were lying on the walkway, some of them buried in the slurry. The area was not normally travelled. The slurry resulted from an overspill from the filter. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469431

A violation of 30 C.F.R. § 56.11001 was alleged on January 3, 1990, because of an accumulation of slurry and dry ore in the center walkway of a washdown floor. Part of the accumulation was wet and part was dry. The area was not frequently travelled, but it was necessary to travel it for maintenance purposes. The violation was abated on or before the termination date when the area was cleaned.

CITATION 3469433

A violation of 30 C.F.R. § 56.11001 was charged because of an accumulation of slurry on a walkway between two conveyors.

The slurry was 4 to 6 inches deep and covered the entire walkway, 150 feet long and 5 feet wide. It was very wet and very slippery. The walkway was used relatively infrequently for maintenance of the conveyors. No employees were in the area at the time the citation was issued. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469434

This citation was issued on January 3, 1990, and charges an unwarrantable failure violation of 30 C.F.R. § 56.11001. It was issued under section 104(d)(1) of the Act. The inspector originally told USS that he was going to issue a 104(a) citation. However, he informed USS by telephone on January 4 that the citation would be issued under section 104(d)(1). The written citation was actually delivered on January 8. The citation charges a violation because of an accumulation of slurry 1-1/2 inches in depth, 10 feet wide and 90 to 100 feet long. There were footprints in the slurry and hoses lying across the walkway. Several employees used the walkway. The washdown hoses were inoperative at the time. The condition was abated prior to the termination date when the area was barricaded and the walkway cleaned up.

ORDER NO. 3469435

On January 3, 1990, Inspector King issued a 104(d)(1) withdrawal order alleging an unwarrantable failure violation of 30 C.F.R. § 56.11001 because of an accumulation of fine dry ore along both sides of an elevated walkway adjacent to a conveyor. The accumulation was conically shaped and covered the entire walkway and was up to 10 inches in depth. The walkway was used for maintenance purposes and was the only access to the conveyor. There were no employees in the area at the time of the citation. The condition was abated on January 8, 1990, when the area was barricaded and cleaned up.

ORDER NO. 3469437

The inspector issued a 104(d)(1) order for a condition observed on January 3, 1990, alleging a violation of 30 C.F.R. § 56.1101. Initially Inspector King informed USS that he would issue a 104(a) citation for the condition. On January 4, 1990, he informed USS by telephone that he was going to issue a 104(d)(1) order. The written order was served on USS on January 8. Ore was present on a walkway around a tail pulley of a conveyor. The accumulation was approximately 2 to 3 feet deep on both sides of the tail pulley and covered about two-thirds of the walkway. The area was not frequently travelled, but was used by maintenance workers and supervisors. A sign was present restricting access to the area. The condition was abated by barricading and cleaning the area.

ORDER NO. 3469438

On January 8, 1990, Inspector King received written complaints from miners given him by the union safety representative all having to do with cleanup problems at the plant. the inspector found piles of fine dry ore and a buildup of slurry across the entire floor of the washdown floor. There were footprints in the material indicating that it had been present for some time. The Union safety committeeman had pointed out the problem to USS some days previously. At the time of the inspection, two employees were cleaning the area with a water hose. The area was used by maintenance workers and operational personnel. None were in the area at the time the order was issued. The area was not barricaded, nor were any warning signs posted. In early January 1990, USS was attempting to reclaim the frozen chunks of concentrate, and it overloaded its reslurrying system, causing a major spill on the washdown floor. This occurred on and prior to January 7. USS has a cleanup program for the agglomerator plant, and additional men were assigned to clean up after the spill. The order was terminated February 13, 1990, after the area was barricaded and cleaned up. It had been cleaned up by the end of January.

ORDER NO. 3469439

On January 8, 1990, Inspector King, again acting on a miner's complaint, issued a 104(d)(2) order alleging a violation of 30 C.F.R. § 56.11001 because the floor of classifier pit, approximately 30 feet by 30 feet, was covered with slurry and water up to 1 foot in depth. The pumps had overflowed causing the accumulation. The area was travelled by miners once or twice each shift to check the pumps. No one was in the area when the order was issued. The area had been cited many times previously for accumulation problems. the order was terminated January 31, 1990, after the area was barricaded and cleaned up.

ORDER NO. 3469440

This order was issued on January 8, 1990, following a miner's complaint. It alleges a violation of 30 C.F.R. § 56.11001 for an accumulation of water and slurry on the floor of another classifier pit. The accumulation was about 1 foot deep and covered an area of about 25 feet by 30 feet. The area was used by maintenance personnel to service the pumps. The condition was similar to that cited in order No. 3469439 and resulted from the same problem. The area was not barricaded or posted. The order was terminated on January 22, 1990, after the area was barricaded and cleaned up.

ORDER NO. 3469471

On January 24, 1990, Inspector King issued a 104(d)(1) order alleging a violation of 30 C.F.R. § 56.11001, for an accumulation of wet slurry on a travelway around a conveyor tail pulley. The

accumulation was from one to eight inches deep and covered an area of 20 feet wide and 60 feet long. The wet slurry was very slippery. Footprints were seen in the walkway. The walkway was not heavily travelled. No one was cleaning in the area when the order was issued. The order was terminated on January 25, 1990, after the area was barricaded and the slurry was hosed away.

STATUTORY PROVISION

Section 104(d)(1) of the Mine Act provides as follows:

> (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 hazards, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), 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 violations. Following

an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

REGULATIONS

30 C.F.R. § 57.11001 provides as follows:

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

30 C.F.R. § 56.20003 provides as follows:

> At all mining operations--
> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;
> (b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and
> (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes or loose boards, as practicable.

ISSUES

1. Whether the violations charged in the citations and orders were established by the evidence.

> 1a. Whether to establish the violations charged, it is necessary to show that employees were actually working in the cited areas when the citations and orders were issued.

2. Whether the violations charged in citations 3444248 and 3469434 and in order 3469438 were properly designated significant and substantial.

3. Whether the violations charged in citation 3469434 and Orders 3469435, 3469437, 3469438, 3469439, 3469440 and 3469471 were the result of USS's unwarrantable failure to comply with the cited standards and whether the citation and orders were properly issued.

4. If the violations are established, what are the appropriate penalties.

CONCLUSIONS OF LAW

I

USS is subject to the provisions of the Mine Act in the operation of the Minntac Plant and I have jurisdiction over the parties and subject matter of these proceedings.

II

The safety standard contained in 30 C.F.R. § 56.11001 requires mine operators to provide and maintain safe means of access to all working places. I interpret this to require that all ordinarily used travelways be kept clear of slipping and tripping hazards. I do not accept the argument that only designated travelways are covered by this standard. I conclude that all walkways or passageways used by miners, whether they are engaged in maintenance, cleaning or production are covered by the standard. I interpret working places to include all areas where work is ordinarily performed. I do not accept USS's argument that the standard only applies to areas where work is being performed at the time the violation is cited. Such an interpretation is unrealistic, and not in keeping with the promotion of health and safety envisioned by the Mine Act.

III

The safety standard contained in 30 C.F.R. § 56.20003 requires mine operators to keep workplaces and passageways clean and orderly; it requires them to keep workplace floors clean and, so far as possible, dry, and to maintain drainage and dry standing places where wet processes are used. As in my interpretation of § 56.11001, I conclude the standard applies to all workplaces and passageways, even though no work was being performed at the time of the cited violations, and even though the passageways were not designated or regularly used as such. The standard recognizes that some operations will result in wet conditions: the issue in each of the cited violations is whether there were excessive amounts of dust, dirt, slurry, etc., in the cited areas.

It is not clear in the citations and orders involved herein, why some were issued under § 56.11001 (safe means of access to working places), and some under § 56.20003 (housekeeping requirements). Most of the violations charged under either standard involve walkways. There is an overlap in the requirements of the two standards, however, and I do not find that any of the citations or orders improperly cited one standard or the other.

The evidence concerning citation 3444248 shows that portions of a walkway 20 feet by 30 feet were covered with 2 inches of slippery slurry. There were also hoses buried in the slurry. The area was a washdown floor, and employees had been assigned to clean it. However, no one was cleaning it at the time it was cited. The condition rendered the walkway unsafe. A violation of 30 C.F.R. § 56.11001 is established. It was moderately serious and the result of ordinary negligence.

Citations 3469424 and 2469425 were issued because of dust and other materials on walkway. In both cases, the accumulation had existed for some time. The walkways were not frequently used. Violations of 30 C.F.R. § 56.20003 are established. They were not serious but resulted from USS's negligence.

Citation 3469426 charged a violation of § 56.11001 because of an accumulation of ore on a walkway up to 8 inches deep covering an area of 10 feet by 3 feet. Employees seldom entered the area. The condition had existed for some time. It was moderately serious and resulted from more than ordinary negligence.

Citations 3469427 and 3469248 both charge violations of § 56.20003 because of ore, hoses and other materials (427), and slurry and ore (428). Both cases involve walkways and extensive areas. Both were low traffic areas. I conclude that the violations were established; that they are not serious and were the result of negligence.

Citations 3469429, 3469431, and 3469433 charge safe access violations: § 56.11001. Each involves a substantial accumulation of wet slurry on walkways. The areas were not frequently travelled. The extent of the accumulations make the violations moderately serious. They resulted from USS negligence which was mitigated to some extent by the fact that the pumps needed for cleanup were inoperative.

Citation 3469434 was issued under section 104(d)(1) charging a violation of § 56.11001 because of an accumulation of slurry along a walkway with hoses lying across the walkway. The walkway was used by a large number of employees. It posed a hazard to such employees and a violation was established. It was serious and resulted from the negligence of USS.

Orders 3469435, 3469437, 3469438, 3469439, and 3469440 were issued under section 104(d)(1) and charge violations of § 56.11001 because of accumulations of ore along walkways, slurry along walkways, slurry and water covering the entire floor. In each instance, I conclude that a violation was established. In each case it was moderately serious and the result of the negligence of USS. The negligence concerning the violation

charged in order 3469437 is mitigated by the fact that a sign restricting access was present.

Order 3469471 charges a violation of § 56.11001 because of an accumulation of wet slurry along an infrequently used walkway. A violation was established. It was not serious but was the result of negligence.

V

Citations 3444248 and 3469434 and Order 3469438 charge violations of a significant and substantial nature. The Commission has held that a violation is significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984); U.S. Steel Mining, Incorporated, 6 FMSHRC 1834 (1984). In each of the violations involved here, substantial areas of accumulation were involved. The walkways were frequently travelled. Both slipping and tripping hazards were present. I conclude that in each instance, serious injuries were likely to result. The violations were significant and substantial.

VI

Citation 3469434 and Orders 3469435, 3469437, 3469438, 3469439, 3469440, and 34694471 were issued under section 104(d)(1) and charge that the violations were the result of the unwarrantable failure of USS to comply with the standard in question. In Emery Mining Corp., 9 FMSHRC 1997 (1987), the Commission stated that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. I conclude that the Secretary has failed to establish such aggravated conduct in relation to any of the cited instances. There were a large number of violations of the standards involved herein. Miners had complained of cleanup problems on many occasions. On the other hand, mitigating circumstances were present in that the water pumps were inoperative for a period of time. USS had devoted substantial overtime work to attempt to alleviate the problems. Negligence was established; unwarrantable failure was not. The violations were not properly written under section 104(d).

ORDER

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

1. Citations 3444248, 3469426, 3469429, 3469431, 3469433, 3469424, 3469425, 3469427 and 3469428 are **AFFIRMED**, Citation 3444248 including its special finding of a significant and substantial violation.

2. Citation 3469434 and Orders 3469435, 3469437, 3469438, 3460439, 3469440 and 3469471 are **MODIFIED** to 104(a) citations; the unwarrantable failure finding is removed.

3. The contest proceedings are thus **GRANTED IN PART**, in that the unwarrantable failure finding is removed, and **DENIED IN PART** in that the violations are **AFFIRMED.**

4. Guided by the criteria in section 110(i) of the Act, I conclude that the following civil penalties are appropriate for the violations and USS shall, within 30 days of the date of this decision pay civil penalties as follows:

CITATION	PENALTY
3444248	$ 250
3469426	350
3469429	400
3469431	400
3469433	400
3469434	750
3469435	750
3569437	600
3569438	750
3469439	750
3469440	750
3469471	200
3469424	200
3469425	200
3469427	200
3469428	200
TOTAL	$7150

/James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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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 24 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 89-201
	:	A.C. No. 15-16040-03411
v.	:	
	:	Docket No. KENT 89-241
KEITH LEWALLEN AND CHARLES PATTERSON, d/b/a TIPPY COAL COMPANY, Respondents	:	A.C. No. 15-16040-03512
	:	Docket No. KENT 89-263
	:	A.C. No. 15-16040-03515
	:	Docket No. KENT 90-1
	:	A.C. No. 15-16404-03516
	:	Docket No. KENT 90-55
	:	A.C. No. 15-16040-03517
	:	No. 1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
D. Randall Jewell, Esq., Millward and Jewell, Barbourville, Kentucky, for Respondent Keith Lewallen;
Michael Caperton, Esq., London, Kentucky, for Respondent Charles Patterson.

Before: Judge Fauver

These consolidated cases for civil penalties under § 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., came on for hearing in London, Kentucky, on November 27, 1990. On the second day of the hearing, the parties moved for approval of a settlement agreement. For the reasons stated on the record, the motion was granted. This decision confirms the bench decision granting the motion to approve settlement.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties' motion to approve settlement, presented at the hearing, is GRANTED.

2. Respondents Charles Patterson and Keith Lewallen, doing business as Tippy Coal Company, are both found to be operators within the meaning of the Act.

3. Each of the citations and orders for which civil penalties are sought in these proceedings is AFFIRMED.

4. Respondents shall pay civil penalties of $11,338.00 in the monthly payments set forth below, provided: Respondent Keith Lewallen's liability (which is joint and several with the liability of Respondent Charles Patterson) is limited to $400.00:

January 27, 1991 - $500.00
February 27, 1991 - $500.00
March 27, 1991 - $500.00
April 27, 1991 - $500.00
May 27, 1991 - $500.00
June 27, 1991 - $500.00
July 27, 1991 - $500.00
August 27, 1991 - $500.00
September 27, 1991 - $500.00
October 27, 1991 - $500.00
November 27, 1991 - $500.00
December 27, 1991 - $500.00
January 27, 1992 - $500.00
February 27, 1992 - $500.00
March 27, 1992 - $500.00
April 27, 1992 - $500.00
May 27, 1992 - $500.00
June 27, 1992 - $500.00
July 27, 1992 - $500.00
August 27, 1992 - $500.00
September 27, 1992 - $500.00
October 27, 1992 - $838.00

5. The failure of the Respondent Charles Patterson to make any one of the monthly payments ordered herein without the prior consent of the District Manager, District 7, of the Mine Safety and Health Administration, Unites States Department of Labor,

shall cause the entire amount of remaining payments to be immediately due and payable.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 24 1991

RONALD L. SHRIVER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-286-D
	:	MORG CD 90-09
CONSOLIDATION COAL COMPANY, Respondent	:	Osage No. 3 Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his Complaint in the captioned case on the grounds that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed and the hearings scheduled January 30, 1991, are accordingly cancelled.

Gary Melick
Administration Law Judge
(703) 756-6261

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Walter Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 24 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-95-M A.C. No. 34-01285-05502 AFS
v.	:	
	:	Meridian Aggregates Co.
EXPLOSIVES TECHNOLOGIES INTERNATIONAL, INC., Respondent	:	

DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor (Secretary);
Volker E. Schmidt, President, Explosives Technologies International, Inc., for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for two alleged violations of mandatory health and safety standards. Pursuant to notice, the case was called for hearing in Kansas City, Missouri, on December 13, 1990. Norman LaValle, Richard Goff, and Steve Viles testified on behalf of the Secretary. Volker Schmidt testified on behalf of Respondent. At the completion of the hearing, both parties argued their positions on the record and waived the right to file post hearing briefs. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. In November 1989 and January 1990, Respondent was a contractor at the site of a mine owned and operated by Meridian Aggregates. Meridian produced crushed granite. Respondent did drilling under contract with Meridian.

2. Respondent's operation is small. Between May 17, 1989 and the date of the citations involved herein, three violations were issued to Respondent at the Meridian facility. This history is not such that penalties otherwise appropriate should be increased because of it.

3. On November 21, 1989, Federal Mine Inspector Norman LaValle conducted a noise survey at the Meridian Aggregates Mine. He attached a dosimeter to the operator of an Atlas Copco 712 drill employed by Respondent. It disclosed noise exposure of 2.94 times the exposure limit, equivalent to 98 dba for an 8 hour shift. A citation was issued for a violation of 30 C.F.R. § 56.5050(b).

4. On January 10, 1990, a compliance assistance inspection was conducted by Inspector LaValle and MSHA District health specialist Steve Viles. Viles was of the opinion that a noise barrier shield could be used on the Atlas Copco 712 drill to reduce the noise exposure for the drill operator.

5. Respondent leased the Atlas Copco Drill from the Mining Supply and Equipment Company, paying $5500 per month.

6. The operator of the drill was wearing personal hearing protection at the time the citation was issued.

7. The citation was terminated on January 10, 1990. The Atlas Copco was replaced by another drill and Respondent informed MSHA that the Atlas Copco would be removed from the property.

8. On January 10, 1990, the boom support structure of Respondent's Robbins Drill had cracks in the metal. The drill was not being operated at the time. Its clutch was being repaired. A citation was issued for a violation of 30 C.F.R. § 56.7002.

9. The cracks in the structure had been present for some time, as there was oil and grease found in the crack.

10. The citation was terminated February 26, 1990 after the boom support structure was repaired by welding it.

REGULATIONS

30 C.F.R. § 56.5050 provides that when an employee's noise exposure exceeds the equivalent of 90 dBA per 8 hours of exposure, "feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used . . . ."

30 C.F.R. § 56.7002 provides as follows:

> Equipment defects affecting safety shall be corrected before the equipment is used.

CONCLUSIONS OF LAW

1. Meridian Aggregates is a mine and Respondent is an independent contractor performing services at the mine. Therefore it is an operator. I have jurisdiction over the parties and subject matter of this proceeding.

2. On November 21, 1989, a drill operator employed by Respondent was exposed to a noise level in excess of that specified in the table contained in 30 C.F.R. § 56.5050.

3. There were feasible administrative and engineering controls which could have been utilized to reduce the noise level to which the employee was exposed.

4. The fact that the drill was not owned but was leased by Respondent is not a defense to a charge of violation of the noise standard. The evidence establishes a violation of 30 C.F.R. § 56.5050(b).

5. The violation was not serious. It resulted from Respondent's ordinary negligence. It was abated within the time set for termination as extended. I conclude that an appropriate penalty for the violation is $50.

6. On January 10, 1990, there were cracks in the metal of a drill boom support structure. The drill was not being operated at the time the condition was discovered because its clutch was being repaired. The cracks had existed for some time. The evidence establishes a violation of 30 C.F.R. § 56.7002.

7. The violation was not serious. It resulted from Respondent's ordinary negligence. It was abated within the time set for termination. I conclude that an appropriate penalty for the violation is $50.

ORDER

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

1. Citations 3283281 and 3271867 are **AFFIRMED.**

2. Respondent shall within 30 days of the date of this decision pay the Secretary the sum of $100 for the violations found herein.

James A. Broderick
Administrative Law Judge

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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 29 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-186
	:	A.C. No. 46-06647-03555
v.	:	
	:	No. 1 Deep Mine
BETHEL FUELS INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

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). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $600 in full. 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 $600 within 30 days of this order. The hearings previously scheduled in this case are accordingly cancelled.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 31 1991

CHARLES T. SMITH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 90-30-D
KEM COAL COMPANY, Respondent	:	BARB CD 89-27

DECISION

Appearances: Michael S. Endicott, Esq., Ed Spencer's Law Offices, Paintsville, Kentucky, for the Complainant;
Timothy Joe Walker, Esq., Reese, Lang & Breeding, P.S.C., London, Kentucky, for the Respondent.

Before: Judge Fauver

By decision of October 31, 1990, Respondent was found to have discharged Complainant in violation of § 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Based upon that decision, the parties stipulated damages and costs (except an attorney's fee) in the amount of $21,864.18, including interest, through October 31, 1990.

Complainant also seeks an attorney fee of $7,500.00, and an order establishing an attorney fee of $150.00 an hour for any future legal work on appeal of this case.

Respondent opposes the proposed attorney fee and seeks a reduced award. The record indicates that counsel for Complainant has expended 30.15 hours in legal work in this case thus far. It further indicates that a reasonable and customary fee for comparable cases in the Eastern Kentucky area is $150.00 an hour.

In determining a reasonable attorney fee, the recognized starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. A reasonable hourly rate is defined as that prevailing in the community for similar work. Once established, this computation may be adjusted upward or downward for unusual or special circumstances.

I find that this case does not present unusual or special circumstances warranting an adjustment of a computation based on an hourly rate of $150.00.

FINAL ORDER

Respondent, Kem Coal Company, shall immediately pay Complainant (1) $21,864.18, reflecting back pay and other stipulated damages with interest through October 31, 1990, and (2) damages, with interest, incurred since October 31, 1990, until Complainant is reinstated or rejects a bona fide offer of reinstatement.

Respondent, Kem Coal Company, is FURTHERED ORDERED to pay Complainant's attorney an attorney fee of $4,522.50, based on a hourly rate of $150.00 for 30.15 hours expended on this litigation, and a future fee based on an hourly rate of $150.00 for any legal work reasonably expended on this matter after the date of this decision.

This Decision and the Decision of October 31, 1990, constitute a final disposition of this matter.

William Fauver
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 31, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 90-124
	:	A. C. No. 01-00323-03638
v.	:	Chetopa Mine
DRUMMOND COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlement of the two violations involved in this case. The originally assessed penalty was $790 and the proposed settlement is $690. The parties discuss the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3016679 was issued for a violation of 30 C.F.R. § 75.400 because coal and coal dust were allowed to accumulate on the slope belt. The originally assessed penalty was $395 and the proposed settlement is $345. Citation No.3016542 was issued for a violation of 30 C.F.R. § 75.400 because coal and coal dust were allowed to accumulate on the 10 east belt. The originally assessed penalty was $395 and the proposed settlement is $345. The parties represent that the reductions are warranted because gravity was not as severe as had been first estimated. According to the parties, gravity is less because of the operator's fire monitoring system along the belt lines. The parties further advise that the operator has a monitoring system which detects the presence of carbon monoxide along the belt lines. In the event of a fire, the monitoring system sounds a warning alarm alerting the responsible person and identifying the belt line with the problem. I accept the foregoing representations and based upon them find that gravity was somewhat less than originally thought. Accordingly, I approve the recommended settlement.

Accordingly, it is **ORDERED** that the proposed settlement be **APPROVED** and the operator **PAY** $690 within 30 days of the date of this decision.

Paul Merlin
Chief 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 31, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-143 A. C. No. 01-00515-03764
v.	:	Mary Lee No. 1 Mine
DRUMMOND COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlement of the seven violations involved in this case. The originally assessed penalty was $2,289 and the proposed settlement is $1,544. The parties discuss the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3016649 was issued a 104(d)(1) citation for a violation of 30 C.F.R. § 75.1105 because there were five batteries and three chargers located in the battery charging station that were not housed in a fire proof area. The originally assessed penalty was $1,000 and the proposed settlement is $255. The parties represent that the reduction is warranted because negligence was not at all as severe as had been first estimated. According to the parties, there were over twenty batteries located in the area and only five were not protected in a fire proof manner, all of which were located to close to the coal ribs. In light of these circumstances, MSHA has modified the citation from a 104(d)(1) citation to a 104(a) citation and reduced negligence from high to moderate. I accept the foregoing representations and based upon them find that negligence was less than originally thought. Accordingly, I approve the recommended settlement.

With respect to the six remaining citations, the parties advise that the operator has agreed to pay those proposed penalties in full.

Accordingly, it is **ORDERED** that the proposed settlements be **APPROVED** and the operator **PAY** $1,544 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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